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THE LAW AND PRACTICE

OF THE

PROBATE DIVISION

OF THE

HIGH COURT OF JUSTICE

WITH

APPENDICES OF STATUTES, STAMP DUTIES, RULES, INSTRUCTIONS AND MEMORANDA, FEES, COSTS, FORMS,

AND

PRECEDENTS OF PLEADING

SECOND EDITION

BY

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PREFACE.

Many changes have taken place in the law and practice of the Probate Division since the first edition of this book was published. To enumerate only a few of the most important, the privileges attaching to the wills of soldiers and seamen have been enlarged by the Wills (Soldiers and Sailors) Act, 1918, and the constitution of the Irish Free State has altered the construction of previous statutes and the practice as to resealing grants. But these changes, important in themselves, sink into insignificance in comparison with those effected by the series of Acts which came into operation on January 1, 1926, and embody the changes in the law made by the Law of Property Act, 1922. The Administration of Estates Act, 1925, repeals most of the old statutes and, in the case of persons dying on or after January 1, 1926, embodies a new code for the devolution of property on intestacy which has profoundly modified the practice of the Court in granting letters of administration. This statute also introduces a new species of personal representative—the special representative for the purposes of settled land; and the Supreme Court of Judicature (Consolidation) Act, 1925, besides codifying the law of probate, renders necessary, by section 160, that there shall be a joint grant of administration in all cases where a life interest or minority arises under a will or intestacy unless the grant is made to a trust corporation. The Legitimacy Act, 1926, enlarges the class of persons entitled to administration, and the practice of the Court in appointing guardians is affected by the Guardianship of Infants Act, 1925. Besides these statutory changes, new rules have been published, and it is not too much to say that the practitioner has to learn his subject afresh.

It is, no doubt, unseemly that one, like myself, unversed in these high mysteries, should presume to criticise the creation of special representatives for the purposes of settled land, but to those anxious that the law of probate should be kept free from needless intricacy and technicality it appears regrettable that the appointment of a special representative should have been considered necessary for the sole purpose of conveying the settled land to the person next interested. With regard to the insistence upon a joint grant wherever a minority or life interest arises, it may be wise in such cases to give the additional safeguard of two administrators, though this is to run counter to the experience of the Court, which has always discouraged joint administrations in view of the practical difficulties which arise from them. But it is certainly unwise to deprive the Court of a discretion to dispense with two administrators where the circumstances of the case render it necessary or convenient to do so, and this appears to be the effect of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925. The matter is the more serious as the section applies even to limited and temporary administrations, so that where there is a life interest, or any beneficiary is a minor, the Court has, apparently, no power to dispense with two administrators even in granting administration *pendente lite*, or administration limited to taking proceedings in Chancery, or, as a *reductio ad absurdum*, administration to a legatee limited to the reception of his legacy. I have laboured in the text to find grounds for supposing that the Court retains a discretion in such cases, but from the decision of the Court of Appeal in *In the Estate of White* (1927), 43 T. L. R. 729, it would seem that the discretion of the Court must be restored, if at all, by an amending Act.

In the preparation of this edition I have had the

great advantage of the able assistance of Mr. H. H. H. Coates, of the Principal Probate Registry, who has revised and brought up to date Parts II, III and IV, which deal with the practice of the Court. Mr. Coates, has also been responsible for the revision of Appendices II to VII, and has introduced many new forms and memoranda.

I have myself revised Part I of the book, which deals with the law; and although much additional matter has been added, and new chapters introduced, *e.g.*, with reference to special representatives for settled land, I have endeavoured by compression to reduce the bulk of the book, so as to render it less unwieldy. I have taken some pains in the revision of the Appendix of Statutes to introduce annotations which will enable those consulting the earlier statutes to turn at once to equivalent provisions in the later Acts, and *vice versa*. I have also introduced some new precedents in the Appendix of Precedents of Pleading.

To disarm criticism, I will conclude this Preface with the words of Swinburne in what is surely the most charming epilogue to any law book: "Thus for thy love (loving Country-man) have I delivered unto the view of thy judgement the picture of my conceit concerning testaments: which if thou shalt behold sharply, then I fear strongly, notwithstanding my late Corrections and Additions, that yet still thou wilt espie, instead of just proportion, lameness, or want of some notable members; and instead of delectable beauty, deformity, or spots of foul and loathsome errours. Wherefore as at the first I did earnestly entreat for favour, so now in the end I do humbly beg for pardon."

C. M.

Temple,
November, 1927.

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PART THE FIRST.

THE LAW.

CHAPTER I.

THE PROBATE DIVISION.

SECTION 1.

THE ORIGIN, CONSTITUTION, AND FUNCTIONS OF THE COURT.

SUB-SECTION 1.—*Origin of the Court.*

The Spiritual Court formerly had jurisdiction of the probate of wills

THE origin of the ecclesiastical jurisdiction in relation to probate and administration has been the subject of much controversy (*a*), but it seems clear that, as early as the reign of Henry II., the Spiritual Court had acquired an exclusive jurisdiction with regard to the probate of wills of personalty and the determination of all matters requisite to their authentication (*b*).

and granting of administration to intestates' estates.

As to the granting of letters of administration, by the common law the Ordinary had the disposal of intestates' estates (*c*), and when administrators were originated by the statute 31 Edw. 3, stat. 1, c. 11, their title and authority were derived exclusively from the Ordinary, whose officers they were (*d*).

Jurisdiction of the Ordinary :

The Ordinary (generally speaking, the bishop of the diocese) had regularly the probate of wills and granting of administration of every person dying within his diocese (*e*), but if a person died having goods in several dioceses, the probate of his will, as also the granting of administration to his estate, belonged to the archbishop of the province in which the goods were situate (*f*).

and of the Metropolitan.

(*a*) Bac. Abr. tit. Exors. E. 1.
(*b*) *Ibid.*; Wms. on Exors. (11th ed.), p. 201; Pollock and Maitland, Hist. Eng. Law, ii. 312 *et seq.*, 330, 339.
(*c*) Bac. Abr. tit. Exors. E. 1. See *Dyke* v. *Walford* (1846), 5 Moo. P. C. 434.
(*d*) 2 Black. Comm. 496.
(*e*) Bac. Abr. Exors, E. 4.
(*f*) *Ibid.*, E. 3.

The Ecclesiastical Courts :

The jurisdiction to grant and revoke probate of wills and letters of administration continued to be exercised on behalf of the Ordinaries by the Ecclesiastical Courts until the year 1857, when the Court of Probate Act (*g*) was passed. The most important of these Ecclesiastical Courts were the Provincial Courts, being, in the Province of Canterbury, the Court of Arches, the Prerogative or Testamentary Court, and the Court of Peculiars. In the Province of York, the Provincial Courts were the Prerogative or Testamentary Court, and the Chancery Court. The Provincial Courts of the Archbishop of Canterbury and the Archbishop of York were independent of each other; the process of one province did not run into the other, but was sent by a requisition to the local authority for execution. The appeal from each of the Provincial Courts lay to the King, and a Commission issued under the Great Seal in each individual case of appeal to certain persons or Delegates to hear and determine the appeal.

Provincial Courts;

The Delegates;

The Court of Arches;

Of the three principal Archiepiscopal Courts of Canterbury, the Court of Arches was the first. That Court exercised the appellate jurisdiction from each of the Diocesan and most of the Peculiar Courts within the province, and might also take original cognisance of cases by letters of request from each of those Courts. The Prerogative Court had jurisdiction of all wills and administrations of personal property left by persons having *bona notabilia*, or effects of a certain value, in various jurisdictions within the province. The Court of Peculiars took cognisance of all matters arising in certain deaneries.

Prerogative Court;

Court of Peculiars;

Other Ecclesiastical Courts.

In addition to the Provincial Courts, there were the Diocesan Courts, being the Consistorial Court of each diocese, exercising general jurisdiction; the Courts of Commissaries appointed by the Bishop, in certain dioceses, to exercise general jurisdiction within prescribed limits; the Courts of Archdeacons exercising jurisdiction according to the terms of their patents or to local custom; and there were also Peculiars of various descriptions in most dioceses, and some Manorial Courts (*h*).

The Court of Probate.

The jurisdiction of these Ecclesiastical and other Courts in relation to the granting or revoking probate of wills and letters of administration was abolished by the Court of Probate Act, 1857, which came into operation on January 11, 1858, and was transferred to the Court constituted by the Act, and called the Court of Probate (*k*); and it was provided that

(*g*) 20 & 21 Vict. c. 77.

(*h*) The number of each class of Courts in each diocese is set out in a table appended to the Report of the Royal Commission on the Ecclesiastical Courts, 1832, upon which this summary is based.

(*k*) Court of Probate Act, 1857, ss. 3, 4.

that Court should have the same powers, and its grants and orders the same effect throughout all England and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively then had in the province of Canterbury, or in the parts of the province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons which were within the jurisdiction of the Prerogative Court; and that all duties which, by statute or otherwise, were imposed on or should be performed by Ordinaries generally, or on or by the Prerogative Court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, should be performed by the Court of Probate; but it was provided that no suits for legacies, or suits for the distribution of residues, should be entertained by the Court (*l*).

Suits for legacies or distribution not to be entertained.

The Supreme Court of Judicature Act, 1873 (*m*), which came into operation on November 1, 1875, enacted that the several Courts therein mentioned (of which the Court of Probate was one) should be united and consolidated together, and should constitute one Supreme Court of Judicature in England. The Supreme Court, so constituted, consists of two divisions: the first, under the name of "His Majesty's High Court of Justice," exercising original jurisdiction; the second, under the name of "His Majesty's Court of Appeal," exercising appellate jurisdiction (*n*). The jurisdiction which was vested in, or capable of being exercised by, the Court of Probate, was transferred to and vested in the High Court (*o*).

The jurisdiction of the Court of Probate transferred to the High Court of Justice by the Judicature Act, 1873.

The High Court of Justice consists of three divisions (*p*), of which the Probate, Divorce, and Admiralty Division is one (*q*); consisting of a President and two puisne Judges (*r*).

The Court of Probate constituted a division of the High Court of Justice.

(*l*) Court of Probate Act, 1857, s. 23.

(*m*) 36 & 37 Vict. c. 66, s. 3.

(*n*) Judicature Act, 1873, s. 4; now repealed and replaced by the Judicature (Consolidation) Act, 1925, s. 1.

(*o*) Judicature Act, 1873, s. 16; now repealed and replaced by the Judicature (Consolidation) Act, 1925, ss. 18, 20.

(*p*) Originally five (Judicature Act, 1873, s. 31), reduced to three by an Order in Council of December 16, 1880; and see now the Judicature (Consolidation) Act, 1925, s. 4. As to the power of a Judge of another Division to sit in the Probate, Divorce, and Admiralty Division and to dispose of interlocutory matters of urgency, see the Judicature (Consolidation) Act, 1925, s. 66.

(*q*) Judicature Act, 1873, s. 31; now repealed and replaced by the Judicature (Consolidation) Act, 1925, s. 4.

(*r*) There was one Judge of the Court of Probate (Court of Probate Act, 1857, s. 5), but by section 1 of the Court of Probate Act, 1858, the Judge of the High Court of Admiralty and the Judge of the Court of Probate might sit for each other. By section 9 of the Matrimonial Causes Act, 1857, the Judge of the Court of Probate was made the Judge Ordinary for the Court for Divorce and Matrimonial Causes; and by section 31, sub-section 5 of the

Causes or matters assigned to this division are disposed of, in the first instance, by one Judge only (*s*).

SUB-SECTION 2.—*Exclusive Jurisdiction of the Court.*

Jurisdiction of the Probate Division.

To the Probate Division are assigned all causes and matters which would have been within the exclusive cognisance of the Court of Probate if the Judicature Act, 1873, had not passed (*t*); and this Division now exercises in England the following jurisdiction (*u*) :—

(a) All such voluntary and contentious jurisdiction and authority in relation to the granting or revoking of probate and administration (*x*) of the effects of deceased persons as was at the commencement of the Court of Probate Act, 1857, vested in or exerciseable by any Court or person in England, together with full authority to hear and determine all questions relating to testamentary causes and matters (*y*);

(b) All such powers throughout England in relation to the personal estate in England of deceased persons as the Prerogative Court of Canterbury had immediately before the commencement of the Court of Probate Act, 1857, in the Province of Canterbury or in the parts thereof within its jurisdiction in relation to those testamentary causes and matters and those effects of deceased persons which were at that date within the jurisdiction of that Court;

(c) The like jurisdiction and powers with respect to the real estate (*z*) of deceased persons as it possesses with respect to the personal estate of deceased persons (*a*);

Judicature Act, 1873, the Probate, Divorce, and Admiralty Division was to consist of the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Admiralty. The Judge of the Court of Probate was made President of the Division (*ibid.*). The power to create a second puisne Judge was conferred by section 5 of the Administration of Justice Act, 1925. See now, the Judicature (Consolidation) Act, 1925, s. 4.

(*s*) Judicature (Consolidation) Act, 1925, s. 60, which now replaces the Judicature Act, 1873, s. 42.

(*t*) Judicature (Consolidation) Act, 1925, s. 56, which now replaces s. 34 of the Judicature Act, 1873.

(*u*) Judicature (Consolidation) Act, 1925, s. 20.

(*x*) "Administration" includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes : Judicature (Consolidation) Act, 1925, s. 175.

(*y*) "Testamentary cause or matter" includes all cases or matters relating to the grant or revocation of probate or administration : *Ibid.*

(*z*) "Real estate" includes (a) chattels real and land in possession, remainder or reversion and every interest in or over land to which the deceased person was entitled at the time of his death; and (b) real estate held on trust or by way of mortgage, whether by demise or sub-demise, or of security, but not money to arise under a trust for sale of land, nor money secured or charged on land : *Ibid.*

(*a*) As to the jurisdiction over real estate, see *infra*, section 2, sub-section 2, pp. 13 *et seq.*

(d) All probate jurisdiction conferred on it by enactments subsequent to the Judicature Act, 1873; and, in the exercise of its probate jurisdiction, the Court performs all such like duties with respect to the estates of deceased persons as were immediately before the commencement of the Court of Probate Act, 1857, performed by Ordinaries generally or by the Prerogative Court of Canterbury in respect of probates, administrations and testamentary causes and matters which were at that date within their respective jurisdictions (*b*).

Rules as to exercise of jurisdiction.

This jurisdiction, as regards procedure and practice, is exercised in the manner provided by the Statutes and Rules of Court, and where there is no special provision, as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly appertained (*c*).

No matter not within the cognisance of the Court of Probate to be commenced in the Probate Division.

Section 58 of the Judicature (Consolidation) Act, 1925, enacts that a person commencing any cause or matter shall not assign it to the Probate Division, unless he would formerly have been entitled to commence that cause or matter in the Court of Probate. As to the converse proposition, viz., the commencing in a division other than the Probate Division, of an action or matter assigned to the Probate Division, the same section provides that if any plaintiff assigns his cause to any division to which it ought not to be assigned, the Court may, on being informed thereof, direct the cause to be assigned to its proper division, or may retain it in the division in which it was commenced. It seems, therefore, that Judges in other divisions have jurisdiction, if they think fit to exercise it, in matters assignable to the Probate Division (*d*), but that the Judge in the Chancery or King's Bench Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so, and in directing the parties to seek their remedy in the division to which such matters are assigned.

Matters assigned to the Probate Division will not be determined by any other division.

The Probate Division will not construe the will except in so far as is necessary for the carrying out of its proper functions.

The main functions of the Probate Division are, in cases of intestacy, to determine what person or persons shall administer the deceased's estate, and, in relation to wills, to determine whether or not the testamentary paper in question is entitled to probate, whether an executor has been appointed and who he is, or, if no executor has been appointed, to determine who is to administer the deceased's estate. Except in so far as

(*b*) Judicature (Consolidation) Act, 1925, s. 20.

(*c*) *Ibid.*, s. 32; which now replaces section 29 of the Court of Probate Act, 1857, by which it was provided that the practice of the Court of Probate should, except where otherwise provided, be so far as circumstances admitted according to the practice in the Prerogative Court.

(*d*) *Pinney* v. *Hunt* (1877), 6 Ch. D. 98; *Bradford* v. *Young* (1884), 26 Ch. D. 656; but see *Priestman* v. *Thomas* (1884), 9 P. D., at p. 76, and at p. 214 (C. A.).

is necessary for the proper determination of these questions, it is no part of the function of the Court to construe the will (*e*). The Ecclesiastical Courts, indeed, were accustomed to perform this office, for suits for legacies might have been brought therein. But section 23 of the Court of Probate Act, 1857, expressly excepted suits for legacies and suits for the distribution of residue from the jurisdiction of the Court of Probate; and by the same section (*f*) of the Judicature Act, 1873, as assigned to the Probate Division "all causes or matters which would have been within the exclusive cognisance of the Court of Probate," all causes and matters for "the administration of the estates of deceased persons" and for "the execution of trusts, charitable or private," were assigned to the Chancery Division.

It is the duty of the Court of Chancery to construe the will and enforce its provisions.

The Chancery Division, whose function it is to enforce a proper performance of the provisions of the instrument, is for this reason sometimes called "The Court of Construction," in contradistinction to the Probate Division, which merely decides the *factum* of the will (*g*).

Sub-section 3.—*Concurrent Jurisdiction of the Court.*

The Probate Division has concurrent jurisdiction to determine all questions in controversy between the parties.

Under section 43 of the Judicature (Consolidation) Act, 1925 (which now replaces sub-section 7 of section 24 of the Judicature Act, 1873), the Probate Division, as a division of the High Court of Justice, in the exercise of the jurisdiction vested in it by

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(*e*) The Court of Probate did not habitually act as a Court of construction; that was not its proper function, save in cases where it was absolutely necessary in order to determine the rights of litigant parties. And where the Court of Probate was bound so to act and give its opinion, then, if resort was had to the Court of Chancery, it was according to the decision of the latter Court that the estate of the testator must ultimately be administered: *Warren* v. *Kelson* (1859), 1 S. & T. 290; and see *Walkeley* (1893), 69 L. T. 419. The Court of Probate, however, had very limited powers in comparison with those of the Probate Division, for, since the Judicature Act, 1873, every one of the Divisions of the High Court and every Judge has now jurisdiction to do that which might be done by any other division or any other Judge: *Tharp* (1878), 3 P. D. 76; *vide infra*, p. 7. It should, however, be borne in mind that the Judicature Acts have not enlarged the jurisdiction of the Court in non-contentious business; it is only where there is an action that its powers have been enlarged: *Tomlinson* (1881), 6 P. D. 209, 210. And still in practice the Court is a Court of Probate and not of construction; contracts and trusts are not properly matters for its consideration, and even if a trust were declared it would have to be administered in the Chancery Division: *Walker* v. *Gaskill*, [1914] P. 192. The Court is, however, sometimes compelled to construe a will in order to determine who is entitled to the grant of administration, and in such cases a question may arise how far its decision on a point of construction is binding upon the Chancery Division. On this point, and generally as to what facts grants of probate or letters of administration are conclusive, see Wms. on Exors. (11th ed.), pp. 439 *et seq.*

(*f*) Judicature Act, 1873, s. 34. See now the Judicature (Consolidation) Act, 1925, s. 56.

(*g*) Wms. on Exors. (11th ed.), p. 207.

the Act, in every cause or matter pending before it " shall grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

The jurisdiction of the Court, therefore, is not confined to the determination of those questions which must of necessity be decided before the Court can exercise its proper function, and determine what testamentary papers of the deceased are entitled to probate and who is entitled to be constituted his personal representative. It extends further; and whenever in an action a subject of controversy arises which can conveniently be determined between the parties, the Court may, and if possible the Court should, determine it, so as to prevent further and needless litigation (*h*).

Under what circumstances the Court will exercise its concurrent jurisdiction.

But in all these cases it is not sufficient that the Court should have jurisdiction; there is always the further question whether it should exercise the jurisdiction conferred upon it. And the Court will not, it seems, exercise its jurisdiction under the section unless the question in controversy between the parties fairly arises out of the suit, unless every person is before the Court whose interests can be affected by its decision, and unless the question is properly put in issue by the pleadings in the suit (*k*).

SUB-SECTION 4.—*The Registries.*

Principal Probate Registry.

The principal registry of the Court for the purpose of the exercise of probate jurisdiction, known as the Principal Probate Registry, is at Somerset House, Strand, in the county of

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(*h*) *Tharp* (1878), 3 P. D. 76, at p. 81.

(*k*) *Tharp* (1878), 3 P. D. 76, at pp. 82, 88, a case decided under obsolete rules as to the probate of wills of married women. Where a testator disposed of certain houses by his will, and it was contended that the houses did not belong to him, the Court made a declaration in a probate action that the houses were the property of the testator: *Richardson* v. *Richardson* (1924), R. No. 1221 (not reported). For cases where a declaration of trust was claimed in a probate action, see *Betts* v. *Doughty* (1879), 5 P. D. 26; *Stone* v. *Hoskins*, [1905] P. 194. In *Walker* v. *Gaskill*, [1914] P. 192, where there were mutual wills, the Court refused to make a declaration of trust upon the footing of contract, and left the parties to pursue their remedy in the Chancery Division. In an action for probate the writ cannot include a claim for a declaration of legitimacy, for that claim must be made by petition, and the statutory procedure followed: *Warter* v. *Warter* (1890), 15 P. D. 35.

District Probate Registries.

London (*l*). There are also District Probate Registries attached and under the control of the Court (*m*).

Jurisdiction: Principal Registry;

The principal probate registry has jurisdiction (concurrently with the district probate registries) in common form business (*n*) in all cases (*o*), and has exclusive jurisdiction in contentious business (*p*).

District Registries;

Since January 1, 1926, grants of probate or of administration may be made in common form by district probate registrars whether the testator had or had not at the time of his death a fixed place of abode within the district of the registry (*q*); but no grant is to be made by a district probate registrar in any case in which there is contention, until the

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(*l*) This was instituted by section 4 of the Court of Probate Act, 1857, now repealed and replaced by section 107 of the Judicature (Consolidation) Act, 1925. It is to be "at such place in the county of London as His Majesty may by Order in Council from time to time appoint": *Ibid.* Registrars and officers of the principal probate registry were appointed by the Court of Probate Act, 1857, s. 14, and the Court of Probate Act, 1858, ss. 6, 7, 24 and 35, and re-appointed to the Supreme Court by section 77 of the Judicature Act, 1873; see now the Judicature (Consolidation) Act, 1925, ss. 114, 116, 118, 120. As to the powers of the registrars, see *post*, p. 523.

(*m*) Section 13 of the Court of Probate Act, 1857, provided for the establishment for each of the districts specified in Schedule A to the Act, and at the places mentioned, of a public registry attached to and under the control of the Court of Probate, known as "the district registry." A new scheme for the establishment of district probate registries was inaugurated by section 17 of the Administration of Justice Act, 1925, and this is now incorporated in section 108 of the Judicature (Consolidation) Act, 1925, which provides for the establishment of District Probate Registries at the places mentioned in the scheme set out in the Second Schedule to that Act (printed, *post*, App. I.); the section provides that no existing registry shall be abolished or new registry established until a date to be determined by the President with the concurrence of the Lord Chancellor. Provisions are included for the modification of the scheme. As to the appointment of clerks of district probate registries, see section 109 of the Judicature (Consolidation) Act, 1925. The district registrars are appointed by the President: section 114.

(*n*) *I.e.*, the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, and all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration: Judicature (Consolidation) Act, 1925, s. 175.

(*o*) See section 150 of the Judicature (Consolidation) Act, 1925, and *infra*, note (*q*).

(*p*) *I.e.*, all proceedings not included in the expression "common form business," *supra*, note (*n*): Rule 3, C. B. District registrars have no jurisdiction in these matters, and caveats must be warned from the principal registry: Rule 9, C. B.

(*q*) By section 46 of the Court of Probate Act, district registrars might only make a grant where the testator or intestate had a fixed place of abode within the district, but this limitation was abolished by section 18 of the Administration of Justice Act, 1925, now repealed and replaced by section 151 of the Judicature (Consolidation) Act, 1925, the provisions of which were only to come into operation subject to certain temporary provisions set out in Part I of the Fifth Schedule to the Act (section 158), which were to cease to have effect on such date as the President, with the concurrence of the Lord Chancellor, should direct. By an order dated January 1, 1926, and printed in [1926] W. N. (Misc.), p. 37, it was directed that those temporary provisions should cease to have effect forthwith.

contention is disposed of, or in any case in which it appears to him that a grant ought not to be made without the direction of the Court (*r*). Provision is made for the submission of doubtful cases by the district registrar to the principal probate registry for the directions of the Court (*s*).

Second and subsequent grants; Second and subsequent grants are to be made in the principal probate registry or in the district probate registry where the original will is registered or the original grant was made (*t*).

Caveats. Caveats may be entered in the principal probate registry or in any district registry; on a caveat being entered in a district registry, a copy is sent by the district registrar to the principal probate registry to be entered among the caveats in that registry (*u*). Caveats must be warned from the principal registry (*x*).

Sub-section 5.—*Probate Jurisdiction of County Courts.*

County Courts. County Courts have, under the provisions of the Court of Probate Act, 1857, ss. 55—58, and of the Judicature (Consolidation) Act, 1925, s. 150 (which reproduces the provisions of the Court of Probate Act, 1858, ss. 10—12), jurisdiction in contentious business in certain cases. The nature and extent of this jurisdiction is considered in a later chapter (*y*).

Jurisdiction in contentious business; in non-contentious business

Where an intestate's estate does not exceed £100. County Courts have also certain jurisdiction in non-contentious business. By the Intestates' Widows and Children Act, 1873 (*z*), s. 1, it is enacted: "Where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required

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(*r*) Judicature (Consolidation) Act, 1925, s. 151, sub-s. 2.

(*s*) *Ibid.*, s. 151, sub-s. 3. Provision is made by section 152 for notice of every application being sent by the district registrar to the principal registry, and he is forbidden to make a grant until he has received a certificate from the principal registry that no other application appears to have been made.

(*t*) Judicature (Consolidation) Act, 1925, s. 153, which also provides for cases in which second or subsequent grants are made, and the original grant issued before 1857 (see section 173 of the Act, which reproduces section 89 of the Court of Probate Act, 1857).

(*u*) Judicature (Consolidation) Act, 1925, s. 154; and see Rules 74, 75, D. R. Notices of caveats are no longer sent to district registries: Direction, January 1, 1926.

(*x*) See *supra*, note (*p*).

(*y*) *Post*, pp. 580 *et seq.*

(*z*) 36 & 37 Vict. c. 52.

by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fees for the same save as is provided by this Act."

By the Intestates' Widows and Children Act Extension Act, 1875 (*a*), the provisions of this Act are made applicable to the surviving children of poor *widows* who die intestate. It is considered that the provisions of these Acts apply only to the children of an intestate who are of full age and competent to take letters of administration, and that they do not apply to grandchildren (*b*).

Duties of registrar of County Court.

The Act of 1873 (*c*) further provides that the registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant (*d*); that, if he has reason to believe that the whole estate and effects of which the intestate died possessed exceed in value £100, he shall refuse to proceed with the application until he is satisfied as to the real value thereof (*e*); and that registrars of County Courts may exercise the powers of Commissioners of the Court of Probate (*f*).

Fees.

Under the provisions of this Act a table of fees to be taken in cases to which the Act applies has been framed. This table will be found in Appendix V.

Sub-section 6.—*Assizes.*

Trial at Assizes.

The Court has power, in proper cases, to direct that probate actions shall be tried at Assizes (*g*).

(*a*) 38 & 39 Vict. c. 27.
(*b*) Circular, August, 1873.
(*c*) 36 & 37 Vict. c. 52.
(*d*) Section 2.
(*e*) Section 3.
(*f*) Section 4.
(*g*) *Vide post*, p. 579. The Court of Probate had power to direct an issue of fact to be tried before a Judge of assize : Court of Probate Act, 1857, s. 38. As to the Probate Division, see Judicature Act, 1873, s. 29, and now the Judicature (Consolidation) Act, 1925, s. 70.

Section 2.

JURISDICTION OF THE COURT IN RELATION TO PROPERTY.

The Court has jurisdiction when there is property in England,

The Probate Division has jurisdiction to grant probate of a will, or letters of administration in respect of the estate of a deceased person, if, and only if, there is real (*h*) or personal property of the deceased locally situate in England at the time of his death, or at the time when application for a grant is made (*i*). The foundation of the jurisdiction of the Court was, until the Land Transfer Act, 1897, came into operation, that there was personal property of the deceased to be distributed within its jurisdiction (*k*), and now is that there is real or personal property of the deceased within its jurisdiction (*h*); the object of its grant is to enable the executor or administrator to administer property in this country (*l*); it is not the function of the Court to determine as an abstract question who is the proper representative of the deceased (*m*). Where the deceased had no property within this country, the Court has no jurisdiction to make a grant (*n*).

but not otherwise.

A will disposing only of property in a foreign country.

If, therefore, a will disposes only of property in a foreign country, it is not entitled to probate in England (*o*). And if two independent wills are made, one disposing of the testator's property in England and the other disposing of his property abroad, the former only will be admitted to probate in this country (*p*). If, however, the two wills are not independent, the case is different (*q*). The English will, if last, may refer to

Two wills, one disposing of property in England, the other of property abroad.

(*h*) As to the jurisdiction of the Court in respect of real property, see *infra*, pp. 13 *et seq.*

(*i*) Dicey, Conflict of Laws (4th ed.), pp. 340, 341.

(*k*) *Tucker* (1864), 3 S. & T. 585, at p. 586; *Butson* (1882), 9 L. R. Ir. 21; see *Roche* (1861), 7 Jur. (N.S.) 784; and see *Stubbings* v. *Clunies-Ross* (1911), 27 T. L. R. 361 (where some of the property that passed under the will had been brought to England).

(*l*) *Coode* (1867), 1 P. & D. 449.

(*m*) *Tucker* (1864), 3 S. & T. 585, at p. 586.

(*n*) *Ibid.*; see *Evans* v. *Burrell* (1859), 4 S. & T. 185; *Fittock* (1863), 32 L. J. P. 157; but see *Sanders*, [1900] P. 292 (resealing of a colonial grant).

(*o*) *Coode* (1867), 1 P. & D. 449; see *Jauncy* v. *Sealey* (1686), 1 Vern. 397; *Att.-Gen.* v. *Dimond* (1831), 1 Cr. & J. 356.

(*p*) *Murray*, [1896] P. 65, at p. 71; see *Coode* (1867), 1 P. & D. 449; *De la Rue* (1890), 15 P. D. 185; *Fraser*, [1891] P. 285; *Seaman*, [1891] P. 253; *Callaway* (1890), 15 P. D. 147; *Astor* (1876), 1 P. D. 150; *Tamplin*, [1894] P. 39; *Smart* (1884), 9 P. D. 64; *Schenley* (1904), 20 T. L. R. 127; and where a deceased leaves a will expressly limited to her property abroad, the Court will grant administration of her property in England to the persons entitled on intestacy: *Mann*, [1891] P. 293.

(*q*) Even though one of the documents refers to and incorporates the other, the Court may grant an indulgence by allowing only a portion of the testamentary papers to be included in the English probate: see *Tamplin*, [1894] P., at p. 44, and the cases cited in the preceding note. In *White Todd*, [1926] P. 173, where there were English and American wills, but the two documents were inter-dependent with regard to the residue, which was liable

and incorporate the foreign will by reference, and then the probate should include both documents, for they virtually become one document. So also the foreign will, if last, may incorporate the English will, in which case the foreign will would not be limited in its operation to property abroad, and both would be included in the probate (*r*).

When of two independent wills, one disposing of the testator's property in England and the other disposing of his property abroad, the former only is admitted to probate, it is the practice to require a copy of the foreign will to be filed in the registry, together with an affidavit verifying it; and a note is appended to the probate that such affidavit has been filed (*s*).

Sub-section 1.—*Personal Property.*

How the local situation of personal property is to be ascertained.

In most cases there can be no difficulty in determining whether or not the property of the deceased is actually situate in England, but where the property consists of debts or other choses in action, questions of difficulty may arise. The whole question is discussed at length by Professor Dicey in his work on the Conflict of Laws (*u*), and from a consideration of the cases he deduces the following rule: that lands and generally, though not invariably, goods must be held to be situate at the place where they at a given moment actually lie; but debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom the claim exists resides (*x*). There are, however, certain exceptions to this rule (*y*); and it is necessary to add that the maxim "*mobilia sequuntur personam*," under which the goods of a deceased

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for English estate duty, it was held that both wills must be proved in England, but that the document to be retained in the English probate registry as evidence of the testamentary act of making the American will should be an examined and sealed copy of that will, and that after probate the original American will should be handed out to the executors named therein for probate in America; and see *Mercer* (1870), 2 P. & D. 91 (where a copy of a will, the original of which was in India, was held to be incorporated by reference in a codicil).

(*r*) *Murray*, [1896] P. 65, at p. 71; see *Western* (1898), 78 L. T. 49; *Green* (1899), 79 L. T. 738; *Harris* (1870), 2 P. & D. 83; *Howden* (1874), 43 L. J. P. 26; *Wilson* (1864), quoted 43 L. J. P., at p. 28; *Bolton* (1887), 12 P. D. 202. In the last case, however, there appear to have been no words of reference, and if the decision in this case conflicts with the cases referred to in the preceding note, it must be regarded as of doubtful authority. See also *Coode* (1867), 1 P. & D. 449; *Saussaye* (1873), 3 P. & D. 42; *Astor* (1876), 1 P. D. 150.

(*s*) *Murray*, [1896] P. 65; *De la Rue* (1890), 15 P. D. 185; *Fraser*, [1891] P. 285; *Seaman*, [1891] P. 253; *Callaway* (1890), 15 P. D. 147; *Astor* (1876), 1 P. D. 150; *Gilmer* v. *Overman* (1907), 23 T. L. R. 716; *White Todd*, [1926] P. 173.

(*u*) Dicey, Conflict of Laws (4th ed.), pp. 343—349.

(*x*) *Ibid.*, p. 344; see *Ewing* (1881), 6 P. D. 19.

(*y*) *Ibid.*, p. 345.

person are for some purposes regarded as situate in the country where he was domiciled at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant (*z*).

Sub-section 2.—*Real Property.*

Prior to 1898 the Court had no jurisdiction to grant probate of a will disposing only of real estate,

but might grant probate of a mixed will.

Prior to January 1, 1898 (on which day the Land Transfer Act, 1897, came into operation), the Court had no jurisdiction to admit to probate a will relating to real property alone (*a*); but if the will were a mixed will, relating both to real and personal estate, the Court had jurisdiction to grant probate (*b*). And by the Court of Probate Act, 1857, it was enacted that where a will affecting real estate was proved in solemn form, or was the subject of a contentious proceeding, the heir-at-law and persons interested in the real estate were to be cited to see proceedings, and if so cited, should be bound by the decree of the Court (*c*).

Prior to 1898 a grant of administration extended only to the personal estate.

A grant of probate or administration extended only to the personal estate of the deceased, though chattels real vested in his personal representative, as did trust and mortgage estates by virtue of the Conveyancing Act, 1881, s. 30 (*d*).

(*z*) Dicey, Conflict of Laws (4th ed.), p. 349. The cases of *Spratt* v. *Harris* (1833), 4 Hagg. 405, and *Winter* (1861), 30 L. J. P. 56, lend some countenance to the view that the Probate Division has jurisdiction to make a grant whenever the deceased died domiciled in England; but this view is inconsistent with *Att.-Gen.* v. *Hope* (1834), 1 C. M. & R. 530; *Fittock* (1863), 32 L. J. P. 157; and *Coode* (1867), 1 P. & D. 449; and see *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314; *Ewing* (1881), 6 P. D. 19; *Laidlay* v. *The Lord Advocate* (1890), 15 A. C. 468, 483.

(*a*) *Habergham* v. *Vincent* (1793), 2 Ves. jun. 230; *Drummond* (1860), 2 S. & T. 8; *Bootle* (1874), 3 P. & D. 177; see also *Gunn* (1884), 9 P. D. 242; *Lloyd* (1884), 9 P. D. 65.

(*b*) *Partridge's Case* (1702), 2 Salk. 553.

(*c*) Court of Probate Act, 1857, ss. 61—63. From very ancient times, wills of real and personal estate were decided upon by different tribunals, the Courts of common law exercising exclusive jurisdiction over all testamentary devises of real estate, the Ecclesiastical Courts possessing a similar power over bequests of personal estate. The consequence of this separation was that the validity of wills was subjected to a different mode of trial, according to the nature of the property intended to be conveyed; and where the will purported to devise real and to bequeath personal property, there might be a double trial, and conflicting determinations. As to wills of real estate, there was no form of proceeding analogous to probate in common form of a will of personalty; nor was it required by law that a will devising real estate only should be proved or registered in any Court (see the Report of the Royal Commission on the Ecclesiastical Courts, 1832). The Court of Probate Act, 1857, by sections 61—64 provided machinery whereby the heir-at-law might be made a party to and bound by the result of a probate action, and for making a grant of probate or letters of administration with the will annexed evidence of a devise or other testamentary disposition affecting real estate, subject to notice that that mode of proof would be relied on, and unless the party receiving the notice, within four days after the receipt of it, gave notice that he disputed the validity of the devise or testamentary disposition. These provisions are still in force in the case of persons dying before January 1, 1926 : Judicature (Consolidation) Act, 1925, Fifth Schedule, Part II.

(*d*) 44 & 45 Vict. c. 41.

Jurisdiction of the Court as to real estate extended by the Land Transfer Act, 1897.

The jurisdiction of the Court in respect of real estate was extended by the Land Transfer Act, 1897 (*e*), which came into operation on January 1, 1898.

Section 1 of that Act, which applies only in cases of death after the commencement of the Act (*f*), provides that "where real estate (*g*) is vested in any person (*h*) without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

And by section 1, sub-section 3, "probate and letters of administration may be granted in respect of real estate only, although there is no personal estate."

Section 2, sub-section 4, of the Act provides: "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin."

The Land Transfer Act, 1897, does not bind the Crown.

The Land Transfer Act, 1897, did not bind the Crown, and a grant to the Solicitor to the Treasury on behalf of the Crown, where the death occurred before January 1, 1926, is of administration of the personal estate only (*i*).

Administration of Estates Act, 1925:

Deaths on or after January 1, 1926.—These provisions of the Land Transfer Act, 1897, are repealed as respects deaths occurring on or after January 1, 1926 (*k*), and in the case of deaths occurring on or after that date, section 1 of the Administration of Estates Act, 1925 (*l*) provides as follows:—

(*e*) 60 & 61 Vict. c. 65.

(*f*) Section 1, sub-section 5.

(*g*) The expression "real estate" does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant: section 1, sub-section 4. But though the *legal* estate in such land does not devolve to the personal representative, an equitable estate or interest does so devolve: *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*h*) The section applies to real estate over which a person exercises by will a general power of appointment, as if it were real estate vested in him: section 1, sub-section 2.

(*i*) *Hartley*, [1899] P. 40.

(*k*) Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), s. 156, sub-s. 11, which also repeals section 30 of the Conveyancing Act, 1881, and section 12 of the Conveyancing Act, 1911, as respects deaths occurring after the commencement of the Act, *i.e.*, January 1, 1926 (Law of Property (Postponement) Act, 1924 (15 Geo. 5, c. 4), s. 1).

(*l*) 15 Geo. 5, c. 23. Save as otherwise expressly provided, the Act does not apply in any case where the death occurred before the commencement of the Act (section 54), *i.e.*, January 1, 1926 (section 58).

" (1) Real Estate (*m*) to which the deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person. Devolution of real estate on personal representative.

" (2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

" (3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate."

By section 155 of the Supreme Court of Judicature (Consolidation) Act, 1925, which now replaces section 13 of the Administration of Estates Act, 1925, probate or administration (*n*) in respect of the real estate (*o*) of a deceased person, or any part thereof, may be granted either separately or together with probate or administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of a trust estate only, and a grant of administration to real estate may be limited in any way the Court thinks proper; but where the estate of the deceased is known to be insolvent, the grant of representation to the estate is not to be severed except as regards a trust estate. Power to grant representation of real and personal estate separately or together.

The provisions of the Administration of Estates Act, 1925, bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall, as respects the estates of persons dying after the commencement of the Act (*p*) and in such cases grants to the Treasury Solicitor are made for all the estate. Application to Crown.

(*m*) By section 3 of the Act, " real estate " includes (1) chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and (2) real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land. As to the application to real estate of the law affecting chattels real, see section 2 of the Act.

(*n*) " Administration " includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes : Judicature (Consoldation) Act, 1925, s. 175.

(*o*) The definition of " real estate " is similar to, but not identical with, that in the Administration of Estates Act, 1925, *supra*, note (*m*). Cf. Administration of Estates Act, 1925, s. 3, and Judicature (Consolidation) Act, 1925, s. 175.

(*p*) Administration of Estates Act, 1925, s. 57; but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on the Crown, etc., may be instituted : *Ibid.*; nor does the Act affect or alter the descent or devolution of any property for the time being vested in the Crown, etc. : *Ibid.*

Vesting of estate of intestate between death and grant of administration.

Where a person dies intestate after January 1, 1926, his real and personal estate, until administration is granted in respect thereof, vests in the President of the Probate Division in the same manner and to the same extent as formerly in the case of personal estate it vested in the Ordinary (*q*).

Conveyance of real estate by executors.

Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the Court, and is as effectual as if all the persons named as executors had concurred therein (*r*).

Present form of grant.

The Court, in cases of deaths occurring since the Land Transfer Act, 1897, came into operation, grants probate and letters of administration in respect of "all the estate which by law devolves to and vests in the personal representative of the deceased."

Real and immovable property in a foreign country.

A will disposing only of real and immovable property in a foreign country cannot be admitted to probate in England (*s*), even though the testator held the land or houses for a chattel interest (*t*). It seems scarcely necessary to add that foreign land and immovables cannot be dealt with under an English grant of administration, nor can administration in respect of them be granted by the English Court (*u*).

Sub-section 3.—*Property exempted from the Jurisdiction of the Court by Statute.*

Certain property is specially exempted from the jurisdiction of the Court by statutes, so that payment thereof to persons

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(*q*) Administration of Estates Act, 1925, ss. 9, 54, 55 (xv). Under the Land Transfer Act, 1897, until the constitution of a personal representative, real estate coming within the operation of the Act vested in the heir: *John* v. *John*, [1898] 2 Ch. 573, 576. As to personalty before the Act of 1925, see the Court of Probate Act, 1858, s. 19.

(*r*) Administration of Estates Act, 1925, s. 2, sub-s. 2. Under the provisions of the Land Transfer Act, 1897, it was held that where a testator died after that Act, having appointed executors, his real estate vested in all his executors, and not only in those who proved the will; and that the executors who had proved could not convey the legal fee simple without the concurrence of their co-executor who had not proved, unless the latter had renounced, or had failed to appear to a citation to accept or refuse probate: *Pawley* v. *L. & P. Bank*, [1900] 1 Ch. 58; *Cohen's Executors and L. C. C.*, [1902] 1 Ch. 187. Consequently section 12 of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), provided that the conveyance might be made by the proving executors, without the concurrence of executors to whom power was reserved. This section was repealed (as respects deaths occurring after the Act) by section 156, sub-section 11 of the Law of Property Act, 1922, and replaced by section 156, sub-section 4 of that Act, now repealed and re-enacted by section 2, sub-section 2 of the Administration of Estates Act, 1925.

(*s*) *Tamplin*, [1894] P. 39, at p. 46.

(*t*) *Freke* v. *Lord Carberry* (1873), L. R. 16 Eq. 461, at p. 466.

(*u*) Dicey, Conflict of Laws (4th ed.), p. 383.

interested in the estates of the deceased may be made without representation obtained.

The effect of these statutes may be summarised as follows :—

Naval assets not exceeding £100.

On the death of an officer, seaman or marine in His Majesty's naval or marine force, or of a person employed in a royal dockyard or other naval establishment, or in any of the civil departments of the navy, or entitled to an allowance from the compassionate fund, or of a widow entitled to a pension on the establishment of the navy, where the amount to the credit of the deceased in the books of the Admiralty or due by the Admiralty, does not exceed £100, it is not necessary for any purpose that representation to the deceased should be taken out, but the Admiralty may, if they think fit, dispose of the money in accordance with certain statutory provisions (*x*).

Officers and soldiers.

Where a person who is serving or has served as an officer, soldier, or otherwise in or with any of His Majesty's military forces, or has received remuneration out of money provided by Parliament for army services, or who is a widow or relative of any such person, dies, and any part of the personal estate of such person not exceeding £100 is held by or under the control of a Secretary of State, the latter may dispose of the same without requiring representation to the deceased to be taken out (*y*).

Merchant seamen.

Wages and property of merchant seamen or apprentices not exceeding £100 in value may be paid over by the Board of Trade to the persons entitled without representation being obtained (*z*).

(*x*) Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 6. The Act contains regulations for the disposal of the intestate's assets, which are elaborated by an Order in Council of December 28, 1865 (amended by S. R. & O. 1915, No. 930, and S. R. & O. 1916, Nos. 132 and 627). The statute and the Orders in Council are printed in Appendix I; see also *post*, p. 446. By the Naval Pensions Act, 1884 (47 & 48 Vict. c. 44), the provisions of the Act are extended to naval pensions, Greenwich Hospital pensions, gratuity and allowance within the meaning of the Greenwich Hospital Acts, 1865 to 1883. And by the Naval Prize Act, 1918 (8 & 9 Geo. 5, c. 30), s. 4, where naval assets to the extent of £100 have been disposed of without representation, and subsequently there is an award of prize money of prize bounty of less than £100, the amount awarded can be disposed of without representation. The Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), and articles xiii—xvii of the Order in Council of December 28, 1865, contain provisions as to the payment of naval assets under the wills of seamen and marines without probate, in certain cases. The Act and Order are printed in Appendix I; see also *post*, p. 446.

(*y*) Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), s. 4. See also the Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 9. The Commissioners of Chelsea Hospital have a similar power in respect of pensions and prize money, not exceeding £50, of soldiers, officers and others: Army Pensions Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 41), s. 5, amended by 31 & 32 Vict. c. 90, s. 2, which increased the limit to £100; Army Prize Money Act, 1832 (2 & 3 Will. 4, c. 53), s. 26; Army Prize (Shares of Deceased) Act, 1864 (27 & 28 Vict. c. 36), s. 3.

(*z*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 176, 177. Section 150 of the Act provides for the payment of deposits in a seamen's savings bank. Section 29 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), makes similar provision in relation to the property of seamen dying on a voyage which does not terminate in the United Kingdom.

Civil servants.

Sums not exceeding £100 due from a public department in respect of civil pay, superannuation or other allowance, annuity or gratuity to any deceased person may, if the department so direct, and subject to regulations made by the Treasury, be paid to the persons entitled without representation obtained (*a*).

Funds in a loan society not exceeding £50.

In case of the intestacy of a debenture-holder, depositor, or other claimant entitled to receive any sum not exceeding £50 out of the funds of a loan society, the same may be paid as provided without representation obtained (*b*).

Funds not exceeding £50 in building society.

A sum not exceeding £50 due to any member of, or depositor in, a registered building society may, on his death intestate, be paid as provided without representation obtained (*c*).

Deposits in savings banks not exceeding £100.

Depositors in trustee or post-office savings banks who are not under sixteen years of age may under regulations made in accordance with the Savings Bank Act, 1887, s. 3, nominate a person to whom any sum, not exceeding £100, payable to such depositor at his decease, may be paid at such decease, and, in the absence of such nomination, provision is made for the payment, without representation obtained, to the persons and in the manner specified (*d*).

Deposits in friendly societies, trades unions, and industrial and provident societies not exceeding £100.

Similar provisions for nomination or payment without representation obtained of sums not exceeding £100 have been made in the case of members of friendly societies (*e*), members of registered trade unions (*f*), and members of industrial and provident societies (*g*).

Funds in Court not exceeding £100.

Where the estate of a deceased person who has died intestate is entitled to a fund or to a share of a fund in Court not exceeding £100, and it is proved to the satisfaction of the Court that no administration has been taken out, and that his assets do not exceed £100 including the amount of the fund or share, the Court may direct that the fund or share shall be paid out to the person who—being a widower, widow, child, father, mother,

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(*a*) Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8. See also the Superannuation (Ecclesiastical Commissioners and Queen Anne's Bounty) Act, 1914 (4 & 5 Geo. 5, c. 5), s. 7; and the Superannuation Act, 1914 (4 & 5 Geo. 5, c. 86), s. 1.

(*b*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 11.

(*c*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 29. In the case of an unregistered building society, under 6 & 7 Will. 4, c. 32, the limit is £20: see 10 Geo. 4, c. 56, s. 24; 6 & 7 Will. 4, c. 32, s. 4; 37 & 38 Vict. c. 42, s. 7.

(*d*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 3. Such nominations cannot be revoked by will.

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 56—58.

(*f*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10; Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 3. See *Crocker* v. *Knight*, [1892] 1 Q. B. 702 (C. A.).

(*g*) Industrial and Provident Societies (Amendment) Act, 1913 (3 & 4 Geo. 5, c. 31), s. 6.

brother or sister of the deceased—would be entitled to take out administration to his estate (*h*).

The production of a grant is not necessary to establish the right to receive money payable on policies of life assurance effected in England by persons who die domiciled elsewhere than in the United Kingdom (*i*). Life policies of persons domiciled abroad.

Besides the cases mentioned above, other statutes provide for dispensing with probate or letters of administration in certain circumstances (*k*). Other statutes.

SUB-SECTION 4.—*Effect of an English Grant upon Property Abroad.*

An English grant, whether of probate or of letters of administration, has no direct operation out of England (*l*). An English grant has no direct operation out of England,

As a corollary to the rule that the English Court has no jurisdiction to make a grant in respect of property situate out of England, it follows that where a testator dies leaving assets in England and abroad the grant of probate or administration by the English Court cannot extend to the latter (*m*). Wherefore the person constituted executor or administrator by the English Court, if he wishes to sue in that capacity in the Court of a foreign country to recover assets of the deceased situate there, cannot rely upon the English grant, but must prove the will or obtain a grant of administration in the Court of that country (*n*). and cannot extend to property abroad.

The rule applies whether or not the deceased was domiciled in England at the time of his death (*o*).

This proposition, which seems now clearly established, may appear at first sight to conflict with the dictum of Sir John Nicholl in *Spratt* v. *Harris* (*p*). "I apprehend," he said, "that all personal property follows the person, and that the

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(*h*) R. S. C., Order XXII, r. 18A.

(*i*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19; see *Haas* v. *Atlas Assurance Co., Ltd.*, [1913] 2 K. B. 209 (the insurers are entitled to retain a sum sufficient to cover the estate duty).

(*k*) Finance Act, 1918 (8 & 9 Geo. 5, c. 15), s. 38, sub-s. 2 (small amounts of Government stock held by colonials dying in military service); County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), s. 26 (money paid into a county court under the Workmen's Compensation Act, 1906); see also the School Teachers (Superannuation) Act, 1918 (8 & 9 Geo. 5, c. 55), s. 8; the Police Pensions Act, 1921 (11 & 12 Geo. 5, c. 31), s. 14; the Fire Brigade Pensions Act, 1925 (15 & 16 Geo. 5, c. 47), s. 12; the Teachers (Superannuation) Act, 1925 (15 & 16 Geo. 5, c. 59), s. 16.

(*l*) Dicey, Conflict of Laws (4th ed.), rule 84, p. 378.

(*m*) See *Murray*, [1896] P. 65, at p. 71.

(*n*) Dicey, Conflict of Laws (4th ed.), pp. 379—381; Wms. on Exors. (11th ed.), pp. 267, 268; see *Blackwood* v. *The Queen* (1882), 8 A. C. 82, at pp. 92, 93; *New York Breweries Co., Ltd.* v. *Att.-Gen.*, [1899] A. C. 62.

(*o*) *Blackwood* v. *The Queen* (1882), 8 A. C. 82.

(*p*) (1833), 4 Hagg., at p. 408; and cf. *Re Scott*, [1916] 2 Ch. 268.

rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate" (*q*). This doctrine must be understood in the sense that a person who has obtained an English grant may sue in the *English* Courts in relation to movables of the deceased situate in a foreign country (*r*), and does not therefore conflict with the rule that the representative constituted by the English Court will have to clothe himself with a title from the Court where the property is locally situate if, in the course of administration, it becomes necessary to take legal proceedings in that country to reduce the estate into possession (*s*).

But an English representative may sue in the *English* Courts in respect of personal property abroad.

When, however, the deceased dies domiciled in England, and it becomes necessary for his representatives to recover and to deal with assets in a foreign country, the Courts of that country ought, by the comity of nations, to follow the decision of the English Court, and by means of a grant or otherwise to enable the English executor or administrator to recover and deal with such assets (*t*).

The Courts of the foreign country will, as a general rule, make a grant to the English representative.

Special provision has been made by statute for the extension of English grants to Scotland (*u*) and Ireland (*x*) by a merely ministerial act of the Scotch or Irish Courts; and adequate provision is made for the recognition of an English grant by the Courts of all British possessions to which the Colonial Probates Act, 1892, has by Order in Council been applied (*y*).

Extension of English grant to Scotland, Ireland, and the colonies.

Sub-section 5.—*Effect of a Foreign Grant upon Property in England.*

A grant of probate or letters of administration, or other authority to represent a deceased person, made by the Courts of a foreign country, has no direct operation in England (*z*).

A foreign grant has no direct operation in England, so as to entitle the foreign representative to sue in the English Courts.

(*q*) See *Whyte* v. *Rose* (1842), 3 Q. B., at p. 507.
(*r*) *Ibid.*
(*s*) Wms. on Exors. (11th ed.), pp. 267, 268, citing Story, Conflict of Laws, Ch. XIII, ss. 512, 513, 518; Dicey, rr. 84, 85.
(*t*) Wms. on Exors. (11th ed.), pp. 267, 268; Dicey, Conflict of Laws (4th ed.), r. 86, p. 381; *Atkins* v. *Smith* (1740), 2 Atk. 63; *Burn* v. *Cole* (1762), Ambl. 415; *Murray*, [1896] P. 65, at p. 71. See also, as to the limits of this rule, *Blackwood* v. *The Queen* (1882), 8 A. C. 82, at pp. 92, 93.
(*u*) Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), s. 14; *vide post*, pp. 485 *et seq.*
(*x*) Probates and Letters of Administration (Ireland) Act, 1857 (20 & 21 Vict. c. 79), s. 94; *vide post*, pp. 483 *et seq.*
(*y*) *Vide post*, pp. 486 *et seq.*, and see the Act printed in App. I with a list of the places to which it has been applied.
(*z*) Dicey, Conflict of Laws (4th ed.), r. 129, p. 490; Wms. on Exors. (11th ed.), pp. 264—266.

No grant of probate or letters of administration by a foreign Court can entitle the person constituted representative of the deceased by such a grant to sue in that capacity in any Court in England (*a*). The Courts of this country look only to the judgment of the Probate Court in England, in granting probate or letters of administration, to ascertain who are authorised to represent the estate of a person deceased (*b*). It follows that a foreign executor or administrator, who wishes to act in England as personal representative of the deceased, cannot rely upon the foreign grant, but must prove the will in the Probate Division of the High Court of Justice (*c*), or obtain a grant of letters of administration (*d*) from that Court (*e*).

SUB-SECTION 6.—*The English Court will follow the Decision of the* Forum Domicilii.

The English Court will, as a general rule, make a grant to the foreign representative,

When a person dies domiciled in a foreign country, and the Court of that country has invested any person, no matter whom, with the power and duty of administering the estate, the Probate Division in England will, as a general rule, follow the decision of the Court of the country of domicil, and constitute the same person representative of the deceased in England.

and grant probate of a will which has been proved in the Court of the domicil.

And where the will of a testator has been proved in a Court of competent jurisdiction in the country of his domicil at the time of his death, a duly authenticated copy will be admitted to probate in this country without further evidence of the validity of the will.

These rules are only one of the consequences of the principle, now generally recognised by the Courts of all civilised countries, that the law of the country in which the deceased was domiciled at the time of his death governs the course of distribution and succession as to his personalty, and, subject to the exceptions mentioned later in this chapter, regulates the decision as to what constitutes his last will (*f*).

Principles upon which the English Court acts where a foreign representative has been appointed.

The principles upon which the English Probate Court acts in cases where a personal representative to the deceased has already been appointed by the Court of the country in which

(*a*) *Whyte* v. *Rose* (1842), 3 Q. B., at p. 507.
(*b*) *Tyler* v. *Bell* (1837), 2 My. & Cr., at p. 109; and see the cases there cited.
(*c*) *Jauncy* v. *Sealey* (1686), 1 Vern. 397; *Price* v. *Dewhurst* (1838), 4 My. & Cr., at pp. 80, 81; *Bond* v. *Graham* (1842), 1 Hare, at p. 484.
(*d*) *Att.-Gen.* v. *Bouwens* (1838), 4 M. & W., at p. 193; *Whyte* v. *Rose* (1842), 3 Q. B., at pp. 507, 508.
(*e*) *Enohin* v. *Wylie* (1862), 10 H. L. C., at p. 19.
(*f*) *Vide post*, p. 27.

he died domiciled were laid down by Sir J. P. Wilde in the case of *In the goods of Earl* (*g*). The learned Judge, after reviewing the cases upon this question decided by the Judges of the Prerogative Court (*h*), said : " The result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (*i*) have militated against the rule of following the foreign grant." The learned Judge then cited with approval the words of Lord Westbury, L.C., in *Enohin* v. *Wylie* (*j*), as to the confusion which must arise if, when a testator dies domiciled in one country, the Courts of every other country should assume the right of declaring who is the personal representative; expressed his adherence to the practical principle there pointed out; and, after stating that this Court is armed with a special power by section 73 of the Court of Probate Act, 1857 (*k*), continued : " I think the Court ought to act upon that section, and to make a grant in all cases " where the deceased died domiciled in a foreign country " to the person (*l*) who has been clothed by the Court of the country of domicil with the power and duty of administering the estate, no matter who he is, or on what ground he has been clothed with that power."

It is thus the duty of this Court to follow the law of the domicil of the deceased by recognising the persons whom the Court of that country has invested with the powers and duties of administrators (*m*). But it has been held that the English

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(*g*) (1867), 1 P. & D. 450, at p. 452; and see *Smith* (1868), 16 W. R. 1130.

(*h*) *Larpent* v. *Sindry* (1828), 1 Hagg. 382; *Read* (1828), 1 Hagg. 474; *Countess da Cunha* (1828), 1 Hagg. 237; *Viesca* v. *D'Aramburu* (1839), 2 Curt. 277; *Stewart* (1838), 1 Curt. 904; *Rogerson* (1840), 2 Curt. 656.

(*i*) *E.g.*, *H.R.H. the Duchess D'Orléans* (1859), 1 S. & T. 253.

(*j*) (1862), 10 H. L. C., at p. 15.

(*k*) In the case of persons dying after January 1, 1926, section 73 of the Court of Probate Act, 1857, is repealed, and is replaced by section 162 of the Judicature (Consolidation) Act, 1925 : see *post*, Chapter XV, pp. 401 *et seq.* And such grants may now be made in the registry without a motion to the Court, unless special circumstances of difficulty arise : see *post*, Part II, Chapter IV, pp. 477 *et seq.*

(*l*) Conversely this Court will refuse to make a grant to a person, named executor in a will, where the Court of the testator's domicil has decreed that the time for the execution of such executorship has elapsed, and that the executor has no longer any right to intermeddle with the deceased's estate : *Laneuville* v. *Anderson* (1860), 2 S. & T. 24; and see *Whitelegg*, [1899] P. 267; *Meatyard*, [1903] P. 125. But where a naturalized British subject died in France, leaving a will executed in England in English form which was entitled to probate under Lord Kingsdown's Act, 1861, s. 2, probate was granted to the executor named in the English will, although proceedings were pending in the French Court for the appointment of a receiver, as no order had in fact been made by the French Court : *Cocquerel*, [1918] P. 4.

(*m*) *Meatyard*, [1903] P., at p. 129. It is not necessary that the grant by the foreign Court should be in form an equivalent to an English grant of probate or administration. Thus in *Dost Aly Khan* (1880), 6 P. D. 6, where

Court cannot follow the foreign law so far as to grant administration to anyone who is, by the law of England, personally disqualified from taking the grant. For instance, however much the foreign Courts may hold that a minor should have the grant, this Court cannot go so far as to give it to such a person (*n*).

The form of the English grant does not necessarily follow that of the foreign grant.

The form, however, of the English grant will not necessarily follow that of the foreign grant. The English Court has regard to the law of the domicil in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and will then give such a grant to that person as will enable him to perform in this country the duties imposed upon him (*o*).

Where probate is to be granted to the foreign representative as executor.

Thus where in a foreign will a person is in terms named executor, and an executor has, by the law of the testator's domicil, powers as extensive as those conferred upon an executor by the law of England, probate will be granted in this country to that person (*p*). But where the powers conferred on the person by the will, or by the law of the country of domicil, fall short of the powers of executors according to the English law, probate will not be granted to that person, but there will be a grant to him of administration with the will

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the deceased was domiciled in Persia, a limited administration was granted to the person declared to be entitled to certain property of the deceased in England by the decree of the Persian Court, although by the law of Persia representation of the estate of a deceased person is not recognised. In *Black* (1887), 13 P. D. 5, a grant was made to a person whom the acting executor had substituted as executor in his stead, to act during his absence, on it appearing that such person, by the laws of the country of domicil, became possessed of all the powers necessary for the administration of the estate; and see *Bianchi* (1859), 1 S. & T. 511; *Abdul Hamid Bey* (1898), 78 L. T. 202. And the Court will grant administration to the person entitled to administer the estate by the law of the testator's domicil, even to the exclusion of the person named executor in the will: *Whitelegg*, [1899] P. 267; *Meatyard*, [1903] P. 125; see *supra*, p. 22, note (*l*).

(*n*) *Meatyard*, [1903] P., at pp. 129, 130. In *Countess da Cunha* (1828), 1 Hagg. 237, a limited administration was granted to a minor residuary legatee, the wife of a minor, on the ground that by the law of Portugal, where the deceased died domiciled, she was entitled to a grant; but in *Duchess D'Orléans* (1859), 1 S. & T. 253, a grant under similar circumstances was refused, on the ground that in England a grant cannot be made to a minor.

(*o*) *Briesemann*, [1894] P., at p. 261. But in *Levy*, [1908] P. 108, where the Court of the domicil had made a grant of administration limited in time, the English Court made a general grant to the foreign administrator.

(*p*) *Von Linden*, [1896] P., at p. 149. And probate will, apparently, be granted to the executor named in the will of a British subject which is entitled to probate under Lord Kingsdown's Act, 1861, irrespective of the powers of an executor according to the law of the testator's domicil: *Cocquerel*, [1918] P. 4. So probate may be granted to the person who is, *by English law*, executor according to the tenor of the will: *Von Linden*, *supra*; though the matter is discretionary, and the Court may require him to take administration with the will annexed: *Grewe* (1922), 38 T. L. R. 440; but probate will not be granted to the executor according to the tenor by foreign law, if he would not be so recognised by the law of England: *Cosnahan* (1866), 1 P. & D. 183; *Earl* (1867), 1 P. & D. 450.

annexed, with powers as near as may be to those granted by the will or by the law of the domicil (*q*). The grant will describe him as "the person entitled under the grant of the country of the deceased's domicil to administer the estate"; and thus the difficulty is avoided of declaring that a person is executor who, according to the practice of the English Court, is not executor, and of continuing the chain of executorship by persons who are executors according to the law of a foreign country, but not according to the law of this country (*r*).

Where a will has been recognised as valid by the Court of the testator's domicil.

When a will (*s*) has been recognised as valid (*t*) by a Court of competent jurisdiction in the country in which the testator was domiciled at the time of his death, it is the established practice of the English Court to admit to probate in this country a duly authenticated copy of such will, without further evidence of its validity, as it is presumed that the foreign Court has been satisfied on that point (*u*). Nor, in such a case, while the will remains unquestioned in the country of domicil, will the English Court allow its validity to be litigated here (*x*), for where the title of persons claiming the estate of a deceased person has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon and must be followed by the Courts of this country (*y*), even if the judgment of the foreign Court has, by the default of the party complaining of the judgment, proceeded on a mistake as to the English law (*z*), or the whole of the facts were not before the foreign

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(*q*) *Von Linden*, [1896] P., at p. 149; see *Cosnahan* (1866), 1 P. & D. 183; *Earl* (1867), 1 P. & D. 450; *Hill* (1870), 2 P. & D. 89 (a case of a grant *de bonis non*); *Dost Aly Khan* (1880), 6 P. D. 6 (where a limited grant was made); *Briesemann*, [1894] P. 260; and see *Moffat*, [1900] P. 152; *Meatyard*, [1903] P. 125.

(*r*) *Earl* (1867), 1 P. & D., at p. 453.

(*s*) *I.e.*, an instrument which has been recognised as regulating the succession to the estate of the deceased after his death by the tribunal of the domicil, even though it would not be regarded as testamentary by the English Courts. See *Oldenburg* (1884), 9 P. D. 234, where, on proof that by the law of Russia no will or codicil of a deceased member of the royal family has any effect as such, but the deceased's property is distributed in accordance with an *acte definitif* decreed by the other members of the family and confirmed by the Emperor, this Court granted probate of the *acte definitif*, notwithstanding the execution of a will and codicils. See also *Cosnahan* (1866), 1 P. & D. 183; *Dost Aly Khan* (1880), 6 P. D. 6.

(*t*) No regard is had to the form in which the Court of the domicil has signified its adoption of the will. The English Court does not require that the form of approval should be the same as its own grant of probate: *Deshais* (1865), 4 S. & T. 13, 14.

(*u*) *Miller* v. *James* (1872), 3 P. & D. 4; *Deshais* (1865), 4 S. & T. 13; *Vigny*, *ibid.* 15.

(*x*) *Miller* v. *James* (1872), 3 P. & D. 4; *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301, at p. 314.

(*y*) *Enohin* v. *Wylie* (1862), 10 H. L. C. 1; *Ewing* v. *Orr-Ewing* (1884), 10 A. C. 453; *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301.

(*z*) *Castrique* v. *Imrie* (1869), L. R. 4 H. L. 414; *Godard* v. *Gray* (1870), L. R. 6 Q. B. 139.

tribunal (*a*); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal was wrong, recourse must be had to the mode of appeal provided in the foreign country (*b*).

A will need not be proved in the *forum domicilii* before application for probate can be made in this country.

In certain early cases it appears to have been laid down that in all cases where a testator died domiciled abroad his will must in the first instance be proved in the Court of the country of domicil, and accordingly proceedings in the English Court for proof of the will were stayed until the tribunal of the domicil had made a decree (*c*). But the view has since prevailed that the Court of this country has power to admit to probate the will of a domiciled foreigner which disposes of property in England, although the tribunals of the domicil have not in the first instance been resorted to, notwithstanding that the validity of the will in such a case is to be determined by the law of the domicil (*d*).

Proof of codicils, after a will has been proved abroad.

It is still, however, the practice of the English Court, in cases where a will has been proved abroad, to require that probate of the codicils, if any, should be applied for to the Court which granted probate of the will (*e*).

Extension of Irish, Scotch, and colonial grants to England.

Provision has been made by statute for the recognition in England of Irish (*f*) and Scotch (*g*) grants by a merely ministerial act of the English Court; and by the Colonial Probates Act, 1892 (*h*), the grant made by the Court of any British possession to which the Act is applied by Order in Council, may be resealed in England.

Section 3.

JURISDICTION AS TO PERSONS DOMICILED ABROAD.

It now becomes necessary to consider the jurisdiction of the Court in relation to the persons in respect of whose estates its

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(*a*) *Brissac* v. *Rathbone* (1861), 6 H. & N. 301.

(*b*) *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717; *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; and see as to the effect of foreign judgments, *Pemberton* v. *Hughes*, [1899] 1 Ch. 781 (C. A.).

(*c*) *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856; *Hare* v. *Nasmyth* (1815), 2 Add. 25, n.; and see *Trimlestown* v. *Trimlestown* (1830), 3 Hagg. 243.

(*d*) See *post*, p. 26.

(*e*) *Miller* (1883), 8 P. D. 167; and see *Crawford* (1890), 15 P. D. 212.

(*f*) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 169, which replaces, as regards persons dying on or after April 1, 1923, the provisions of the Probates and Letters of Administration (Ireland) Act, 1857 (20 & 21 Vict. c. 79), s. 95; *vide post*, pp. 480 *et seq.*

(*g*) Judicature (Consolidation) Act, 1925, s. 168; which replaces the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), s. 12, as amended by the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70); *vide post*, pp. 484, 485.

(*h*) 55 Vict. c. 6; *vide post*, pp. 486, 487.

grants are made, and to inquire to what extent its jurisdiction is affected by the nationality and domicil of such persons.

Where the deceased left property in this country, the Court has jurisdiction whatever his nationality or domicil.

If the deceased has left property in this country, the Probate Division has jurisdiction to grant probate or letters of administration in respect of his estate, whatever may have been his nationality and domicil at the time of his death, and notwithstanding the fact that the tribunal of his domicil has not in the first instance been resorted to by the parties.

The *forum domicilii* has not exclusive jurisdiction.

In certain early cases, to which reference has been made in the preceding section, the Judges of the Probate Courts in England appear to have taken the view that they ought not to make a grant in respect of the personal estate of a deceased person who died domiciled abroad unless and until recourse had first been had to the Court of the country of the domicil (*i*). But the contrary view has now prevailed; and although the English Court recognises the necessity of applying the *law* of the domicil when granting probate or administration of the personal estate of deceased persons who die domiciled abroad, and the propriety of following the decision of the tribunal of the domicil in cases where the question litigated in the English Court has actually been raised and decided in the former Court (*k*), it is now clear that the Courts of the domicil have not exclusive jurisdiction in such cases, so as to prevent the person entitled to represent the deceased by the law of his domicil, from applying in the first instance in the English Court for a grant of probate or letters of administration in respect of the personal estate of the deceased which is situate in England (*l*).

(*i*) *Hare* v. *Nasmyth* (1815), 2 Add. 25, n.; *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856; *ante*, p. 25.

(*k*) *Vide ante*, pp. 21 *et seq.*

(*l*) The view that the forum of the domicil has exclusive jurisdiction to determine the succession to movable estate (and thus incidentally to decide what is the will of the deceased, and who is to be his personal representative) appears to have been founded on the judgment of Lord Westbury in *Enohin* v. *Wylie* (1862), 10 H. L. C. 1, at p. 13. This judgment was more than once criticised by Lord Selborne, who in the case of *Ewing* v. *Orr-Ewing* (10 A. C. 453, 502), said: "For the purpose of determining the succession to movable estate . . . recourse must be had, *not always or necessarily to the Courts*, but always and necessarily to the law, of the domicil." See also the judgments of Lord Cranworth and Lord Chelmsford in *Enohin* v. *Wylie*, where the former said (10 H. L. C., at p. 19): "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil." Cf. *Doglioni* v. *Crispin* (1886), L. R. 1 H. L. 301, at p. 314; see this case commented upon, *Re Trufort* (1887), 36 Ch. D. 600, at 611; and see *Surrey* v. *Perrin*, [1912] P. 233.

The statement in the text is not intended to preclude the possibility that the English Court, when proceedings are actually pending in the Court of the domicil, might take the view that proceedings in this country should be stayed until the tribunal of the domicil has made a decree. Where administration with a will annexed had been obtained in this country, after a caveat entered had expired, but without notice to the adverse party, and

The general principle which governs both testamentary and intestate succession is that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and succession to his personalty, and therefore regulates the decision as to what constitutes his last will, and whether and how far it is valid, and who is entitled to be appointed his personal representative, and that without regard to his nationality, the place of his birth or of his death or the situation of the property at the time of his death (*m*).

The law of the deceased's domicil at death governs all questions as to the validity of his will of personalty, and who is entitled to be appointed his personal representative.

In the succeeding sub-sections of this section it is proposed to discuss the application of this principle to grants of probate and of letters of administration by the English Court, and the important exceptions which modify its applicability.

At the outset it becomes necessary to define the sense in which certain terms are used in the course of the discussion.

Definition of terms.

The term "foreigner" is used in this chapter as equivalent to "alien"; *i.e.*, any person not a natural-born or naturalized British subject. The term "British subject" includes a naturalized British subject.

"Foreigner" and "British subject."

A will is "valid" in the sense in which that term is used in this section, if made by a person under no testamentary incapacity and duly executed. Such a will may be wholly or in part inoperative because it contains provisions to which the law will not give effect. But if the will is valid in the sense adverted to, the Court of Probate in this country will admit the instrument to probate as testamentary, leaving it for the Court of Chancery to determine how far its provisions can be given effect to. The distinction is clearly drawn by Lord Cranworth in *Whicker* v. *Hume* (*n*):—"Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary,

The term "valid" as applied to a will in this section refers to *formal* validity, and not to material validity.

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while the will was in suit in the Irish Court—the *forum domicilii*—the administration was revoked, as surreptitiously obtained: *Trimlestown* v. *Trimlestown* (1830), 3 Hagg. 243. But in *Duprez* v. *Veret* (1868), L. R. 1 P. & D., 583; and in *Surrey* v. *Perrin*, [1912] P. 233, a stay of proceedings was refused, although it was alleged that proceedings were pending in the Courts of the domicil; and cf. *Cocquerel*, [1918] P. 4.

(*m*) *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76, at p. 82, and cases there cited; Dicey, Conflict of Laws (4th ed.), Comment to r. 193; Wms. on Exors. (11th ed.), pp. 269, 270; and see *Craigie* v. *Lewin* (1843), 3 Curt. 435, at p. 450; *Ferraris* v. *Hertford* (1843), 3 Curt. 468, at p. 486; *Bremer* v. *Freeman* (1857), 10 Moo. P. C. 306, at pp. 357 *et seq.*; *Enohin* v. *Wylie* (1862), 10 H. L. C. 1; *Crispin* v. *Doglioni* (1863), 3 S. & T. 96, 99; *Miller* v. *James* (1872), 3 P. & D. 4; *Re Cunnington*, [1924] 1 Ch. 68.

(*n*) (1858), 7 H. L. C. 124, at pp. 156, 157.

but it would be conclusive of nothing more, for after that there would then arise the question, how is the Court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered" (*o*).

The expression "the law of the domicil" must be understood as referring to the rules applicable in the case of the particular testator or intestate.

It is necessary to give some explanation of the meaning of the expression "the law of the domicil." Foreign law is a matter of fact to be ascertained by the English Court by the evidence of experts skilled in such law (*p*); and when it is said that the law of a particular country must regulate the decision of the English Court, the rules applicable *in the case of the particular intestate or testator by the law of that country are intended.* For example, a testator, born an English subject, dies domiciled in Belgium leaving a will not executed according to the forms required of Belgian subjects by the law of Belgium; but by the law of Belgium the validity of the will in such a case is not to be governed by the law of that country applicable to its natural-born subjects, but by the law of the testator's own country. The will being valid according to the law of England, is admissible to probate here, as conforming to the rules applicable in the case of that particular testator by the law of Belgium, the country of the domicil (*q*).

The law of the domicil as it stood at the time of the death of the testator or intestate is to be applied.

Finally, the expression "the law of the domicil at the time of death" means not only the law of the country in which the deceased was domiciled at the time of his death, but also that law *as it existed at the time of his death; i.e.*, if a change is made in that law after the death of the testator or intestate, the English Court will not have regard to such change, even though in terms retrospective (*r*).

Sub-section 1.—*Validity of a Will of Personalty governed by the* Lex Domicilii.

The law of the domicil governs the validity of a will of personal estate.

When the English Court is called upon to grant probate of a will of personalty, its decision both as to the validity of the will and as to its title to probate is regulated and governed, subject to the exceptions hereafter to be mentioned (*s*), by the

(*o*) See Dicey, Conflict of Laws (4th ed.), pp. 756—758.

(*p*) *Bremer* v. *Freeman* (1857), 10 Moo. P. C. 361. As to what persons are competent to give evidence on this point, *vide post*, p. 478.

(*q*) *Collier* v. *Rivaz* (1841), 2 Curt. 855. For further illustration of this principle, see *Maltass* v. *Maltass* (1844), 1 Rob. 67, 3 Curt. 231; *Abdul Messih* v. *Farra* (1888), 13 A. C. 431; *Lacroix* (1877), 2 P. D. 94; and see Dicey, Conflict of Laws (4th ed.), pp. 811—825.

(*r*) *Lynch* v. *Provisional Government of Paraguay* (1871), 2 P. & D. 268; *Re Aganoor's Trusts* (1895), 64 L. J. Ch. 521.

(*s*) Sub-sections 2 and 4, *post*.

law of the country in which the testator was domiciled at the time of his death (*t*).

Accordingly, where the will of personalty (*u*) of a foreigner (*x*) is brought into the Probate Division in this country for probate, the object of that Court is to deal with the instrument exactly as the Court of the testator's domicil would have dealt with it at the time of his death (*y*); in other words, in deciding whether the instrument is admissible to probate, the English Court will be guided by the law of the country where the testator was domiciled at the time of his death, and will grant or refuse probate of the instrument according as it is or is not a valid will (*z*) by the law of that country (*a*).

A will of personalty of a foreigner who dies domiciled in England must be executed in accordance with the English law.

Hence, on the one hand, the will of personalty (*b*) of a foreigner (*c*) who died domiciled in England will be admitted to probate in this country if it is a valid will by the law of England (*d*); probate of the instrument will be refused if the will is invalid on account of the testamentary incapacity of the testator or non-compliance with the formalities prescribed for due execution (*e*) by the English law.

The will of personalty of a foreigner

On the other hand, the will of personalty (*f*) of a foreigner (*g*) who died domiciled abroad (*h*) will be admitted to

(*t*) *Curling* v. *Thornton* (1823), 2 Add. 6, 21; *Anstruther* v. *Chalmer* (1826), 2 Sim. 1; *Stanley* v. *Bernes* (1830), 3 Hagg. 373; *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76; *Preston* v. *Melville* (1841), 8 Cl. & F. 1; *Craigie* v. *Lewin* (1843), 3 Curt. 435; *Ferraris* v. *Hertford* (1843), 3 Curt. 468, at p. 486; *Bremer* v. *Freeman* (1857), 10 Moo. P. C. 306; *Enohin* v.. *Wylie* (1862), 10 H. L. C. 1; *Crispin* v. *Doglinoni* (1863), 3 S. & T. 96, 99; *Miller* v. *James* (1872), 3 P. & D. 4; *Eames* v. *Hacon* (1880), 16 Ch. D. 407.

(*u*) As here used, the term "personalty" does *not* include leaseholds and other chattel interests in lands, for these, in common with other immovables, are governed by the *lex loci rei sitæ*: *Freke* v. *Lord Carberry* (1873), 16 Eq. 461; *De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123; *Gentili* (1876), Ir. R. 9 Eq. 541; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; *Re Moses*, [1908] 2 Ch. 235; *vide post*, p. 36.

(*x*) For the meaning of this term, *vide ante*, p. 27. A natural-born British subject who has become an alien by marriage is a foreigner in this sense: *Von Buseck* (1881), 6 P. D. 211; *Bloxam* v. *Favre* (1883), 8 P. D. 101; 9 P. D. 130, C. A.

(*y*) *Vide ante*, p. 28.

(*z*) *Vide ante*, p. 27.

(*a*) *Vide ante*, p. 28.

(*b*) *Vide supra*, note (*u*).

(*c*) *Vide ante*, p. 27.

(*d*) *Hare* v. *Nasmyth* (1815), 2 Add. 25, n. The property was in England, and the party died there, but the domicil was in Scotland, and the validity of the will was held to depend on Scotch law. The decision is no longer applicable to the will of a British subject (see 24 & 25 Vict. c. 114, *post*, p. 31). See *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76; *Yates* v. *Thomson* (1835), 3 Cl. & Fin. 544; *Bloxam* v. *Favre* (1883), 8 P. D. 101; 9 P. D. 130, C. A.; *Von Buseck* (1881), 6 P. D. 211.

(*e*) *Vide ante*, p. 27.

(*f*) *Vide supra*, note (*u*).

(*g*) *Vide ante*, p. 27.

(*h*) *I.e.*, in a foreign country or any British possession or in Scotland, the Channel Islands, or the Isle of Man. Ireland had, and Northern Ireland still has, the same system of law as England.

who died domiciled abroad will be admitted to probate only if it is a valid will by the law of the country of his domicil.

probate in England if it is a valid will by the law of the country in which the testator was domiciled at the time of his death (*i*); probate of the instrument will be refused if the will is invalid on account of the testamentary incapacity of the testator or non-compliance with the formalities prescribed for due execution (*k*) by the law of the country of domicil (*l*).

Sub-section 2.—*Exception in the Case of Wills of British Subjects.*

Exception as to wills of British subjects by Lord Kingsdown's Act, 1861: Section 1.

Wills of British subjects made out of the United Kingdom as regards personal estate.

The principle under discussion was rendered to a great extent inapplicable to the wills of British subjects dying after August 6, 1861, by the Wills Act, 1861 (*m*), commonly known as Lord Kingsdown's Act.

Section 1 of that Act provides: "Every will and other testamentary instrument made out of the United Kingdom (*n*) by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate (*o*) be held to be well executed for the purpose of being admitted in England and Ireland (*n*) to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place (*p*) where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin."

It will be noticed that a will, to come within this section of the Act, must be, first, a will "made out of the United

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(*i*) *Maraver* (1828), 1 Hagg. 498. In that case the domicil having been Spain, the law of that country decided the probate.

(*k*) As to the effect of material invalidity—*i.e.*, the illegality of the *provisions* of the will by the law of the domicil—*vide ante*, p. 27; and see *Thornton* v. *Curling* (1824), 8 Sim. 310; *Campbell* v. *Beaufoy* (1859), Johns. 320.

(*l*) *Stanley* v. *Bernes* (1830), 3 Hagg. 374 (this was a case in which the will was that of a British subject, as to whom the law was altered by 24 & 25 Vict. c. 114, but the decision is still applicable to the wills of foreigners); *Von Buseck* (1881), 6 P. D. 211; *Bloxam* v. *Favre* (1883), 8 P. D. 101; 9 P. D. 130, C. A.

(*m*) 24 & 25 Vict. c. 114.

(*n*) The "United Kingdom" does not include the Channel Islands or the Isle of Man. References in enactments passed before the establishment of the Irish Free State to the "United Kingdom" or "Ireland," are (with certain exceptions which do not affect the statute under consideration) to be construed as exclusive of the Irish Free State: Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, c. 2), s. 6; Irish Free State (Consequential Adaptation of Enactments) Order, 1923, (Stat. R. & O., 1923, No. 405), art. 2.

(*o*) This term as used in the Act *includes* leaseholds: *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584; *Lyne* v. *De la Ferté* (1910), 102 L. T. 143; and also an interest in the proceeds of the sale of real estate held upon trust for sale: *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

(*p*) *I.e.*, the law applicable to the case of the particular testator: *Lacroix* (1877), 2 P. D. 94; *vide ante*, p. 28.

Kingdom " (*pp*), secondly, a will " made by a British subject " (*q*), and, thirdly, a " will of personal estate " (*qq*).

A will executed in accordance with the provisions of this section is " well executed for the purpose of being admitted to probate." The law of the country in which the testator was domiciled at the time of his death still regulates all questions as to his capacity to make a will, and the material validity of its provisions (*r*).

As the Act does not invalidate any will which would have been valid if the Act had not passed (*s*), the will of personalty of a British subject made in accordance with the formalities prescribed by the law of his domicil at the time of his death is valid, independently of the Act.

In determining the question what papers are testamentary under the provisions of Lord Kingsdown's Act, the Court will have regard to the law of one country only, and will not mix up the legal precepts of different countries (*t*).

Section 2. Wills of British subjects made within the United Kingdom as regards personal estate.

By section 2 of the Act " Every will and other testamentary instrument made within the United Kingdom (*u*) by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland (*u*) to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom (*u*) where the same is made."

To come within this section of the Act, a will must be,

(*pp*) See note (*n*), p. 30.

(*q*) *I.e.*, a natural-born British subject or a naturalized British subject: *Gally* (1876), 1 P. D. 438; and see the Naturalization Act, 1870 (33 Vict. c. 14), now repealed and replaced by the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), as amended by the British Nationality and Status of Aliens Acts, 1918 and 1922. Nothwithstanding the provision of the Naturalization Act, 1870, s. 2 (now replaced by section 17 of the British Nationality and Status of Aliens Act, 1914), that property may be disposed of by an alien in the same way in all respects as by a natural-born British subject, the will of an alien is not within this section of Lord Kingsdown's Act, and is invalid unless executed with the forms and solemnities required by the law of the testator's domicil: *Von Buseck* (1881), 6 P. D. 211; *Bloxam* v. *Favre* (1883), 8 P. D. 101; 9 P. D. 130, C. A.

(*qq*) See note (*o*), p. 30.

(*r*) *Vide ante*, p. 27, and see Dicey, Conflict of Laws (4th ed.), p. 757; *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584; and cf. *Thornton* v. *Curling* (1824) 8 Sim. 310; *Campbell* v. *Beaufoy* (1859), Johns. 320; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24. See also *Lyne* v. *De la Ferté* (1910), 102 L. T. 143 (holograph will made in France by British subject domiciled in England, dealing with leaseholds, and wrongly dated).

(*s*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 4.

(*t*) *Pechell* v. *Hilderley* (1869), 1 P. & D. 673. As to cases in which no particular form is prescribed by the *lex loci* (in this case the Congo Free State), see *Stokes* v. *Stokes* (1898), 78 L. T. 50.

(*u*) See note (*n*) on p. 30.

first, a will made "within the United Kingdom" (*w*), secondly, a will "made by a British subject" (*w*), and, thirdly, a will of "personal estate" (*w*).

A will which complies with these conditions will be held to be well executed if executed "according to the forms for the time being in force in that part of the United Kingdom (*w*) where the same is made." And since the Act does not invalidate any will which would have been valid if the Act had not passed (*x*), such a will is well executed if executed according to the forms prescribed by the law of the testator's domicil.

A will executed in accordance with the provisions of this section must be held by the English Court to be "well executed"; but the law of the country in which the testator was domiciled at the time of his death still regulates all questions as to his capacity to make a will, and the material validity of its provisions (*y*).

Sub-section 3.—*Effect of Change of Domicil.*

Lord Kingsdown's Act, 1861, s. 3.

Change of domicil not to invalidate will.

Section 3 of the Act provides: "No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same."

This section of the Act applies to all wills, whether of British subjects or aliens, wherever made (*z*).

Effect of the section.

Its effect is thus stated by Professor Dicey in his work on the Conflict of Laws: "A will made by any person in the form required by the law of his domicil at the time of its execution will not now be treated by any English Court as invalid, because the will is not made in the form required by the law of the country where he was domiciled when he died. Possibly also such a will may be deemed valid even if the testator had not capacity to make a will by the law of such country. . . . It is also clear that all question of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicil" (*a*).

(*w*) For an explanation of these terms *vide ante*, pp. 30, 31, notes (*n*), (*o*), and (*q*); and see *Re Watson*, [1887] W. N. 142.

(*x*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 4.

(*y*) *Vide supra*, p. 31, note (*r*); but see *Cocquerel*, [1918] P. 4 (where a naturalized British subject died in France, leaving a will executed in England in English form. As the case was within Lord Kingsdown's Act, 1861, s. 2, the executor appointed by the English will was held to be entitled to probate in England, without regard to the domicil of the deceased).

(*z*) *Groos*, [1904] P. 269.

(*a*) Dicey, Conflict of Laws (4th ed.), p. 770. On the question whether a

Thus where a domiciled Scotsman made a will and afterwards married in Scotland, and later still acquired an English domicil, which he retained until his death, the English Court held that, as the will was valid up to the moment when the Scotch domicil was abandoned, it was not revoked by the subsequent change of domicil, and was entitled to probate in England (*b*).

And in *Westerman* v. *Schwab* (*c*) it was held that a will dealing with movable property, duly executed in England by a testratrix who was then a spinster domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman (*c*).

Sub-section 4.—*Further Exception in Cases of Wills Exercising a Power.*

A will of personalty made in execution of a power valid if executed as required by Wills Act, 1837, though not in accordance with law of domicil.

A further exception to the rule under discussion exists in cases of wills of personalty made in exercise of a power of appointment conferred by an English instrument.

It has been established that where a will of personalty is made in exercise of a power of appointment conferred by an English instrument, it is, so far as form is concerned, a good exercise of the power if executed in accordance with the provisions of the Wills Act, 1837, ss. 9 and 10, even though the person appointing be domiciled abroad and the will be not validly executed according to the law of the domicil. In such a case the document may be admitted to probate for the purpose of the appointment, though it may not be admissible for any other purpose (*d*).

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will, which is *invalid* by the law of the testator's domicil at the time of its execution, can be rendered valid by his subsequent change of domicil, see Dicey, pp. 770—772; and see *Re Groos*, [1915] 1 Ch. 572 (effect of change of domicil to enlarge the area of the property to which the will extends).

(*b*) *Reid* (1866), 1 P. & D. 74; and see *Loustalan* v. *Loustalan*, [1900] P. 211; *Groos*, [1904] P. 269.

(*c*) (1905), 8 F. 132, Ct. of Sess.

(*d*) This rule, now finally and authoritatively established by the decision of the House of Lords in *Murphy* v. *Deichler*, [1909] A. C. 446, was at one time considered doubtful. First laid down by the Judicial Committee in *Tatnall* v. *Hankey* (1838), 2 Moo. P. C. 342, it was dissented from by Sir C. Cresswell in *Crookenden* v. *Fuller* (1859), 1 S. & T. 441; but in *Alexander* (1860), 29 L. J. P. 93, the same learned Judge departed from the view he had expressed in *Crookenden* v. *Fuller* (*ubi supra*), and considered himself bound by the terms of the report of the Judicial Committee in *Tatnall* v. *Hankey* (*ubi supra*; and see *Huber*, [1896] P., at p. 211, n. (2). In *Hallyburton* (1866), 1 P. & D. 90, Lord Penzance, though following the decision in *Alexander* (*ubi supra*), stated his strong impression that Sir C. Cresswell was right in the view he expressed in *Crookenden* v. *Fuller* (*ubi supra*), and that the report on which he acted in *Alexander* (*ubi supra*), was at variance with the view of the Privy Council subsequently expressed by Lord Brougham in *Barnes* v. *Vincent* (1846), 5 Moo. P. C. 201. In *Huber*, [1896] P. 209, Sir Francis Jeune expressed his agreement with the opinion of Lord Penzance and the reasoning on which it was founded. But he held that, inasmuch as Lord Penzance in 1866 refused to disturb the law as laid down in *Alexander* (*ubi*

Thus where a foreign testator who was at the time of his death domiciled in France made a will in exercise of a power of appointment conferred by an English instrument, with the forms prescribed by section 9 of the Wills Act, 1837, the document was admitted to probate in England although invalid by the law of France (*e*).

The will is only good in so far as it exercises the power of appointment.

The will is only good in so far as it is an execution of the power of appointment, and is invalid in so far as it deals with personal property other than that which is the subject of the power (*f*). Probate will not be granted of such a will to the executor named therein, for he takes nothing *jure representationis* (*g*), but administration with the will annexed may be granted to the appointee, limited to such property as the deceased had power to dispose of and did dispose of by the will (*h*).

A power to appoint "by a will duly executed."

A power to appoint "by a will duly executed" is well exercised by a will executed in accordance with the formalities prescribed by the law of the testator's domicil at death, even though the instrument is invalid by English law (*i*). But

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supra) because wills might have been made in reliance on that authority, *a fortiori* the same course must be pursued in 1896. See also *Tréfond*, [1899] P. 247. All doubt as to the authority of the rule was set at rest by the decision of the House of Lords in *Murphy* v. *Deichler*, [1909] A. C. 446.

(*e*) *Huber*, [1896] P. 209; see *Alexander* (1860), 29 L. J. P. 93; *Hallyburton* (1866), 1 P. & D. 90; *Tréfond*, [1899] P. 247.

(*f*) *Tréfond*, [1899] P. 247.

(*g*) See *De Camisani* (1890), unreported, cited Tristram & Coote (16th ed.), p. 216; *Vannini*, [1901] P. 330; *Tréfond* (*supra*); and see *post*, p. 81.

(*h*) *Tréfond*, [1899] P. 247, at p. 250; *Vannini*, [1901] P. 330. The grant in *Hallyburton* (1866), 1 P. & D. 90 was, in fact, a limited grant, although the report makes it appear otherwise: see *Vannini*, [1901] P., at p. 332. With the consent of those interested on intestacy, a general grant of administration with the will annexed may be made: *Tréfond* (*supra*); *Vannini* (*supra*); and see *post*, p. 81.

(*i*) *D'Huart* v. *Harkness* (1865), 34 Beav. 324. The expression "will" or "will duly executed" in the instrument creating the power (whether general or special) must be taken to mean any instrument recognised by the English law as a will: *Re Price*, [1900] 1 Ch. 442, 447; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620, 626. The exercise of a special power of appointment given to the testator by an English settlement is in no way affected by any disability which he may be under to dispose of his own property by the law of his domicil, for the exercise of the power is not a disposition of the testator's own property: *Pouey* v. *Hordern*, [1900] 1 Ch. 492. The same rule applies to the exercise of general powers of appointment (*Re Megret*, [1901] 1 Ch. 547; *Re Pryce*, [1911] 2 Ch. 286); unless the donee of the power has executed it in such a way as to make the fund part of his own estate to be dealt with in one mass (*Re Pryce*, [1911] 2 Ch. 286; *Re Lewal's Settlement Trusts*, [1918] 2 Ch. 391; see *Re Hadley*, [1909] 1 Ch. 30, 35, and Wms. on Exors. (11th ed.), p. 279). As to the circumstances in which section 27 of the Wills Act, 1837 (which provides that a general bequest or devise shall be construed to include estates over which the testator has a general power of appointment and shall operate as the execution of such a power) can be applied to foreign wills, not executed in accordance with the provisions of the Wills Act, 1837, though valid according to the law of the testator's domicil and admitted to probate in England, see *Re D'Este's Settlement Trusts*, [1903] 1 Ch. 898; *Re Scholefield*, [1905] 2 Ch. 408; *Re Baker's Settlement Trusts*, [1908] W. N. 161; *Re Simpson*, [1916] 1 Ch.

where a will is not duly executed by the law of the testator's domicil at death, nor according to the provisions of the Wills Act, 1837, s. 9, it is not a valid exercise of an English power of appointment, even though made by a British subject and admitted to probate as within the provisions of Lord Kingsdown's Act, 1861 (*k*).

Where special formalities are required by the instrument creating the power, it is not enough that the instrument purporting to execute the power should be a will according to the law of the domicil, for in cases where the provisions of section 10 of the Wills Act do not apply the will must comply with the terms of the power (*l*).

Where special formalities are required by the instrument creating the power.

SUB-SECTION 5.—*Appointment of Personal Representative governed by* Lex Domicilii.

It has been seen that where a person dies domiciled in a foreign country, and the Court of that country has invested any person with the power and duty of administering his estate, the English Court will, as a general rule, constitute the same person representative of the deceased in England (*m*). And, on the principle that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and succession to his personalty (*n*), whenever an original administration to the effects of a person who died domiciled abroad is applied for in this country, whether the deceased was a British subject or an alien, the grant will be made to the person entitled to the effects of the deceased according to the law of the country of domicil, and as such entitled by that law to be appointed personal representative of the deceased (*o*).

The person entitled to be appointed personal representative of the deceased by the law of his domicil is entitled to the English grant.

502; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620, 627; *Re Lewal's Settlement Trusts*, [1918] 2 Ch. 391.

(*k*) *Re Kirwan's Trusts* (1883), 25 Ch. D. 373 (where it was held that Lord Kingsdown's Act does not affect section 10 of the Wills Act, 1837, which makes an appointment by will—*i.e.*, by the will of a person domiciled in England—invalid if not executed in accordance with that Act); *Hummell* v. *Hummell*, [1898] 1 Ch. 642. But these decisions have been much criticised, and it is very doubtful whether they would be followed: see Dicey, Conflict of Laws (2nd ed.), pp. 694, 824; Wms. on Exors. (11th ed.), pp. 281, 282; *Re Price*, [1900] P. 442; *Re Walker*, [1908] 1 Ch. 560; *Re Simpson*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620; *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

(*l*) *Barretto* v. *Young*, [1900] 2 Ch. 339. But defective execution in this respect may be remedied for the persons for whom and in the circumstances in which it is the practice of the Court of Chancery to aid the defective execution of a power: *Re Walker*, [1908] 1 Ch. 560.

(*m*) *Ante*, pp. 21 *et seq.*

(*n*) *Vide ante*, p. 27.

(*o*) *Johnston* (1832), 4 Hagg. 182, and see as to the limitations of this rule *ante*, pp. 21 *et seq.*

Where subjects of foreign States die in his Majesty's dominions, and there is no person to administer their estates, the consuls of such foreign States may administer.

By the Domicil Act, 1861 (24 & 25 Vict. c. 121), s. 4, "Whenever a convention shall be made between her Majesty and any foreign State, whereby her Majesty's consuls or vice-consuls in such foreign State shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by Order in Council to direct, and from and after the publication of such Order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign State shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign State, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased persons, limited in such manner and for such time as to such Court shall seem fit" (*p*).

Sub-section 6.—*Validity of a Will of Lands governed by* Lex Situs.

The validity of a will of lands is governed by the law of the country where the land is situate (*lex situs* (*q*)). Accordingly a will of English immovables—and in this term are included English leaseholds and chattels real (*r*)—must, in order to be entitled to probate, be executed in accordance with the ordinary testamentary law of England, no matter what may have been the domicil of the testator (*s*).

The validity of a will of lands is governed by the *lex loci rei sitæ*.

(*p*) As to the right of a foreign consul to take possession of the property of a foreigner dying here *in itinere*, see *Aspinwall* v. *The Queen's Proctor* (1839), 2 Curt. 241; *Wyckoff* (1862), 3 S. & T. 20.

(*q*) Dicey, Conflict of Laws (4th ed.), pp. 558, 559.

(*r*) *Freke* v. *Lord Carberry* (1873), 16 Eq. 461; *De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123; *Gentili* (1876), Ir. R. 9 Eq. 541; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24.

(*s*) *Freke* v. *Lord Carberry* (1873), 16 Eq. 461; *De Fogassieras* v. *Duport* (1881), L. R. Ir. 123; *Gentili* (1876), Ir. R. 9 Eq. 541; *Bovey* v. *Smith* (1682), 1 Vern. 85; *Bowaman* v. *Reeve* (1721), Pre. Ch. 577; *Brodie* v. *Barry* (1813), 2 Ves. & Bea. 127, at p. 131. Where a will purports to deal with both personalty and realty, and the gifts of the personal estate are not independent of those of the realty, and the gifts of the realty fail because the will is not well executed according to the provisions of the Wills Act, 1837, a question may arise how far the gifts of personalty can be given effect to, even

Lands in England descend on intestacy according to the English law, whatever may be the nationality or domicil of the intestate (*t*).

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though the will is duly executed according to the law of the testator's domicil. On this point *Godman* v. *Godman*, [1920] P. 261, and the cases there cited, should be referred to; see *post*, p. 256.

(*t*) *Doe* v. *Vardill* (1826), 5 B. & C. 438.

CHAPTER II.

TESTAMENTARY CAPACITY AND KNOWLEDGE AND APPROVAL.

Who is capable of making a will.

It is said (*a*) that all persons are capable of disposing of their estate by testament who have sufficient discretion, their own free will, and have not been guilty of certain offences. Wherefore it appears that there are three grounds of incapacity : (1) want of sufficient discretion, (2) want of liberty and free will, and (3) criminal conduct (*b*).

An alien may make a will.

The Naturalization Act, 1870 (*c*), s. 2, now repealed, and re-enacted by section 17 of the British Nationality and Status of Aliens Act, 1914 (*d*), provides that " real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

This section has been held to confer upon an alien the power of disposing of his property by will (*e*). During the late war, restrictions were placed on the probate of wills of alien enemies (*f*).

The rules which guide the Court in granting or refusing

(*a*) Swinb., Part II, s. 1; Wms. on Exors. (11th ed.), p. 8.

(*b*) 2 Black. Comm. 496.

(*c*) 33 & 34 Vict. c. 14.

(*d*) 4 & 5 Geo. 5, c. 17.

(*e*) *Von Buseck* (1881), 6 P. D. 211; *Bloxam* v. *Favre* (1883), 8 P. D. 101; 9 P. D. 130 (C. A.). But the section does not extend to aliens the *privilegium* conferred by Lord Kingsdown's Act on British subjects : *vide ante*, p. 31.

(*f*) On August 24, 1914, a notification was made by the President of the Probate Division that during the war no probate of a will or letters of administration of the estate of an alien enemy, wherever resident, would be granted in respect of any assets in this country without the express licence of the Crown; and in cases where probate and letters of administration were granted during the war, the grant was made on condition that no portion of the assets should be distributed or paid during the war to any beneficiary or creditor who was a subject of an enemy State, wherever resident, or to anyone on his behalf, or to or on behalf of any person resident in an enemy State, of whatever nationality, without the express sanction of the Crown, acting through the Treasury. Under the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), a custodian of enemy property was constituted, and by section 1, sub-section 2, the Public Trustee was appointed to be the custodian for England and Wales, and where the persons entitled to the assets of the deceased were alien enemies, grants were made to the Public Trustee : see *Schiff*, [1915] P. 86; *Grundt and Oetl*, [1915] P. 126; *Schulze's Case*, [1917] S. C. 400; *Krejewsky* (1918), 34 T. L. R. 184; *Woolf*, [1918] W. N. 205.

probate of the will of an alien are dealt with at length in the preceding chapter (*g*).

The statute 39 & 40 Geo. 3, c. 88, s. 10, confers upon the sovereign, power of disposing, by last will and testament in writing under his sign manual, of certain property which, it is therein provided, shall be deemed to be personal estate and effects of the sovereign and his successors (*h*).

The sovereign may make a will,

It would seem, however, that the Court of Probate has no jurisdiction to grant probate of the will of a deceased sovereign (*i*).

but his will cannot be proved in the Probate Court.

SECTION 1.

PERSONS INCAPABLE FROM WANT OF DISCRETION.

SUB-SECTION 1.—*Infants.*

The Wills Act, 1837, s. 7, enacts that "no will made by any person under the age of twenty-one years shall be valid." As, however, soldiers in actual military service and mariners or seamen at sea are, by section 11 of the Act, permitted to dispose of their personal estate (*k*) as they might have done before the making of the Act, it has been held that a will made by an infant (*l*) while a soldier in actual military service (*m*) or a mariner or seaman at sea (*n*) is valid (*o*).

No infant can make a will, unless a soldier or seaman.

(*g*) Chapter I, s. 3, pp. 25 *et seq.* (*h*) See also 25 & 26 Vict. c. 37.

(*i*) *In the Goods of his late Majesty King George III* ~~(1862)~~ (1812), 1 Add. 255; *In the Goods of his late Majesty King George III* (1862), 3 S. & T. 199; see *Att.-Gen.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. C. 369.

(*k*) The Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), s. 3, provides that a testamentary disposition of any real estate in England or Ireland made by a person to whom section 11 of the Wills Act, 1837, applies, and who dies after the passing of the Act (*i.e.*, February 6, 1918), shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age, or that the disposition has not been made in such manner or form as was at the passing of the Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid. The effect is to extend to the wills of real estate of soldiers in actual military service and to mariners and seamen being at sea the privilege which they formerly possessed as regards wills of personal estate. The Act has been held to apply to the case of a sailor who made his will before, but died after, the passing of the Act: *Yates*, [1919] P. 93. As to real estate to which an unmarried infant is entitled under a settlement, see Administration of Estates Act, 1925, s. 51 (3), and *post*, p. 284.

(*l*) Before the Act males above the age of fourteen, and females above the age of twelve, were capable of making wills of personal estate; and that was the rule of the civil law: 2 Black. Comm. 497; *Hyde* v. *Hyde* (1711), Prec. Ch. 316. Even if a boy were of that strength that he were a soldier, notwithstanding those great privileges which belonged to soldiers in making their testaments, yet could he not make his testament before he had accomplished his age of fourteen years: Swinb., Part II, s. ii, pl. 3.

(*m*) *Farquhar* (1846), 4 N. C. 651; *Hiscock*, [1901] P. 78; *vide post*, p. 257. (*n*) *McMurdo* (1867), 1 P. & D. 540; *vide*, p. 257.

(*o*) Section 1 of the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5,

Sub-section 2.—*Persons of Unsound Mind.*

No person is capable of making a valid will who is not of sound mind, memory, and understanding.

The statute 34 & 35 Hen. 8, c. 5, s. 14, provides that the will of an "idiot or any person *de non sane* memory shall not be taken to be good or effectual in the law." This provision was merely declaratory of the law as it had been from time immemorial (*p*), for by the law of England no person is considered capable of making a valid will unless he be—to adopt the language of the pleader—of "sound mind, memory, and understanding." By this phrase emphasis is laid upon two functions of the mind, which must be sound in order to create a capacity for making a will: there must be a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him (*q*); from which it follows that no person of unsound mind is capable of making a will.

This proposition involves a consideration of what amount and quality of intellect is requisite to constitute testamentary capacity (*r*). And, first, it is to be observed that the words "a sound disposing mind" do not mean a perfectly balanced mind. The law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean, or even bad motives. He may, either wholly or partially, disinherit his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride (*s*), but still effect must be given to his will, however much such courses may be condemned, provided it be the will of a free and capable testator. "There is no country in the world," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*t*), "in which the law permits a larger exercise of volition in the disposal of property after death, than

By "sound mind" is not meant "a perfectly balanced mind."

For a man may leave his property as he pleases,

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c. 58), expressly declares and enacts that section 11 of the Wills Act, 1837, authorises and has always authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act (*i.e.*, the Wills Act, 1837), though under the age of twenty-one years. The section was passed to remove doubts as to the construction of section 11 of the Wills Act, 1837, expressed by Younger, J., in *Re Wernher; Wernher* v. *Beit*, [1918] 1 Ch. 339. The combined effect of sections 11 and 27 of the Wills Act, 1837, is to preserve to infant soldiers in actual military service the power which they previously possessed of exercising a general power of appointment over personal estate by will: *Re Wernher; Wernher* v. *Beit*, [1918] 2 Ch. 82 (C. A.).

(*p*) Ency. of Laws of England (2nd ed.), tit. "Will," p. 671.

(*q*) *Per* Sir J. Hannen in *Boughton* v. *Knight* (1873), 3 P. & D., at pp. 65, 66.

(*r*) Sir J. Hannen in *Boughton* v. *Knight* (1873), 3 P. & D., at p. 67.

(*s*) Sir J. Hannen in *Boughton* v. *Knight* (1873), 3 P. & D., at p. 66; see also the remarks of Lord Kenyon in *Greenwood* v. *Greenwood* (1790), 3 Curt. App. xxx, xxxi.

(*t*) (1867), 1 P. & D., at p. 400.

in England. But it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind the law calls 'a sound disposing mind.'"

Cockburn, C.J., in *Banks* v. *Goodfellow* (*u*), after stating that the law of England leaves the disposition of his property by will to the unfettered discretion of the testator, said: "It is obvious that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

unless the mind is perverted by disease

"Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand" (*x*).

or insane delusions.

A high degree of mental soundness is requisite in order to constitute capacity to make a will.

In *Boughton* v. *Knight* (*y*), Sir J. Hannen, in his charge to the jury, made the following observation on the subject of testamentary capacity (*z*): "Whatever degree of mental soundness is required for . . . responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to

(*u*) (1870), L. R. 5 Q. B., at p. 565.

(*x*) Compare, upon the question of the measure of mental capacity to be insisted upon, the observation of Erskine, J., in *Harwood* v. *Baker* (1840), 3 Moo. P. C., at p. 290; Lord Kenyon in *Greenwood* v. *Greenwood* (1790), 3 Curt. App. xxx.

(*y*) (1873), 3 P. & D. 64.

(*z*) *Ibid.*, at p. 72.

constitute capacity to make a testamentary disposition, . . . because it involves a larger and wider survey of facts and things than any one of those matters." The same learned judge, in *Burdett* v. *Thompson* (*a*), referred to and somewhat qualified this observation. He said : " It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said—and I repeat it—is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will. . . . From the character of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims and of determining in what proportion the property shall be divided amongst the claimants."

A " sound disposing mind," then, is a mind which is capable of appreciating, uninfluenced by mental disorder or morbid delusion, the claims of others upon the testator's bounty, and of determining in what proportion his property shall be divided amongst them. But the very terms of the definition immediately suggest the question, What is the criterion of mental disorder, of unsoundness of mind? By what principles and rules shall the Court be guided in approaching the question whether the individual testator whose capacity is called in question was sane or insane, of sound or unsound mind, at the time of the execution of the will?

What is the criterion of mental disorder?

Many attempts have been made both by psychologists and by jurists to define insanity, but the definitions given are so imperfect that it would be difficult to find one which includes all who are insane, and excludes all who are sane. " The difficulty is fully accounted for," says a learned writer on medical jurisprudence (*b*), " by the fact that mental disorder varies in its degree as well as in its character; and the shades of disordered intellect in the early stages are so blended as to be scarcely distinguishable from a state of sanity. It is this twilight condition of the mind, when it is fluctuating between sanity and insanity, which no definition can comprise, especially as the mind differs in its power and manifestations in most persons, and it is therefore difficult to fix upon a

The difficulty in defining " insanity."

(*a*) (1873), 3 P. & D. 72, note (1).
(*b*) Taylor, Manual of Medical Jurisprudence (12th ed.), p. 724.

standard by which a fair comparison may be made." "The difficulty," said Lord Cranworth in *Boyse* v. *Rossborough* (*c*), "is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine" (*d*).

Four forms of insanity:

Medical jurists have commonly recognised four forms which insanity may take: *mania*, *monomania*, *dementia*, and *idiocy* (*amentia*) (*e*).

Mania:

Mania.—Mania is defined as the form of insanity which manifests itself by a general derangement or perversion of the mental faculties, accompanied by greater or less excitement, sometimes amounting to violent fury (*f*). Ideas flow through the mind without order or connection, the person losing all control over his thoughts, and believing and acting upon them, however absurd or inconsistent they may be. In this form of insanity there are usually remissions, more or less complete, and in some instances after a violent attack the reason appears to be perfectly restored, forming then what is termed a lucid interval (*g*).

Monomania;

Monomania.—"This name is applied to that condition in which the mental alienation is apparently only partial; in other words, it is nothing more than insanity manifesting itself in one direction. In mania the mind is disordered on all kinds of subjects; in monomania the disorder is confined chiefly either to one subject or to one class of subjects. Monomaniacs are infected with false ideas on certain points, of which they cannot divest themselves, and out of which they cannot be reasoned: they start from false principles; but, setting this aside, their inferences and deductions from these principles often possess logical accuracy (*h*). In every subject not connected with their special delusions they are like the

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(*c*) (1857), 6 H. L. C., at p. 45.

(*d*) Cf. *per* Sir John Nicholl in *Dew* v. *Clark* (1826), 3 Add., at p. 87.

(*e*) *Taylor*, p. 733. Ancient jurists recognised a fourfold—but different—classification of persons of unsound mind (*non compos mentis*): (1) idiot or fool natural; (2) he who was of good and sound memory, but by the visitation of God has lost it; (3) *lunaticus*, *qui gaudet lucidis intervallis*, and sometimes is of good and sound memory and sometimes *non compos mentis*; (4) by his own act, as a drunkard: see *Beverley's Case* (1603), 4 Co. Rep., at p. 124 b.

(*f*) Taylor, p. 733.

(*g*) *Ibid.*, p. 733; see *post*, p. 55. *Nichols* v. *Binns* (1858), 1 S. & T. 239, was a case of this description.

(*h*) See Locke on the Human Understanding, Book II, Chapter XI, s. 13.

rest of the world; they talk and reason as justly upon facts as before the access of their malady, but their general deportment, habits, and character are changed. Thus a miser may become a spendthrift, and a hard-working and industrious mechanic may pass his time in idleness; a man of moral habits may become immoral in conversation and conduct, and an abstemious man may become a drunkard" (*i*).

"Monomania in its early stage is liable to be confounded with eccentricity, but there is this difference between them: in monomania there is obviously a change of character—the person is different from what he was; in eccentricity such a difference is not remarked—he is, and always has been, singular in his ideas and actions, there is no observable change of character. An eccentric man may be convinced that what he is doing is absurd and contrary to the general rules of society, but he professes to set these rules at defiance: a true monomaniac cannot be convinced of his error, and he thinks that his acts are consistent with reason and the general conduct of mankind. In eccentricity there is the will to do or not to do: in real monomania the controlling power of the will appears to be lost" (*k*).

"Monomania" frequently discussed in testamentary suits under the name of "partial insanity."

The existence of this species of insanity has frequently been recognised by Judges in testamentary suits, sometimes under the name of partial insanity, or, as Lord Brougham preferred to describe it (*l*), "insanity or unsoundness always existing, though only occasionally manifest." "Nothing is more certain," said the same learned Judge (*m*), "than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by physicians, 'monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind: a person shall be of sound mind, to all appearance, upon all subjects save one or two, and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination."

The earliest reported case in which insanity of this description was considered in a testamentary suit, would appear to be the case of *Greenwood* v. *Greenwood* (*n*). But the authoritative recognition of this species of insanity in a

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(*i*) Taylor, p. 734.
(*k*) *Ibid.*, pp. 735, 736.
(*l*) *Waring* v. *Waring* (1848), 6 Moo. P. C., at p. 350.
(*m*) *Ibid.*
(*n*) (1790), 3 Curt. App. i—xxxi.

testamentary suit occurred in the case of *Dew* v. *Clark* (*o*), which, to adopt the language of Sir Edward Vaughan Williams (*p*), obtained the most complete and solemn consideration, and led to the full investigation of what was there described as "partial insanity." That was a case in which a daughter pleaded, in opposition to her father's will, that the testator was not of sound mind at the time of the execution of the will, in that—in addition to exhibiting other symptoms of a diseased and disordered intellect—he had conceived an insane antipathy to her, his only child, from her infancy, and was actuated by that antipathy throughout the remainder of his life; and that the will in question was founded upon, and owing solely to this insane antipathy, and therefore not to be held valid.

Sir John Nicholl in admitting the allegation, after remarking that this was, in substance, a case of partial insanity, and that the possible occurrence of such a case must be admitted on the authority of *Greenwood* v. *Greenwood* (*q*), went on to warn the plaintiff as to what must be proved in a case of this character, where the general capacity of the testator was substantially not impeached. He said (*r*): "She must understand that no course of harsh treatment, no sudden outbursts of violence, no display of unkind or even unnatural feeling, merely, can avail in proof of her allegation. She can only prove it by making out a case of antipathy, clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity" (*s*).

What must be proved in such a case.

In *Waring* v. *Waring* (*t*), the existence of this species of insanity—monomania characterised by delusions upon one or more subjects while the mind remains in other respects apparently unimpaired—received further recognition; and in *Smith* v. *Tebbitt* (*u*) Sir J. P. Wilde said: "A person who is affected by monomania, although sensible or prudent on subjects and occasions other than those upon which his infirmity

(*o*) (1822), 1 Add. 279; (1824), 2 Add. 102; (1826), 3 Add. 79; (1828), 5 Russ. 163. The case is also reported by Dr. Haggard from the Judge's notes.

(*p*) Wms. on Exors. (11th ed.), p. 21.

(*q*) (1790), 3 Curt. App. i—xxxi.

(*r*) 1 Add. 284.

(*s*) Cf. the remarks of Sir J. Hannen in *Boughton* v. *Knight* (1873), 3 P. D. 64. A sane man may take an unduly harsh view of the character or conduct of his children, but "there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect; . . . there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind": *Ibid.*, p. 69.

(*t*) (1848), 6 Moo. P. C. 342.

(*u*) (1867), 1 P. & D., at p. 401.

is commonly displayed, is not in law capable of making a will. I conceive the decided cases to have established this proposition : that, if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable." It is thus clear than once an insane delusion is proved to have existed in the mind of the testator, and that delusion has had, or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to the validity of the will.

Whether the existence of delusions which do not in fact influence the testamentary dispositions shall avoid a will.

Hereupon it becomes necessary to consider whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, *which delusions had in point of fact no influence whatever on the testamentary disposition in question*, are sufficient to deprive a testator of testamentary capacity and to invalidate his will.

Prior to the year 1870, in which year the case of *Banks* v. *Goodfellow* (*x*) was decided, this question would have been answered in the affirmative; for the doctrine which prevailed until that date may be thus stated : To constitute testamentary capacity, soundness of mind is indispensably necessary; but the mind, though it has various faculties, is one and indivisible; if it is disordered in any one of those faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound; such a mind is unsound, and testamentary incapacity is the necessary consequence (*y*). But a different doctrine subsequently prevailed, and has since been fully accepted. According to that doctrine, the question under consideration must be answered in the negative; and the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.

Where any delusion is proved to have existed, the presumption is against the will;

" No doubt," said Cockburn, C.J., in *Banks* v. *Goodfellow*, at the close of a long and most illuminating judgment (*z*)—

(*x*) L. R. 5 Q. B. 549.

(*y*) See *per* Sir John Nicholl in *Groom* v. *Thomas* (1829), 2 Hagg., at pp. 436, 453, 454; Sir H. J. Fust in *Frere* v. *Peacocke* (1846), 1 Rob., at pp. 445, 556; Lord Brougham in *Waring* v. *Waring* (1848), 6 Moo. P. C., at pp. 349—353; Sir C. Cresswell in *Symes* v. *Green* (1859), 1 S. & T., at p. 410; Sir J. P. Wilde in *Smith* v. *Tebbitt* (1867), 1 P. & D., at p. 401.

(*z*) (1870), L. R. 5 Q. B., at p. 570.

"No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilian, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld."

but if the Court is satisfied that the delusion could have no effect upon the will, the will must be upheld.

This statement of the law was followed by Sir J. Hannen in *Boughton* v. *Knight* (*a*) and in *Smee* v. *Smee* (*b*), and must now be regarded as well established (*c*).

Dementia.—The characteristics of this form of insanity are a total absence of reasoning power and an incapacity to perceive the true relations of things. "The language is incoherent, and the actions are inconsistent. . . . Memory is lost, and sometimes the same word or phrase is repeated for many hours together" (*d*).

Dementia;

"Dementia varies in degree. The disordered mind of aged persons is one form of dementia (*e*). . . . In some instances the disease comes on gradually, the faculties decaying one by one; in other cases, though more rarely, it may occur suddenly. Dementia may be acute or chronic, remittent or intermittent (*f*). It is distinguished from mania in that in mania there is an incoherence of ideas depending on too great rapidity of thought and excitement of the intellectual powers; in dementia there is a want of ideas, and the incoherence depends on the loss of the power of connecting them, owing to defect of memory. In fact, in dementia there is more or less complete

(*a*) (1873), 3 P. & D. 64; see pp. 73 *et seq.*
(*b*) (1879), 5 P. D. 84, at p. 91.
(*c*) See *Sivewright* v. *Sivewright's Trustees*, [1920] S. C. (H. L.) 63, *post*, p. 55, note (*y*).
(*d*) Taylor, 736.
(*e*) *Ibid.*, 736.
(*f*) *Ibid.*, 737.

abolition of the moral, intellectual, and voluntary powers; in mania, and also in monomania, they exist, but are in a state of perversion. But dementia is often a consequence of these states, and sometimes alternates with them " (*g*).

Idiocy.

Idiocy (*Amentia*).—Idiocy may be said to be characterised by a congenital deficiency of the mental faculties. " There is not here a perversion or a loss of what has once been acquired, but a state in which, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power to fit him for his social position " (*h*). There is, however, a state in which the mind is capable of receiving some ideas, and of profiting to a certain extent by instruction. This state is called " imbecility " (*i*). It is obvious that between the minor degrees of imbecility and sanity it may be exceedingly difficult, indeed almost impossible, to distinguish (*k*). In every case the question will be whether the mind of the testator was so impaired by want of intelligence arising from defective organisation, that sufficient intelligence to understand and appreciate the testamentary act in its different bearings did not exist (*l*).

Imbecility.

Difficulty of distinguishing between imbecility and sanity.

" An idiot," says Swinburne (*m*), " or a natural fool is he who, notwithstanding he be of lawful age, yet he is so witless that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer to any such easy question. Such an idiot cannot make any testament, nor may dispose either of his lands or goods. But if a man be of a mean understanding, as it were betwixt a wise man and a fool, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate or a dunce, such an one is not prohibited to make a testament."

How disproved.

The characteristic of idiocy or imbecility is permanence, with very little or no variation : where, therefore, the case presented against the will is that of idiocy or imbecility, proof of acts of business is very important evidence to meet such a case, and to show that such a state did *not* exist at a given period. One afflicted with lunacy may sometimes manage pecuniary affairs with perfect propriety; but an idiot, never (*n*).

(*g*) Taylor, 737.

(*h*) *Ibid.*, 737.

(*i*) *Ibid.*, 737, 738. See also a very interesting description of this species of unsoundness of mind in *Ingram* v. *Wyatt* (1828), 1 Hagg., at pp. 401 *et seq.*

(*k*) See *Bannatyne* v. *Bannatyne* (1852), 2 Rob. 472.

(*l*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 566, and cases there cited.

(*m*) Swinb., Part II, s. 4; 2 Shep. Touch. by Prest., 403.

Moral insanity.

(*n*) Dr. Lushington in *Bannatyne* v. *Bannatyne* (1852), 2 Rob., at pp. 491, 494. Some medico-legal writers have described a state which they call *moral insanity*, in which there are no hallucinations or illusions, and no

It has thus been seen that unsoundness of mind may manifest itself in many ways, and exist in varying degrees. Therefore it would appear that the correct answer to the suggested inquiry,—What is the true test by which unsoundness of mind, sufficient to involve testamentary incapacity, may be distinguished from mere eccentricity (*o*) and extravagance on the one hand, and dulness and feebleness of the intellect on the other?—should be that there is no one clear, certain, and infallible test. "It has frequently been attempted," said Sir H. J. Fust in *Mudway* v. *Croft* (*p*), "to furnish some general rules which might serve as guides to Courts of law in the investigation and decision of cases of this description, but all endeavours to do so have failed; each case has some distinguishing features; each case must be governed by its own peculiar circumstances. . . . It is absolutely and essentially necessary to look to the peculiar circumstances of each individual case; and to judge from the whole character of the person whose mental capacity is the subject of inquiry, what was the state and condition of the mind of that individual, not only with respect to the immediate times at which a will is executed, but at the intermediate stages of his life."

There is no one infallible test by which unsoundness of mind can be distinguished.

Each case must be governed by its own peculiar circumstances.

It was at one time suggested that the true test of unsoundness of mind was the presence of delusion. "The true criterion, the true test, of the absence or presence of insanity," said Sir John Nicholl in *Dew* v. *Clark* (*q*), "I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely delusion. Wherever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination, and wherever at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar half technical sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion,

At one time it was suggested that the presence or absence of delusions was the sole test.

evidence of delusions or intellectual aberration, but simply a perversion of the moral sentiments: see Taylor, p. 725. An unsuccessful attempt to upset a will on the ground of the existence of this species of insanity was made in *Frere* v. *Peacocke* (1846), 1 Rob. 442. Sir H. J. Fust said: "Because a man does not duly appreciate the acts or feelings which generally influence mankind, that therefore he is to be considered mad, and unfit to make a disposition of his property, is *not* the law of this country. I am of opinion that perversion of moral feeling does not constitute unsoundness of mind, so as to render an act performed *per se* invalid": *Ibid.*, at p. 456.

(*o*) See *Pilkington* v. *Gray*, [1899] A. C. 401

(*p*) (1843), 3 Curt., at p. 675.

(*q*) (1826), 3 Add., at p. 90.

in this sense of it, and insanity to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects in any degree is for that reason essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how like soever to a real madman he may speak or act on some or on all subjects, still, in the absence . . . of anything in the nature of delusion so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane" (*r*). But although the presence of delusion is indeed a prevailing characteristic of insanity, it is obvious from what has already been stated that this test breaks down in its application to the varying forms which insanity may assume. It excludes on the one hand cases of undoubted testamentary incapacity in which, although no actual delusions are present, the mind is so weakened and impaired as to be utterly incapable of coherent thought, such cases, for example, as have been described under the headings of dementia and idiocy (*s*). On the other hand, it includes cases in which testamentary capacity undoubtedly exists, for instance where delusions are present which neither affect the general faculties of the mind nor influence the testator in making his will. Nay more, sane people often imagine things to exist which have no existence in reality, and display the greatest obstinacy in adhering to their convictions (*t*). "What

This test breaks down when applied in practice.

"Delusion" defined.

(*r*) "Delusion" has been variously defined: "the belief of facts which no rational person would have believed": Sir J. Nicholl in *Dew* v. *Clark* (Dr. Haggard's report, p. 7); "a pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity": Dr. Willis, quoted by Sir J. Nicholl in *Dew* v. *Clark*, 3 Add., at p. 91 (see also *Wheeler* v. *Alderson* (1831), 3 Hagg., at p. 598; *Frere* v. *Peacocke* (1846), 1 Rob. 445); "the belief in things, as realities, which exist only in the imagination of the patient. The frame or state of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind": Lord Brougham in *Waring* v. *Waring* (1848), 6 Moo. P. C., at p. 354; "the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sane mind would give them credit, and the carrying to an insane extent impressions not in their nature irrational": Dr. Lushington in *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C., at p. 247; see these definitions considered and commented on by Sir J. P. Wilde in *Smith* v. *Tebbitt* (1867), 1 P. & D., at pp. 401 *et seq.*

(*s*) *Ante*, pp. 47, 48. Sir John Nicholl seems to doubt the existence of such cases: see *Wheeler* v. *Alderson* (1831), 3 Hagg. 599; but *Bannatyne* v. *Bannatyne* (1852), 2 Rob. 472 (see at p. 482), and *Nichols* v. *Binns* (1858), 1 S. & T. 239, are cases where no delusion was alleged to exist.

(*t*) Sir H. J. Fust in *Chambers* v. *The Queen's Proctor* (1840), 2 Curt., at p. 448, said: "I do not consider that the case of *Dew* v. *Clark* goes to the full extent that a will, under whatever circumstances, must necessarily be invalid because the deceased might entertain notions which might have no foundation; but the Court must look to see whether the delusion be an insane delusion, and continued to be an insane delusion, and was so indelibly

else gives rise," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*u*), " to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams? "

It is therefore clear that the existence of mental delusions thus defined is not capable of being erected into an universal test of mental disease.

Where delusions exist, the jury are to ask themselves the question, " Can I understand how any man in the possession of his senses could have believed such a thing? "

Sir J. Hannen's observations to the jury in *Boughton* v. *Knight* (*x*) give, however, a very fair description of the test for insane beliefs where these exist. " You must remember," he said, " that the tribunal that is to determine the question, whether judge or jury, must of necessity take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure in this sense : that you should say ' I do not believe such and such a thing, and therefore a man who believes it is insane.' Nay more, you must not say, ' I should not have believed such and such a thing; therefore the man who did believe it is insane.' But you must of necessity put to yourself this question and answer it : ' Can I understand how any man in possession of his senses could have believed such and such a thing?' And if the answer you give is, ' I cannot understand it,' then it is of the necessity of the case that you should say the man is not sane."

In arriving at a conclusion whether a given testator was sane or insane,

his words and deeds are to be referred to the standard which by experience is found to be the common standard of the human race

The remarks of Sir J. P. Wilde in *Smith* v. *Tebbitt* (*y*) on the subject of the test of mental disease, whether delusions are or are not present, deserve the closest attention. " No man knows aught of the condition of another's mind," said the learned Judge, " except by comparison with his own. And in instituting this comparison we recognise the general fact that all mankind are endowed with the same senses, moved by the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individual at different times. But they vary within certain limits, and certain limits only. It is when the words or deeds of others, referred to our own standard and that which by experience is found to be the common standard of the human race, appear to transgress those limits, that we suspect these common senses, emotions, and faculties which we know to exist, to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself either on many subjects or with uniform constancy

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fixed in the mind of the deceased, that no reasoning, no demonstration, no remonstrance of friends, could convince him that it was void of foundation."

(*u*) (1867), 1 P. & D., at p. 402.

(*x*) (1873), 3 P. & D., at p. 68.

(*y*) (1867), 1 P. & D., at pp. 403 *et seq.*

in the behaviour of the individual, we pronounce disease without hesitation. In proportion as the divergence is either casual or trifling, or open to some other probable solution, the inquiry is difficult, and the judgment hesitates. Here then, I think, is the simple rule by which mankind in general pronounce upon mental disease. But to those who have studied the subject of insanity another and alternative method is open." That alternative method, continued the learned Judge in a passage too long to quote *in extenso*, is the comparison with persons known to be insane which the medical expert, through long familiarity with the symptoms of insanity, is enabled to make. It is the office of the Court, then, to inform itself, as far as opportunity permits, of the general results of medical observation, and to approach the subject on the two opposite sides thus indicated—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the deceased.

and compared with the words and deeds of persons known to be insane,

and by this twofold comparison his sanity is to be judged.

It is submitted that this test, if strictly applied, will solve most, if not all of the difficulties which arise in investigations of this kind.

The testator's words and deeds at the time when he is alleged to have been insane are to be compared with his words and deeds at the time he was known to be sane,

There is one further point which demands notice in this connection. "When the sanity of an individual is in question," says Dr. Ray in his work on the Medical Jurisprudence of Insanity, in a passage more than once quoted by Judges of the Prerogative and Probate Courts (*z*), "instead of comparing him with a fancied standard of mental soundness, . . . his natural character should be diligently investigated, in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. Compare a man with himself, his acts and thoughts now, with his acts and thoughts at some previous period when his mind was in undoubted health. You will the better detect what is morbid, than if you set up a general comparison with the thoughts and acts of mankind."

or with those of mankind whom in general temperament and character he most resembled.

"It is a variation of this reflection," said Sir J. P. Wilde (*a*), "to say, 'Compare a man's acts and thoughts with those of mankind whom in general temperament and character he most resembles.' It may be that there is no period of undoubted health in the previous life of the patient to which you can refer, or the details of it may be wanting; and, in the absence of these, the best standard of comparison will present itself in persons whose general temperament and character have some

(*z*) Sir H. J. Fust in *Mudway* v. *Croft* (1843), 3 Curt. 677; Sir J. P. Wilde in *Smith* v. *Tebbitt* (1867), 1 P. & D. 421.
(*a*) In *Smith* v. *Tebbitt* (1867), 1 P. & D. 421.

resemblance, the closer the better, to those of the individual whose sanity is in question " (*b*).

The burden of proving that the testator was of sound mind primarily on those who propound his will.

Burden of Proof.—A person who propounds a will undertakes to satisfy the Court of Probate that the testator who made it was of sound and disposing mind (*c*). But if a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding (*d*). If therefore the will, not irrational on the face of it, is produced and its execution proved, and no other evidence is offered, the Court will, on that evidence alone, pronounce for the will (*e*). For, it is said, sanity must be presumed until the contrary is shown (*f*), and until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational (*g*). And if the party opposing the will gives some evidence of incompetency, but not sufficient to disturb the belief of the Court in the sanity of the testator, the presumption in favour of competency will prevail (*h*).

It has therefore been said that the burden of proof lies upon the party who undertakes, upon the ground of insanity, to defeat the will (*i*), and that, if derangement be alleged, it is incumbent on the party alleging it to prove such derangement (*k*). But when the whole case is before the Court on evidence given on both sides, the decree of the Court must be against the validity of the will, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it (*l*).

It thus appears that the burden of proof often shifts about in the process of the cause, according as the successive steps of the inquiry, by leading to inferences decisive until rebutted,

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(*b*) Cf. *Austen* v. *Graham* (1854), 8 Moo. P. C. 493.

(*c*) Lord Brougham in *Waring* v. *Waring* (1848), 6 Moo. P. C. 355; see *Smee* v. *Smee* (1879), 5 P. D., at p. 91. As to the admissibilty as evidence of sanity of letters written to the testator, see *Wright* v. *Tatham* (1837), 7 A. & E. 313, affirmed 4 Bing. N. C. 489.

(*d*) Sir C. Cresswell in *Symes* v. *Green* (1859), 1 S. & T. 402.

(*e*) *Sutton* v. *Sadler* (1857), 3 C. B. (N.S.), at p. 98; *Wheeler* v. *Alderson* (1831), 3 Hagg., at p. 587.

(*f*) Sir J. Nicholl in *Burrows* v. *Burrows* (1827), 1 Hagg. 113; *Fulleck* v. *Allinson* (1830), 3 Hagg. 542; *Wheeler* v. *Alderson* (1831), 3 Hagg. 598; Sir C. Cresswell in *Nichols* v. *Binns* (1858), 1 S. & T., at p. 243.

(*g*) Sir William Wynne in *Cartwright* v. *Cartwright* (1793), 1 Phill., at p. 100.

(*h*) *Sutton* v. *Sadler* (1857), 3 C. B. (N.S.), at p. 98.

(*i*) Sir John Nicholl in *Dew* v. *Clark* (1826), 3 Add. 86; *Wheeler* v. *Alderson* (1831), 3 Hagg. 598.

(*k*) Lord Thurlow in *Att.-Gen.* v. *Parnther* (1792), 3 Bro. C. C. 443.

(*l*) Sir C. Cresswell in *Symes* v. *Green* (1859), 1 S. & T. 402; *Sutton* v. *Sadler* (1857), 3 C. B. (N.S.), at p. 98; Sir J. P. Wilde in *Smith* v. *Tebbitt* (1867), 1 P. & D. 436; *Keays* v. *McDonnell* (1872), Ir. R. 6 Eq. 611.

cast on one or the other party the necessity of protecting himself from the consequences of such inferences (*m*).

An additional burden of proving the testator's sanity is on those who propound the will if circumstances of suspicion arise,

It is to be observed that though, as a general rule, the burden of proving insanity rests upon those who seek to defeat the will upon that ground, yet if circumstances of grave suspicion arise at the outset of a case, the burden of proving, and very satisfactorily proving, the testator's sanity rests upon the propounding party (*n*).

as where the testator has been found a lunatic by inquisition,

Thus, where the testator has been found a lunatic by inquisition from a period anterior to the execution of the will, that fact, though not in itself conclusive as against the will (*o*), is sufficient to rebut the ordinary presumption in favour of the will, and to require the party propounding it to prove that the testator was of sound mind at the time when the will was executed (*p*). The presumption of law, in such a case, is that the verdict of the jury under the commission of lunacy was well founded, and that the deceased continued lunatic so long as the commission was not superseded. It is true that a person so circumstanced may have entirely recovered before the commission has actually been superseded; it is true that he may have partially recovered, may have had lucid intervals; but the *onus probandi* must be upon whoever asserts the affirmation of complete or partial recovery (*q*).

or where the will "sounds to folly."

Again, if the will itself is couched in incoherent, irrational, or strange terms, or, as it is sometimes put, "sounds to folly," that in itself raises a doubt as to the testator's sanity in the mind of the Court, which it is the duty of the person propounding it to remove. Swinburne (*r*), indeed, says that, "if in the testament there be mixture of wisdom and folly, it is to be presumed that the same was made during the testator's frenzy; insomuch that if there be but one word sounding to folly, it is presumed that the testator was not of sound mind and memory when he made the same." But this applies only to the case of a person who is sometimes sane and sometimes insane, and of whose state of mind when he wrote the will there is no direct proof (*s*). The mere extravagance and

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(*m*) Lord Brougham in *Waring* v. *Waring* (1848), 6 Moo. P. C. 355.
(*n*) *Ibid.*, p. 356; and see the cases cited *ante*, p. 53, note (*f*).
(*o*) *Rodd* v. *Lewis* (1755), 2 Lee, 176; *Watts* (1837), 1 Curt. 594.
(*p*) Dr. Lushington in *Bannatyne* v. *Bannatyne* (1852), 2 Rob. 477; *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C., at p. 239.
(*q*) *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C., at p. 244. Note that the reports made by "Chancery visitors" under the Lunacy Act, 1890, as to the condition of the lunatic from time to time, are to be destroyed on his death, and even if not destroyed, must be regarded as non-existent, and no order can be made to produce them: *Roe* v. *Nix*, [1893] P. 55.
(*r*) On Wills, Part II, s. 3.
(*s*) *Arbery* v. *Ashe* (1828), 1 Hagg. 219.

strangeness of the will, though sufficient to place upon the persons propounding it the burden of proving capacity, is not in itself conclusive evidence of unsoundness of mind (*t*).

No inference of previous derangement from insanity *after* the execution of the will.

The fact that the deceased became insane at a date subsequent, and even shortly subsequent to the execution of the will, will not in itself invalidate the instrument by raising an inference of previous derangement, though where undoubted insanity is proved to have existed at a time subsequent to the execution of the will, previous acts otherwise of a doubtful character may assume a new complexion (*u*).

Where insane delusions are proved to have existed.

Further, if insane delusions upon any subject are proved or admitted to have existed, the burden of proving that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property is upon those who seek to support the will upon that ground (*x*). Unless the Court is satisfied that there can be no reasonable connection between the delusion and the bequests in the will, those who propound the will have not discharged the burden cast upon them, and the Court will pronounce against the instrument (*y*).

A will may be made by one generally of unsound mind during a lucid interval.

Will made during a Lucid Interval.—Although it may be proved or admitted that the testator was habitually of unsound

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(*t*) *Austen* v. *Graham* (1854), 8 Moo. P. C. 493.

(*u*) *Burrows* v. *Burrows* (1827), 1 Hagg. 109; *Hoby* v. *Hoby* (1828), 1 Hagg. 150; *Wheeler* v. *Alderson* (1831), 3 Hagg. 599. It appears to be doubtful how far evidence that the deceased's relations were insane is admissible to prove hereditary constitutional insanity upon the part of the deceased himself: see *Marsh* v. *Tyrell* (1828), 2 Hagg. 84, see 3 Curt. 667; *Frere* v. *Peacocke* (1843), 3 Curt. 664, at p. 670.

(*x*) *Smee* v. *Smee* (1879), 5 P. D. 91. *Vide ante*, pp. 46 *et seq.*

(*y*) *Ibid.*, p. 92. In *Sivewright* v. *Sivewright's Trustees*, [1920] S. C. (H. L.) 63, 64, Lord Haldane said: "If [the testator's] act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of a delusion. The delusion must have been an actual and impelling influence. . . . The law requires that the temporary delusion should be shown to have brought about the disposition impeached. The mere occasional existence of such a delusion is not by itself enough . . . ." and he referred to *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, as illustrating that proposition. These observations appear to have been considered by Horridge, J., in *Priddle* v. *Priddle* (1921), Times Newspaper, July 9, to be in conflict with the decision in *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549, see *ante*, p. 47. It does not, however, appear from the speech of the learned Law Lord that he intended to lay down any new rule of law, or to assert that where insane delusions are proved to have existed, the burden of proving that they affected the disposition of property was on those who attacked the will. He had already found as a fact, in the case before him, that the existence of insane delusions had not been established, and it is improbable that he intended by an *obiter dictum* in a Scottish appeal to overrule a principle that has uniformly guided the decisions of the English Court for over fifty years, ever since the decision in *Banks* v. *Goodfellow* (*supra*).

mind, the Court will yet pronounce for his will if satisfied that, when the will was made, the testator was for the time being in the enjoyment of his sound senses. " If you can establish," said Sir William Wynne in *Cartwright* v. *Cartwright* (*z*), " that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it." Such intermissions are commonly called " lucid intervals."

By a " lucid interval " is meant a complete, though temporary, recovery of sanity.

By a " lucid interval " is meant not a cooler moment, an abatement of pain or violence or of a higher state of torture, but an interval in which the mind, having thrown off the disease, has recovered its general habit (*a*). " It must be shown," said Sir John Nicholl in *Groom* v. *Thomas* (*b*), " not merely that the party whose act is the subject of inquiry was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained."

The mind need not be restored to all its former vigour.

But it is not necessary that the mind should be restored to all its former vigour. Although the mind, after the removal of the disease, may labour under a languor and debility, yet, if it be proved that the morbid affection no longer obscures or vitiates the judgment, that will suffice (*c*). But such a state will be examined with jealousy in order to ascertain whether the disorder was in fact removed (*d*). Nor is it necessary that the disorder should be permanently eradicated; it may only intermit; it may be liable to return; but if the mind be apparently rational upon all subjects, and no symptoms of delusion can be called forth on any subject, this may constitute a lucid interval (*e*).

Nor need the recovery be permanent.

The burden of proving a lucid interval.

If derangement be proved or be admitted to have existed at any particular period anterior to the will, but a lucid interval be alleged to have prevailed at the time when the will was executed, then the burden of proof attaches on the party alleging such lucid interval, and he must show sanity and competence at the period when the act was done, and to which the lucid interval refers (*f*).

(*z*) (1793), 1 Phill. 100.
(*a*) Lord Thurlow in *Att.-Gen.* v. *Parnther* (1792), 3 Bro. C. C., at p. 444.
(*b*) (1829), 2 Hagg., at p. 434.
(*c*) *Holyland* (1805), 11 Ves., at p. 11.
(*d*) *Att.-Gen.* v. *Parnther* (1792), 3 Bro. C. C. 443, 444.
(*e*) *Wheeler* v. *Alderson* (1831), 3 Hagg. 599.
(*f*) *Per* Lord Thurlow in *Att.-Gen.* v. *Parnther* (1792), 3 Bro. C. C. 443; see also *Hall* v. *Warren* (1804), 9 Ves. 611; *per* Lord Eldon in *Holyland* (1805), 11 Ves., at p. 11; Sir W. Wynne in *Cartwright* v. *Cartwright* (1793), 1 Phill., at p. 100; Sir J. Nicholl in *White* v. *Driver* (1809), 1 Phill., at

"If unsoundness extending over years be once proved by those who oppose a will," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*g*), "there is no doubt as a proposition of law that they are not bound to carry the evidence of insane actions or delusions up to the very moment of the testament. A diseased state of mind once proved to have established itself would be presumed to continue, and the burden of showing that health had been restored falls upon those who assert it."

The evidence in support of a lucid interval

The evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement (*h*).

Proof of the existence of a lucid interval often a matter of extreme difficulty;

In this connection it may be well to observe that, in cases particularly of monomania, the proof of a lucid interval is a matter of extreme difficulty, for the reason that the patient so affected is not infrequently rational to all outward appearance, without any real abatement of his malady (*i*). Repeated cases have made it clear that persons essentially insane may be calm, may do acts, hold conversations, and even pass in general society as perfectly sane (*k*). Remarkable instances have occurred of the extraordinary power which madmen often possess of concealing their infirmity (*l*). However calm and

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p. 88; in *Kindleside* v. *Harrison* (1818), 2 Phill., at p. 465; in *Groom* v. *Thomas* (1829), 2 Hagg., at p. 434; see *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C., at p. 245.

(*g*) (1867), 1 P. & D., at p. 434; see *Waring* v. *Waring* (1848), 6 Moo. P. C., at p. 357.

(*h*) Lord Thurlow in *Att.-Gen.* v. *Parnther* (1792), 3 Bro. C. C. 443; see *Ayrey* v. *Hill* (1824), 2 Add., at p. 209; but see *per* Lord Eldon in *Holyland* (1805), 11 Ves., at p. 11.

(*i*) *Brogden* v. *Brown* (1825), 2 Add. 445. It is this circumstance—the different state and condition of the testator's mind at different times—coupled with the different abilities of witnesses to form opinions as to sanity or the reverse state, and their different opportunities of seeing the patient, that leads to the conflicts of evidence so often observable in testamentary suits of this description. So much the more is it incumbent upon the Court to weigh the evidence with very great attention, to rely but little upon mere opinion one way or the other, but to be guided in its own judgment by facts proved and by acts done rather than by the judgment of others: *Kindleside* v. *Harrison* (1818), 2 Phill. 457, 459.

(*k*) *Groom* v. *Thomas* (1829), 2 Hagg. 442.

(*l*) *Dew* v. *Clark* (1826), 3 Add. 88. Two instances are mentioned in the trial of James Hadfield in Howell's State Trials, Vol. XXVII, pp. 1315 *et seq.* One is a case in which Mr. Erskine cross-examined for a whole day an alleged lunatic with a view to showing that he was insane. Not knowing the particular delusion under which the man was suffering, Mr. Erskine could extort no symptom of insanity. At length, the subject of the delusion having been communicated to Mr. Erskine, a question was put to the alleged lunatic upon that subject, upon which the latter said, with the utmost gravity and emphasis, "I am the Christ!" The other is a case where a lunatic named Wood, who twice indicted his keeper for detaining him in a madhouse, was on the first occasion trapped by a question on the subject of his delusion into displaying his madness on that point. On the second indictment all the ingenuity of the Bar and all the authority of the Court could not make him say one word upon the topic of his delusion, though he signified to those who were near him that it was still present in his mind; but,

particularly in cases of monomania.

rational, then, the conduct and ordinary behaviour of the monomaniac may be, however great his apparent capacity in the management of his affairs, it is still possible that he nurtures insane ideas and hallucinations on particular subjects, and is thus diseased in mind (*m*). It has therefore been said that the fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind (*n*).

The test of a lucid interval in such cases.

The test of the existence of a lucid interval in such cases would appear to be that no symptom of delusion can be called forth at the time (*o*), even when the patient's attention is directed to the subject-matter of the delusion (*p*). The patient should be able to describe his feelings and talk *of the subject of his delusion* without betraying any signs of unnecessary vehemence or excitement (*q*).

Distinction in this respect between various forms of insanity.

In this connection a distinction exists between cases of permanent insanity where delusions are present, on the one hand, and cases of temporary derangement resulting from delirium caused by illness or fever, on the other. For in delirium intervals of coolness and actual lucidity are much more common than when a permanent delusion has seized the mind (*r*); the apparently rational intervals of persons merely delirious are, for the most part, *really* such. Delirium being a fluctuating state of the mind, created by temporary excitement, in the absence of that excitement, to be ascertained by the appearance of the patient, the patient is most commonly really sane. Hence the probabilities, *a priori*, in favour of a lucid interval are infinitely stronger in a case of delirium than in one of permanent insanity (*s*).

Again, where a person is afflicted with habitual insanity *unaccompanied by delusions*, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals, may be a true, and indeed the only indication of the existence of a lucid interval at the time when the will was made (*t*).

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conscious that the delusion had occasioned his defeat on the former occasion, he obstinately kept it back. See also *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C. 232.

(*m*) *Smith* v. *Tebbitt* (1867), 1 P. & D., at p. 426.

(*n*) *Smee* v. *Smee* (1879), 5 P. D., at p. 90.

(*o*) *Wheeler* v. *Alderson* (1831), 3 Hagg., at p. 599.

(*p*) *Nichols* v. *Binns* (1858), 1 S. & T. 245.

(*q*) Taylor, 732.

(*r*) *Hoby* v. *Hoby* (1828), 1 Hagg. 158, 159.

(*s*) *Brogden* v. *Brown* (1825), 2 Add. 445; *Dimes* v. *Dimes* (1856), 10 Moo. P. C. 428.

(*t*) *Nichols* v. *Binns* (1858), 1 S. & T. 245.

The weight to be given to the consideration that the provisions of the will are rational.

If any testamentary instrument originate with the deceased person himself, and all the contents thereof are rational and conformable to his habits and connection, to the state of his fortune and family, and especially if agreeable to former testamentary acts intended when the testator was undoubtedly of sound mind, then the contents furnish presumptive evidence that the testator was of sound mind when he did the acts necessary to carry such intentions into effect. But this is presumptive evidence only; for if it be proved *aliunde* that he was of unsound mind, then the act is void, for a man of unsound mind cannot make a valid will, even if the necessities of his family render it most desirable that he should do the act in question (*u*).

Strong presumptive evidence in favour of a lucid interval may arise from that circumstance,

It thus appears that very strong presumptive evidence in favour of the existence of a lucid interval may arise from the fact that the will itself is a rational instrument. Indeed, in *Cartwright* v. *Cartwright* (*x*) Sir William Wynne stated the proposition in terms so strong as to be, without the explanations and reservations which the context affords, to some extent misleading. "I think," he said, "the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further" (*y*); and he cited Swinburne (*z*) in support of this proposition. "Unquestionably," added the learned Judge, "there must be complete and absolute proof that the party who had so formed it did it without any assistance."

if the will is written by the testator without assistance.

Cartwright v. *Cartwright* was the case of a lady, possessed of considerable property, who had for different periods of time been afflicted with insanity, accompanied by symptoms of the worst character. Being importunate for pen, ink, and paper, they were, by permission of her physician, given to her, and, her hands being untied, she sat down and wrote the will, which turned out to be a perfectly rational and

(*u*) Dr. Lushington in *Prinsep* v. *Dyce Sombre* (1856), 10 Moo. P. C. 285.
(*x*) (1793), 1 Phill., at p. 100.
(*y*) And see Sir John Nicholl's remarks in *Scruby* v. *Fordham* (1822), 1 Add. 90; *Evans* v. *Knight* (1822), *ibid.*, at p. 237.
(*z*) On Wills, Part II, s. 3.

proper instrument, the result of her own sole will and pleasure, not being dictated or suggested by any person. It was under these circumstances, and after an exhaustive review of all the evidence in the case, that Sir William Wynne came to the conclusion already adverted to. And therefore it must not hastily be concluded from his words that every rational act, rationally done, is under all circumstances sufficient to constitute a lucid interval; it was the particular manner in which the act was done in the case before him that led Sir William Wynne to the conclusion that there was a lucid interval in that particular case (*a*).

But not every rational act rationally done is sufficient to establish a lucid interval,

It is, however, true to say that a rational act done in a rational manner, while not perhaps "the strongest and best proof," certainly not conclusive proof of a lucid interval, does contribute materially to the establishment of it (*b*). But it must always be remembered that after the paroxysm has passed, insanity may still be lurking in the mind of the patient, with nothing apparent on the surface to show it. In such cases, particularly where delusions are proved to have existed, it is not sufficient that the will upon the face of it should be what might be considered a rational will. The Court will look below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration, not merely the amount and nature of his property, but the interest of those who by personal relationship or otherwise had claims upon him (*c*), free from the influence of morbid delusions which might affect his will.

for after the paroxysm has passed away, insanity may still lurk in the mind of the patient.

On the other hand, as has already been stated, the incoherence or inofficious character of the will may in itself raise a doubt in the mind of the Court, which the persons propounding the will must dispel before the document will be pronounced for (*d*).

Incapacity arising from physical infirmity or the decay of advancing age.

It remains to consider the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence occasioned by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement.

If by these means the mental power is reduced below the ordinary standard to such a degree that sufficient intelligence to

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(*a*) Sir H. J. Fust in *Chambers* v. *The Queen's Proctor* (1840), 2 Curt. 446, 447.

(*b*) *Bannatyne* v. *Bannatyne* (1852), 2 Rob. 501; *Nichols* v. *Binns* (1858), 1 S. & T. 244.

(*c*) *Smee* v. *Smee* (1879), 5 P. D. 92.

(*d*) See *ante*, p. 54; and see *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 570; *Clarke* v. *Lear* (1791), cited in *Cartwright* v. *Cartwright* (1793), 1 Phill., at p. 119.

understand and appreciate the testamentary act in its different bearings is wanting, the power to make a valid will is gone. A man may not be so insane as to justify his being found a lunatic by inquisition, and yet may not be equal to the important act of disposing of his property by his will (*e*). "In order to constitute a sound disposing mind," said Erskine, J., in *Harwood* v. *Baker* (*f*), "a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and the protection of the law is in no cases more needed than in those where the mind has been too much enfeebled to comprehend more objects than one." And it was held in *Combe's Case* (*g*) that sane memory for the making of a will is not at all times when the party can say yea or no, or has life in him, nor when he can in some things answer with sense; but he ought to have judgment to discern and to be of perfect memory, otherwise his will is void (*h*).

On the other hand, though the mental powers may be reduced below the ordinary standard, yet if the faculties retain sufficient strength to comprehend the extent of the property to be disposed of and the claims of others upon the testator's bounty, the power to make a will remains (*i*). Old age alone does not deprive a man of the power of making a testament, for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind (*k*). Nor does the feebleness arising from illness. "*Non sani tantum*," says Voet, "*sed et in agone mortis positi, seminece ac balbutiente linguâ voluntatem promentes, recte testamenta condunt, si modo mente adhuc valeant*" (*l*). "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest

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(*e*) *Mountain* v. *Bennet* (1787), 1 Cox, at p. 356.

(*f*) (1840), 3 Moo. P. C., at p. 290.

(*g*) (1606), Moore (K. B.) 759; *S. C.* 8 Vin. Abr. 43, No. 22.

(*h*) See *The Marquis of Winchester's Case* (1599), 6 Co. Rep. 23, where it was said: "By law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason"; and see *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 122.

(*i*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 566.

(*k*) Swinb., Part II, s. 5; *Kindleside* v. *Harrison* (1818), 2 Phill. 462. Great age raises some doubt of capacity, but only so as to excite the vigilance of the Court; *Ibid.*

(*l*) Commentary on the Pandects, lib. 28, tit. 1, s. 36, quoted by Cockburn, J., in *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B., at p. 566.

degree, otherwise very few would make testaments at all; neither has it been understood that he must possess them in as great a degree as he may formerly have done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and adjudged of, then he cannot be said to be of sound and disposing mind and memory " (*m*).

Where a testator has given instructions for a will during health, and executes it during illness.

If a testator, while in a state of health, has given instructions for a will, and it is prepared in accordance with those instructions, a very slight degree of mental capacity at the time of the execution will, it should seem, suffice (*n*). Thus where a testatrix was on her deathbed in a state approaching insensibility at the time when the will, drawn up in accordance with the instructions she had previously given when perfectly capable, was submitted to her for execution : it was held that although she might not be in a state to remember and understand the instructions she had given; although she might be incapable—even if roused—of understanding each clause if it had been put to her; yet if she were capable of understanding, and did understand, that she was engaged in executing the will for which she had given instructions, that was sufficient (*o*).

The fact that the testator was ill or aged may render him susceptible to importunity and influence.

Feebleness and weakness of intellect caused by advanced age or illness, even though insufficient in itself to negative testamentary capacity, is frequently a very important element in testamentary cases upon another ground, namely, that persons so affected are peculiarly susceptible to importunity and improper influence in relation to their testamentary dispositions (*p*). For if a will be prepared by a person who benefits largely thereunder, and it be proved that the testator was in a feeble and weak state at the time, that is a circumstance which will rouse the vigilance of the Court; and the Court, before pronouncing for the will, must be satisfied that the testator was cognisant of its contents and in a condition

(*m*) *Den* v. *Vancleve*, 2 Southard, at p. 660, cited with approval by Cockburn, C.J., in *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 567; and see *Harrison* v. *Rowan* (1820), 3 Washington's Rep. (U. S.), at p. 585; *Stevens* v. *Vancleve* (1822), 4 Washington's Rep. (U. S.), at p. 267; *Gillett* v. *Rogers* (1913), 108 L. T. 732 (testatrix incapable of speaking or writing owing to a stroke, assented by nods, and by pressures of the hand in answer to questions put to her).

(*n*) *Harwood* v. *Baker* (1840), 3 Moo. P. C., at p. 313.

(*o*) *Parker* v. *Felgate* (1883), 8 P. D. 171.

(*p*) *Vide post*, p. 76.

to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing (*q*).

It remains to consider the cases of certain other classes of persons who are, according to the old text-books on ecclesiastical law, incapable, from want of discretion, of making a will.

Sub-section 3.—*Persons Drunk.*

One who is drunk at the time of making his will cannot make a valid testament;

"He that is overcome with drink," says Swinburne (*r*), "during the time of his drunkenness is compared to a madman; and therefore, if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case." The effects of drunkenness or ebriety only subsist whilst the cause, the excitement, visibly lasts; there can scarcely be such a thing as latent ebriety (*s*). Therefore all that need be shown in the case of a will made by an habitual drunkard would seem to be that he was free from the exciting influence of drink at the time when the will was executed, or that the excitement, if it existed at that time, did not exist in such a degree as to prevent the testator from appreciating and understanding the testamentary act in all its bearings (*t*). Intoxication has, therefore, been said to be in truth temporary insanity; the brain is incapable of discharging its proper functions; there is temporary mania: but that species of derangement, when the exciting cause is removed, ceases; sobriety brings with it a return of reason (*u*).

but an habitual drunkard may make a will when he is sober.

Sub-section 4.—*Persons Deaf and Dumb.*

One who is deaf and dumb may make a will by signs,

"Some persons," says Swinburne (*x*), "can neither hear nor speak; others can speak, but not hear; some again can hear, but not speak. Touching the first sort, that is to say those who are both deaf and dumb, if any be so by nature, then can he not make any kind of testament or last will (*y*),

(*q*) *Dufaur* v. *Croft* (1840), 3 Moo. P. C. 136; *Harwood* v. *Baker* (1840), 3 Moo. P. C. 282.

(*r*) Part II, s. 6. As to wills destroyed by persons under the influence of drink, *vide post*, p. 162, note (*e*).

(*s*) *Ayrey* v. *Hill* (1824), 2 Add., at p. 210.

(*t*) *Ibid.*; *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B., at p. 566.

(*u*) *Wheeler* v. *Alderson* (1831), 3 Hagg., at p. 602.

(*x*) Part II., s. 10.

(*y*) Sir W. Page Wood, in *Harrod* v. *Harrod* (1854), 1 K. & J., at p. 9, said: "The presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person; but the onus

unless it do appear by sufficient arguments that he understandeth what a testament meaneth, and that he hath a desire to make a testament; for if he have such understanding and desire, then he may by signs and tokens declare his testament (*z*). If he be not deaf and dumb by nature, but being once able to hear and speak, if by some accident afterwards he loseth both his hearing and the use of his tongue, then, in case he be learned and be able to write, he may with his own hand write his testament or last will, and so by art supply the defect of nature (*a*). But if he be not able to write, then is he in the same case as they are which be both deaf and dumb by nature, that is to say, if he have understanding he may make his testament by signs, otherwise not at all (*b*). Such as can speak and cannot hear may make their testaments as if they could both speak and hear, neither skilleth it whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they be learned, may very well make their testaments themselves by writing; or, being unlearned, may also make their testaments by signs, so that the same signs be sufficiently well known to such as then be present " (*c*).

or by writing,

Persons deaf, but not dumb.

Persons dumb, but not deaf.

Sub-section 5.—*Persons Blind or Illiterate.*

The Court must be satisfied that a blind testator knew and approved of the contents of his will.

The Court, before pronouncing for a will executed by a blind person, must be satisfied that the testator knew and approved of its contents (*d*). It is not, however, necessary to prove that the identical paper which the testator signed as his will was read over to him (*e*). If the will is proved to be in conformity with the instructions given by the testator, that will suffice, although not proved to have been read over to the testator previous to execution (*f*).

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of proving the unsoundness of mind of such a person must rest on those who dispute his sanity. There is nothing in our experience which would lead us to conclude that the deaf and dumb are generally of unsound mind."

(*z*) A testator who was deaf and dumb made his will by communicating his testamentary instructions to an acquaintance by signs and motions. The will, prepared in conformity with these instructions, was duly executed by the testator, and was admitted to probate by the Court, after an affidavit had been filed setting forth the signs by which the testator signified that he understood and approved of the provisions of the will: *Geale* (1864), 3 S. & T. 431; and see *Owston* (1862), 2 S. & T. 461.

(*a*) Swinb., Part II, s. 10.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) Swinb., Part II, s. 11; *Barton* v. *Robins* (1768), 3 Phill. 455, n. (*b*); *Moore* v. *Paine* (1728), 2 Lee, 595; *Fincham* v. *Edwards* (1842), 3 Curt. 63; 4 Moo. P. C. 198 (on appeal); *Axford* (1860), 1 S. & T. 540.

(*e*) *Fincham* v. *Edwards*, *ubi supra*. A testator who was so blind that he could do little more than distinguish night from day was held capable of acknowledging his signature to a will: *King* v. *Berry* (1871), Ir. R. 5 Eq. 309.

(*f*) *Fincham* v. *Edwards*, *ubi supra*.

So also, if the testator is unable to read, the Court must be satisfied that the contents of his will were brought to his knowledge, and that he approved of them. For though the law in other cases may presume that the person who executes a will knows and approves the contents thereof, yet that presumption ceaseth, where by defect of education he cannot read (*g*). Persons who cannot read.

Section 2.

PERSONS INCAPABLE FROM WANT OF LIBERTY AND FREE WILL.

Although a testator, at the time of the execution of the will, were of sound mind, memory, and understanding, and the will good so far as relates to its execution and attestation, yet it may be an instrument having no legal validity. For if the testator executed it under coercion or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations, in none of these cases can the instrument, in contemplation of law, properly be considered as his will (*h*).

Sub-section 1.—*Wills obtained by Fraud.*

The fact that a will has been obtained by fraud (*i*) is sufficient ground for setting it aside (*k*). "If a testator be circumvented by fraud," says Swinburne (*l*), "the testament loseth his force." And there cannot be a stronger instance of fraud than a false representation respecting the character of an individual, made to the testator for the purpose of inducing him to revoke a bequest made in favour of that individual, or to exclude the person so calumniated from any benefit in his will (*m*). So if some person, by falsehood, raises prejudices in Wills obtained by fraud may be set aside.

(*g*) *Barton* v. *Robins, ubi supra*; 4 Burn's Eccl. Law, p. 74 (9th ed.).

(*h*) *Boyse* v. *Rossborough* (1856-7), 6 H. L. C., at p. 44.

(*i*) Fraud has sometimes been regarded as a species of undue influence; it is a mere question of terms, but by the rules of pleading, established in the Court of Probate since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence used in a plea raises the question of coercion alone: *Parfitt* v. *Lawless* (1872), 2 P. & D. 471. A plea of undue influence is insufficient to let in a charge of fraud, but leave to amend by inserting a plea of fraud may be granted during the progress of the hearing—*White* v. *White* (1862), 2 S. & T. 504—even after the plaintiff's case is closed: *Riding* v. *Hawkins* (1889), 14 P. D. 56.

(*k*) *Lord Donegal's Case* (1751), 2 Ves. Sen., at p. 408.

(*l*) Part I, s. 3, pl. 32.

(*m*) Lord Lyndhurst in *Allen* v. *McPherson* (1845-7), 1 H. L. C., at p. 207, citing *Butterfield* v. *Scawen* (1775), not reported. See *Grindall* v. *Grindall* (1830), 4 Hagg. 10, which case was founded on a charge of this description, and failed from want of proof, but not upon any doubt of the duty of the Court to refuse probate had the charge been established: *White* v. *White* (1862), 2 S. & T. 504.

the mind of the testator against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions thus formed to their disadvantage may never be removed, such contrivance may be equivalent to positive fraud, and may render invalid any will executed under false impressions so kept alive (*n*). In every case it is left to the discretion of the Judge, comparing the deceit with the capacity or understanding of the person deceived, to decide whether the fraud is such as may overthrow the testament or not (*o*).

Sub-section 2.—*Wills obtained by Coercion, Force, or Fear.*

Wills obtained by force cannot stand.

If it should be demonstrated that actual force was used to compel the testator to make the will, there can be no doubt that although the formalities required had been complied with, and the testator were of perfect mind and memory, yet such a will could never stand; but it is incumbent on the party who impeaches the will to show this (*p*). A will obtained by threats (*q*) is invalid; but it is said that it must not be every fear, or a vain fear, that will have the effect of annulling the will, but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner; whereof no certain rule can be delivered, but it is left to the discretion of the Judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatened as threatening; in the person threatening, his power and disposition; in the person threatened, the age, sex, courage, pusillanimity and the like (*r*).

The quality of the threats and the circumstances of the parties are to be taken into account.

Sub-section 3.—*Wills Obtained by Undue Influence.*

Wills obtained by "undue influence."

There is another ground, which though not so distinct as that of actual force or fear, nor so easy to be proved, yet if it be made out, will equally suffice to invalidate a will. That is dominion or influence acquired over a testator so as to prevent the exercise by him of his own discretion in the making of his will (*s*).

(*n*) *Boyse* v. *Rossborough* (1856-7), 6 H. L. C. 49.

(*o*) Swinb., Part VII, s. 3, pl. 3. See *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 123.

(*p*) Eyre, C.B., in *Mountain* v. *Bennet* (1787), 1 Cox, 355.

(*q*) See *Nelson* v. *Oldfield* (1688), 2 Vern. 76.

(*r*) Godolph., Part III, Chapter XXV, s. 8; Swinb., Part VII, s. 2, pl. 7; see *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 123. As to preventing a testator by threats from revoking his will, *vide post*, p. 78.

(*s*) Eyre, C.B., in *Mountain* v. *Bennet* (1787), 1 Cox, 355.

"There is no subject," said Sir James Hannen, in his charge to the jury in *Wingrove* v. *Wingrove* (*t*), "upon which there is a greater misapprehension than upon that of undue influence. The misapprehension . . . arises from the particular form of the expression. We are all familiar with the use of the word 'influence'; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore, when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. . . . A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour." Neither of these cases, shocking as they are, amounts to undue influence (*u*).

By "undue influence" is meant not persuasion however strong, from motives however improper,

"To be undue influence in the eye of the law," continued the learned Judge, "there must be—to sum it up in one word—coercion (*x*). It must not be a case in which a person has been induced, by means such as I have suggested, to come to a conclusion that he will make a will in a particular person's favour; because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence (*y*).

but *coercion*.

"The coercion may of course be of different kinds; it may be in the grossest form, such as actual confinement or violence,

Such coercion may be of various kinds.

(*t*) (1886), 11 P. D., at p. 82.

(*u*) Compare Lord Cranworth's remarks in *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 48.

(*x*) "There must be proof of something amounting to force and coercion in obtaining the act itself": Sir John Nicholl in *Williams* v. *Goude* (1828), 1 Hagg., at p. 596. "Undue influence, and the importunity which is to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility": Parke, B., in *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 491. "Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud": Cranworth, L.C., in *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 48. But since "fraud, which includes misrepresentation, is now the subject of a separate plea (see note (*i*) on p. 65, *supra*), undue influence used in a plea in this Court raises the question of coercion, and that only": Lord Penzance in *Parfitt* v. *Lawless* (1872), 2 P. & D., at p. 471; and see *Sefton* v. *Hopwood* (1855), 1 F. & F. 578; *Lovett* v. *Lovett* (1857), 1 F. & F. 581.

(*y*) See *Baudains* v. *Richardson*, [1906] A. C. 169, at p. 184.

or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness, and pressing something upon him, may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

But considerations however improper are not undue influence, unless if the testator could speak his wishes he would say "this is not my wish, but I *must* do it."

"These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence, unless the testator is in such a condition that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it.'

"If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view—still, it is not undue influence" (*z*).

"The influence to vitiate an act," said Sir John Nicholl in *Williams* v. *Goude* (*a*), "must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be very strong ground in support of a testamentary act; further there must be proof that the act was obtained by this coercion—by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."

No amount of persuasion or advice will amount to undue influence;

It is thus clear that no amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, or any other consideration, will avail to set aside a will, so long as the free volition of the testator to accept or reject that advice was not invaded (*b*). Appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may fairly be pressed upon the testator (*c*). But—and this is the point where legitimate persuasion ends and undue influence begins—pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the

but though the testator may be led, he must not be driven.

(*z*) See *Baudains* v. *Richardson*, [1906] A. C., at p. 184.
(*a*) (1828), 1 Hagg., at p. 581; see *Sefton* v. *Hopwood* (1855), 1 F. & F., at p. 580.
(*b*) Lord Penzance in *Parfitt* v. *Lawless* (1872), 2 P. & D., at p. 474.
(*c*) Sir J. P. Wilde in *Hall* v. *Hall* (1868), 1 P. & D., at p. 482.

volition without convincing the judgment, is a species of restraint under which no valid will can be made (*d*). "Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, the testator may be led but not driven; his will must be the offspring of his own volition, and not the record of some one else's" (*e*).

Though undue influence is equivalent to "coercion," actual violence need not be used.

It thus appears that, though true to state that undue influence is equivalent to coercion (*f*), in the interpretation of that word some latitude must be allowed (*g*). It is not necessary that actual violence should be used or threatened, provided the will of the testator were overborne (*h*). Roll, C.J., in a very early case (*i*) said: "If a man make his will in his sickness by the over importuning of another, to the end that he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will" (*k*). But the importunity must be such as the testator was too weak to resist; such as to render the act no longer that of the deceased (*l*).

The influence must be exercised in relation to the will.

The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions (*m*). It is not sufficient to establish that a person has the power unduly to overbear the will of the testator; it is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced (*n*). But this principle must not be carried too far. Where the evidence shows that at or near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the persons benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be

(*d*) Sir J. P. Wilde in *Hall* v. *Hall* (1868), 1 P. & D., at p. 482.
(*e*) *Ibid.*
(*f*) See note (*x*) on p. 67, *ante*.
(*g*) *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 48.
(*h*) *Ibid.*
(*i*) *Hacker* v. *Newborn* (1654), Style, 427.
(*k*) See *Lamkin* v. *Babb* (1752), 1 Lee, 7.
(*l*) *Kindleside* v. *Harrison* (1818), 2 Phill., at p. 551; *Constable* v. *Tufnell* (1883), 4 Hagg., at p. 485.
(*m*) Cranworth, L.C., in *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 51.
(*n*) Sir J. Hannen in *Wingrove* v. *Wingrove* (1885), 11 P. D., at p. 83; *Baudains* v. *Richardson*, [1906] A. C. 169; *Craig* v. *Lamoureux*, [1920] A. C. 349.

such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised (*o*).

Burden of proving undue influence.

The burden of proving that the document is the last will of a free and capable testator is primarily upon those who propound it.

Burden of Proof.—It is said that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator (*p*). "In the Court of Probate," said Parke, B., in *Baker* v. *Batt* (*q*), "where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, he is bound to pronounce his opinion that the instrument is not entitled to probate. For if the party upon whom the burden of the proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal of the truth of the proposition which he has to maintain, he must fail in his suit."

But that burden is in general discharged by proof of due execution by a capable testator,

The burden of proof thus cast upon the person propounding the will is in general discharged by proof of capacity and the fact of execution, and when these have been proved the Court will, under ordinary circumstances, assume from them the knowledge of, and assent to the contents of the instrument by the deceased, and without requiring further evidence will pronounce for the will (*r*).

and when these are proved, the burden of proving undue influence is upon the party who alleges it.

When, therefore, the person propounding the will has once proved that it has been executed with due solemnities by a person of competent understanding, and apparently a free agent, he has *prima facie* discharged the burden of proof cast upon him by the law, and the burden of proving that the will was executed under undue influence is on the party who alleges it (*s*). Undue influence cannot be presumed (*t*); and it is said that in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence, it must be shown that they are inconsistent with a contrary hypothesis (*u*).

(*o*) Cranworth, L.C., in *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 51.
(*p*) Parke, B., in *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 482.
(*q*) (1838), 2 Moo. P. C., at pp. 319, 320.
(*r*) *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 484.
(*s*) *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 49; *Craig* v. *Lamoureux*, [1920] A. C. 349, 356.
(*t*) *Ibid.*
(*u*) Cranworth, L.C., in *Boyse* v. *Rossborough* (1856—7), 6 H. L. C., at p. 51; *Craig* v. *Lamoureux*, [1920] A. C. 349, 356.

But while it is true that undue influence cannot be presumed, it is equally true that in many cases wills have been pronounced against, not because fraud or undue influence has been conclusively proved against the persons propounding the will, but because those persons have failed to discharge the burden placed upon them of satisfying the conscience of the Court that the will propounded was the will of a free and capable testator. Though the Court will not presume fraud or undue influence, it may require strong proofs of intention (*x*).

But when all the evidence is before the Court, it must be satisfied affirmatively that the will propounded is the will of a free and capable testator;

Particularly has this been the case where the circumstances under which the will was prepared and executed have been such as to excite the suspicion and vigilance of the Court. When such circumstances exist, the Court may pronounce against the will—even though a charge of fraud or undue influence has not clearly been brought home to the persons propounding it—unless such suspicion is removed, and the Court is satisfied that the testator's knowledge and approval of the contents of the instrument have been affirmatively established.

particularly if the circumstances under which the will was prepared are such as to excite the suspicion of the Court.

Foremost among the circumstances which will excite the suspicion and vigilance of the Court must be placed the fact that the will was prepared by, or on the instructions of, a person who takes large benefits thereunder.

As where the will was prepared by or on the instructions of a person who takes large benefits thereunder.

"If a party writes or prepares a will under which he takes a benefit," said Parke, B., in *Barry* v. *Butlin* (*y*), "that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

The learned Judge proceeded to state that this principle was well established, and was laid down by Sir John Nicholl in *Paske* v. *Ollat* (*z*), *Ingram* v. *Wyatt* (*z*), and *Billinghurst* v. *Vickers* (*z*), as having been handed down to him by his predecessors; "and," added Parke, B., "the Privy Council has sanctioned and acted upon it in the case of *Baker* v. *Batt*" (*z*).

(*x*) Sir J. Nicholl in *Billinghurst* v. *Vickers* (1810), 1 Phill., at p. 194.

(*y*) (1838), 2 Moo. P. C., at p. 481.

(*z*) In *Paske* v. *Ollat* (1815), 2 Phill. 323, Sir John Nicholl said: "The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely jealous of a circumstance of this nature. By the Roman law, *qui se scripsit hæredem* could take no benefit under a will. By the law of England this is not the case; but the law of England requires, in all instances of this sort, that the proof should be clear and decisive;—the balance must not be left *in equilibrio;* the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct

Where a beneficiary prepares the will, "the presumption and *onus probandi* is against the instrument."

"Their Lordships are fully sensible of the wisdom of this rule," continued the learned Judge, "and the importance of its practical application on all occasions. At the same time their Lordships think it fit to observe . . . that some of the expressions used by Sir John Nicholl in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will 'the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing but to the knowledge of the contents of the paper' (*a*); and that 'where the capacity is doubtful there must be proof of instructions or reading over' (*b*). If by these expressions the learned Judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him or the reading over the instrument by or to him are the most satisfactory evidence of such knowledge; we fully concur in the proposition so understood. In all probability the learned Judge intended no more than this.

This statement criticised and explained.

"But if the words used are to be construed strictly; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof is thereupon required from the party propounding the will,—we feel bound to say that we assume the doctrine to be incorrect.

"The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast,

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must be watched as that of an interested person; propriety and delicacy would infer that he should not conduct the transaction; and *a fortiori* in a case where he is the confidential attorney of the deceased; and where the benefit conferred is to a considerable amount.

"The presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof:—and the onus of proof may be increased by circumstances: such as unbounded confidence in the drawer of the will; extreme debility in the testator; clandestinity; and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. These are the principles and rules handed down to me by my predecessors." See also the remarks of the same learned Judge in *Bilinghurst* v. *Vickers* (1810), 1 Phill., at pp. 193, 194; *Ingram* v. *Wyatt* (1828), 1 Hagg., at p. 391.

In *Baker* v. *Batt* (1838), 2 Moo. P. C. 321, Parke, B., laid down the same principle in almost identical language to that used in *Barry* v. *Butlin*.

(*a*) *Paske* v. *Ollat* (1815), 2 Phill., at p. 324.

(*b*) *Billinghurst* v. *Vickers* (1810), 1 Phill., at p. 193.

the issue must be found against him. In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case and under all circumstances to create a contrary presumption, and to call upon the Court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased. . . .

"All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, . . . varying according to circumstances (*c*); for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

"Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognisance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it" (*d*).

(*c*) In *Kindleside* v. *Harrison* (1818), 2 Phill., at p. 559, Sir John Nicholl said: "The codicil is prepared through the agency of the person benefited, and without the professional person who prepared it having had access to the deceased for the purpose of taking his instructions . . . [that always excites the jealousy and vigilance of the Court] . . . but the Court must take care not to convert a circumstance which is only a reason for vigilance and caution into an actual defeasance of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which accompany it; the thing frequently happens without exciting much, though upon all occasions a certain portion of, caution."

(*d*) This judgment is of such importance that it has been considered advisable to set out the material portions *in extenso*. Sir Herbert Jenner in *Durling* v. *Loveland* (1839), 2 Curt., at p. 227, said that he acceded to every one of the doctrines and principles laid down in this judgment; and that he was not aware that the Court had ever acted on any other or different principles. See also *Hitchings* v. *Wood* (1838—41), 2 Moo. P. C., at p. 436. The principle here laid down has been adopted in a number of subsequent cases, notably in *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448, and in

This same principle was laid down and acted upon in *Fulton* v. *Andrew* (*e*) and *Brown* v. *Fisher* (*f*). In the former case (*g*) Lord Hatherley said : " There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction " (*h*).

Those who take for their own benefit, after being instrumental in preparing a will, must show the righteousness of the transaction.

The rule in *Barry* v. *Butlin*, *Fulton* v. *Andrew*, and *Brown* v. *Fisher* is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document : it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made by proving the will (*i*). For, before the

The rule is not confined to cases in which a will is prepared by or on the instructions of a beneficiary, but extends to all cases in which circumstances excite the suspicion of the Court.

Brown v. *Fisher* (1890), 63 L. T. 465, and is sometimes referred to as the " rule laid down in *Barry* v. *Butlin*, *Fulton* v. *Andrew*, and *Brown* v. *Fisher*." It has been made the basis of a doctrine as to the costs of an unsuccessful plea of undue influence and fraud, which will be found discussed at p. 624, *post*. In *Parker* v. *Duncan* (1890), 62 L. T. 642, Sir J. Hannen said : " It is the duty of any man who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice, and he should take care that the testimony called in support of the will should not be that of himself alone, but that it should be independent and impartial."

(*e*) (1875), L. R. 7 H. L. 448.

(*f*) (1890), 63 L. T. 465.

(*g*) L. R. 7 H. L., at p. 471.

(*h*) See *Tyrell* v. *Painton*, [1894] P., at p. 160.

(*i*) *Tyrell* v. *Painton*, [1894] P., at p. 157, *per* Lindley, L.J. See *per* Davey, L.J., at p. 159. A further extract from Lord Lindley's judgment in this case will serve to show the duty thrown upon the Court in cases of this kind. " The President (in the Court below) appears to me to have attached too little weight to the rule expounded in the cases which have been referred to. He seems to have thought that he had only to address himself to the question of fraud—whether the will had been obtained by fraud; that the burden of proving that lay on the plaintiff [*i.e.*, on the person attacking the will] and that he had not discharged himself of that burden. Now, in my opinion, this will . . . was executed under such suspicious circumstances that he ought to have said ' Do the defendants affirmatively establish to my satisfaction that the testatrix knew what she

question of fraud can arise, the suspicion arising from the circumstances under which the will was executed has to be dealt with and removed (*k*). The vital and essential issue in a case of this description is not whether a case of fraud has been made out, but whether the plaintiffs have discharged the onus cast upon them by the law of showing the righteousness of the transaction, and that the paper propounded did express the true will of the deceased (*l*).

Dictum of Walton, J., in *Wilson* v. *Bassil*.

Walton, J., in *Wilson* v. *Bassil* (*m*), said that in cases of this character the defendant was entitled to presume what the law presumes, and to call upon the plaintiff to prove not merely the valid execution of the will, but also that it was *not* obtained by fraud or undue influence, and that it does really express the true will of the deceased. This *dictum*, having regard to the language used by Parke, B., in *Barry* v. *Butlin* (*n*), must, it is submitted, not be pressed too far. In *Spiers* v. *English* (*o*) Sir Gorell Barnes said : " I am not sure that I quite agree with the views of the learned Judge who tried the case of *Wilson* v. *Bassil* (*p*) when he said there was a presumption against the will. I do not think that is quite the right way to put it. If the learned Judge meant to say more than that the onus was especially heavy upon a person who obtains and puts forward for probate a will in his own favour, I do not agree with him. I doubt whether the fact of his having been instrumental in making a will under which he substantially benefits makes any difference in the presumption of law. The question always is whether a person propounding a will has made out a case in favour of the document. And in my view a plea of undue influence ought never to be put forward unless the person who pleads it has reasonable grounds upon which to support it."

Dissented from by Sir Gorell Barnes, P., in *Spiers* v. *English*.

The rule is not to be used as a cloak for charges of dishonesty.

It has been laid down that the rule in question is not to be used as a screen behind which a man may make veiled charges of fraud or dishonesty without assuming the responsibility of making those charges in plain terms (*q*).

Circumstances which may arouse the vigilance of the Court.

It may be useful to give some instances of circumstances which may arouse the vigilance and suspicion of the Court, though of course in many cases such circumstances admit of satisfactory explanation.

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was doing when she executed this will?' " This view was fully endorsed and acted upon by the Court of Appeal in *Finny* v. *Govett* (1908), 25 T. L. R. 186.

(*k*) *Tyrell* v. *Painton*, [1894] P., at p. 159, *per* A. L. Smith, L.J.
(*l*) *Finny* v. *Govett* (1908), 25 T. L. R. 186, at p. 188.
(*m*) [1903] P., at p. 242.
(*n*) *Vide supra*, p. 71.
(*o*) [1907] P., at p. 124.
(*p*) [1903] P. 239.
(*q*) *Low* v. *Guthrie*, [1909] A. C. 278, at p. 281.

Will made by interrogatories.

A will made by interrogatories—*i.e.*, where the testator gives his instructions in answer to questions—is valid, but where the will is so made, the Court will—particularly if the questions were "leading" questions—be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case (*r*).

Great change of testamentary dispositions.

A great change of testamentary dispositions, evidenced by a departure from further testamentary intentions long adhered to, requires explanation; especially if the person in whose favour the change is made possesses great influence and authority, and originates and conducts the whole transaction (*s*). Such a circumstance might, under certain conditions, give rise to a suspicion—requiring to be dissipated—that so sudden a change was not the result of the free volition of the testator (*t*). Such a suspicion might be dissipated by proof of change of circumstances, making an alteration of previous testamentary instruments probable (*u*).

Other suspicious circumstances.

Again the following circumstances may require satisfactory explanation, especially where the person who prepared the will was a beneficiary thereunder : the fact that the testator gave no instructions for the will (*x*), and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him, while he was weak or debilitated; excluded his relations and friends; obtained money from him; and assumed control of his affairs. Any one of these circumstances, standing alone, may admit of explanation, but their cumulative effect would be to raise a strong suspicion that the testator was a mere passive instrument in their hands (*y*).

Another circumstance which will, it seems, excite the vigilance of the Court is the fact that the intellect of the testator was impaired or weakened by age or illness. When a person is in full and vigorous possession of his intellect, the mere act of execution would lead to the inference that he knew the contents of the instrument he signed; but where a person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained his real intentions (*z*).

(*r*) *Green* v. *Skipworth* (1809), 1 Phill., at p. 58.

(*s*) *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 87; *Mynn* v. *Robinson* (1828), 2 Hagg., at p. 181. (*t*) *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 110

(*u*) *Constable* v. *Tufnell* (1833), 4 Hagg., at p. 487.

(*x*) *Middleton* v. *Forbes* (1787), cited in *Ingram* v. *Wyatt* (1828), 1 Hagg., at p. 395.

(*y*) *Marsh* v. *Tyrrell* (1828), 2 Hagg., at p. 139; *Constable* v. *Tufnell* (1833), 4 Hagg., at p. 495; *Paske* v. *Ollat* (1815), 2 Phill., at p. 324.

(*z*) *Durling* v. *Loveland* (1839), 2 Curt., at p. 229; *Hampson* v. *Guy* (1891), 64 L. T. 778 (C. A.).

The weight to be given to the fact that testator and beneficiary occupy the relation of doctor and patient, attorney and client, confessor and penitent, etc.

" In equity," said Lord Penzance in *Parfitt* v. *Lawless* (*a*), " persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions made between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.

" Applying this view of the subject to the making of a will, it was contended that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence." The learned Judge stated that this was not the law in the Probate or any other Court with regard to wills, and, after quoting Lord Cranworth's *dictum* in *Boyse* v. *Rossborough* (*b*),—" Undue influence cannot be presumed,"—continued : " In the case of a legacy under a will a legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge."

It is thus clear that the rules of Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills. It is only when the person occupying a relationship such as has been indicated himself writes or procures from the testator a will in his own favour, or where other circumstances of a suspicious character surround the making and execution of the will, that the vigilance of the Court—in accordance with the principles already laid down—is aroused, and that affirmative proof of the righteousness of the transaction is required (*c*).

(*a*) (1872), 2 P. & D., at p. 468.

(*b*) (1856—7), 6 H. L. C., at p. 49.

(*c*) See *Paske* v. *Ollat* (1815), 2 Phill., at p. 324; *Ingram* v. *Wyatt* (1828), 1 Hagg., at pp. 394 *et seq.*, 470; *Wyatt* v. *Ingram* (1832), 3 Hagg., at p. 468; *Raworth* v. *Marriott* (1833), 1 My. & K. 643; *Hindson* v. *Weatherill* (1854), 5 De G. M. & G., at p. 313; *Jones* v. *Godrich* (1844), 5 Moo. P. C., at p. 20; *Ashwell* v. *Lomi* (1850), 2 P. & D. 478. In *Atter* v. *Atkinson* (1869), 1 P. & D., at p. 668, Sir J. P. Wilde said : " There is no

The Chancery Division will not, on the ground of undue influence, refuse to enforce a will.

It is clear, since the decision of the House of Lords in *Allen* v. *McPherson* (*d*), that the Chancery Division will not, on the ground of fraud or undue influence, set aside or refuse to enforce the provisions of a will which has been pronounced valid by the Probate Division.

A part of the will may be rejected, if obtained by fraud or undue influence.

If it be proved that a part of the will alone, *e.g.*, the residuary bequest, was obtained by undue influence or fraud, that part may be rejected, and the remainder admitted to probate (*e*), at least if that part is so distinct and severable that its rejection does not alter the construction of the true part; for in such a case it has been held that the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone (*f*). But where the rejection of the words alters the sense of those which remain, it was at one time doubted whether any part of the instrument could be treated as valid (*g*). It has, however, since been held that words introduced into a will by fraud or mistake may be rejected, where the effect of their rejection may be to render ambiguous, or even insensible, the clause of which they formed a part (*h*).

Where the testator is prevented by force and threats from revoking his will.

In a case where a testator had executed a will in favour of the plaintiffs, and subsequently, it was alleged, being desirous of depriving the plaintiffs of all benefit conferred upon them by that will, had a will prepared to that effect, but was prevented by the force and threats of the plaintiffs from executing it, the defendants claimed that the plaintiffs should be held to be trustees of the shares devolving upon them by the former will, in favour of the persons who would have taken such shares, had the later will been executed. The case ended in a compromise (*i*).

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special rule applying to attorneys, but the force of the observation (in *Barry* v. *Butlin*) is obviously increased in such a case, for we know that a person making a will confides more in a professional man than he generally does in any other person he may call in to assist him." As to a medical man, see *Greville* v. *Tylee* (1851), 7 Moo. P. C. 320.

(*d*) (1845—7), 1 H. L. C. 191, see at p. 210.

(*e*) *Barton* v. *Robins* (1775), 3 Phill. 455, n. (*b*); *Billinghurst* v. *Vickers* (1810), 1 Phill. 187; *Allen* v. *McPherson* (1845—7), 1 H. L. C., at p. 209; *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448; *Farelley* v. *Corrigan*, [1899] A. C. 563.

(*f*) *Rhodes* v. *Rhodes* (1882), L. R. 7 A. C., at p. 198.

(*g*) *Rhodes* v. *Rhodes* (1882), L. R. 7 A. C., at p. 198; see *Harter* v. *Harter* (1873), 3 P. & D. 11.

(*h*) *Boehm*, [1891] P., at p. 251.

(*i*) *Betts* v. *Doughty* (1879), 5 P. D. 27. The Court would, it is submitted, make such an order if the facts as alleged had been proved. In the unreported case of *Niepel* v. *Kluge* (1909), an action in which the pleadings were based upon this case came before the Court: fraud was alleged against the plaintiffs in preventing the deceased from altering his will, and the relief claimed was that they should be held trustees of their share in trust to pay the defendant such sum as she would have been entitled to had such alteration been made. No exception was taken to the form of pleading

In a probate suit where the defendant alleged that the will propounded had been obtained by the undue influence of a person who had died a few days before the execution of the will, the Court held that statements by the deceased person not in the presence of the testator were admissible in evidence so far as they went to the plea of undue influence (*k*).

Statements by a deceased person charged with undue influence.

Sub-section 4.—*Wills of Married Women.*

Prior to the passing of the Married Women's Property Act, 1882 (*l*), the capacity of a married woman to dispose of her real and personal estate by will was limited. She was incapable of devising lands; and her will of personal estate (except of property to which she was entitled *en autre droit* as executrix) could, in general, only be admitted to probate if her husband consented to the particular will that she had made being admitted to proof. A married woman, could, however, make a valid will in pursuance of an agreement made before marriage, or of an agreement made after marriage, for consideration, as she might in the exercise of a power to appoint by will; and the Court of Probate would allow such a will to be proved without the husband's consent.

The state of the law prior to the Married Women's Property Act, 1882.

Besides the case of a will made by a married woman by virtue of a power, there were, even before the Married Women's Property Act, 1882, other circumstances under which a will made by her was valid without the consent of her husband, namely, where personal property was actually given or settled, or agreed to be given or settled, to the separate use of the wife. In such a case she might dispose of that property as a *feme sole*, to the full extent of her interest therein. A married woman who had obtained a protection order or a judicial separation from her husband was also entitled to dispose of property acquired by her after the date of the order or decree in all respects as a *feme sole*, and such property descended, on her death intestate, as if her husband had then been dead (*m*).

The law as to the testamentary powers of married women has been completely altered by the Married Women's Property Act, 1882 (*n*). That Act applies to all wills made after January 1, 1883, and it has, therefore, been considered unnecessary to enter in any detail into the law which prevailed

The law completely altered by the Married Women's Property Act, 1882,

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either in the Probate Court or in the Court of Appeal, but the case failed for want of proof.

(*k*) *Radford* v. *Risdon* (1912), 28 T. L. R. 342.

(*l*) 45 & 46 Vict. c. 75.

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21 and 25.

(*n*) 45 & 46 Vict. c. 75.

before that date. The subject will be found fully treated in Sir Edward Vaughan Williams' book on Executors, upon which the preceding summary has been based (*o*).

The Married Women's Property Act, 1882 (*p*), provides :—

whereby a married woman may dispose of her separate estate by will as if she were a *feme sole*.

" A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and *disposing by will* or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee " (*q*).

Property of a woman married *after* the Act to be held by her as a *feme sole*.

" Every woman who marries *after* the commencement of this Act " [*i.e.*, January 1, 1883] " shall be entitled to have and to hold as her separate property, *and to dispose of in manner aforesaid* all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill " (*r*).

Property acquired after the Act by a woman married *before* the Act to be held by her as a *feme sole*.

" Every woman married *before* the commencement of this Act " [*i.e.*, January 1, 1883] " shall be entitled to have and to hold *and to dispose of in manner aforesaid* as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act " [January 1, 1883] " including any wages, earnings, money and property so gained or acquired by her as aforesaid " (*s*).

Before the Act, probate of the will of a married woman was limited, and her husband was entitled to a grant *cæterorum*.

Prior to the Married Women's Property Act, 1882, the probate of the will of a married woman made by virtue of a power, or disposing of property which she held to her separate use, was not general, but was limited to the property the testatrix had a right to dispose of and had disposed of by her will, and her husband was entitled to have a grant of administration *cæterorum* (*t*). The power under which the will purported to have been made was specified in the grant (*u*).

But, since the Act, general pro-

But in consequence of the change in the capacity of married women brought about by the Act, a new rule was framed (*x*).

(*o*) Wms. on Exors. (11th ed.), pp. 38—47.
(*p*) 45 & 46 Vict. c. 75.
(*q*) Section 1, sub-section 1.
(*r*) Married Woman's Property Act, 1882, s. 2.
(*s*) *Ibid.*, s. 5.
(*t*) *Price* (1887), 12 P. D. 137.
(*u*) Probate Rules, 1862, Rule 15, " Non-contentious Business."
(*x*) Amended Rule 15 (18 of the Rules for District Registrars), coming into force on April 19, 1887; see *Price* (1887), 12 P. D. 137.

This rule provides that in a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with the will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with the will annexed, without any exception or limitation, and shall issue to an executor or other person authorised in the usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy.

Probate of the will of a married woman is granted to her executor,

There are, however, cases in which the Court still refuses to make a general grant in respect of the wills of married women (*y*), *e.g.*, in cases where a married woman who is not a British subject has made a will which, though valid as the exercise of a power of appointment, is not executed in the form required for a will by the law of the country in which the testratrix was domiciled at the time of her death (*z*). In no case will *probate* be granted of such a will to the executor named therein as such, for he takes nothing *jure representationis* (*a*), but administration with the will annexed may be granted to the appointee limited to such property as the deceased had power to dispose of, and did dispose of to the appointee by her will (*b*). If, and only if, the consent of the persons entitled on intestacy is obtained, the appointee may take a general grant of administration with the will annexed (*c*).

except in cases where the will, though valid as the exercise of a power, is not executed in accordance with the law of the testatrix's domicil at death.

Section 3 of the Married Women's Property Act, 1893 (*d*), enacts "that section 24 of the Wills Act, 1837" (which provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the

Section 24 of the Wills Act, 1837, applies to the will of a married woman made during coverture.

(*y*) See *Donovan* (1898), 78 L. T. 567; *Leman*, [1898] P. 215.

(*z*) *Vide ante*, p. 34.

(*a*) See *de Camisani* (1890), unreported; quoted Tristram & Coote (16th ed.), p. 216; *Vannini*, [1901] P. 330; *Tréfond*, [1899] P. 247. So as to all wills by a married woman in execution of a power before the Act of 1882: *Tugman* v. *Hopkins* (1842), 4 Man. & G., at p. 400; *O'Dwyer* v. *Geare* (1859), 1 S. & T. 465; *Tomlinson* (1881), 6 P. D, at p. 210; *Brownrigg* v. *Pike* (1882), 7 P. D., at p. 64.

(*b*) *Tréfond*, [1899] P. 247, at p. 250; *Vannini*, [1901] P. 330. The grant in *Hallyburton* (1866), 1 P. & D. 90, was, in fact, a limited grant, although the report makes it appear otherwise: see *Vannini*, [1901] P., at p. 332.

(*c*) *Tréfond*, [1899] P., at p. 250; *Vannini*, [1901] P. 330.

(*d*) 56 & 57 Vict. c. 63.

will), " shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband " (*e*).

Sub-section 5.—*Wills of Seamen.*

Special indulgences and special protection granted by the law of this country in respect of wills made by seamen.

As to the wills of persons in the sea service, it is the policy of the law of this country to grant special indulgences and to extend special protection to the testamentary intentions of this class of persons. In some particulars they are (in common with soldiers on active service) excused from observing the formalities required from other members of society (*f*); while, on the other hand, greater formalities and special modes of attestation are in some respects required as to their written wills, in order to protect them against fraud and imposition, and to secure due effect to their real testamentary intentions (*g*).

A seaman's will is invalid if written on the same instrument as a power of attorney,

The Navy and Marines (Wills) Act, 1865 (*h*), s. 4, enacts : " A will made after the commencement of this Act by any person while serving as a seaman or marine (*i*) shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney."

This section is a re-enactment of a provision which has formed part of the statute law since the ninth year of William III (*k*). The statute of William III (*l*), in consideration that wills and powers of attorney were obtained from seamen without their being aware of their contents and effect, rendered the will absolutely void if embodied in the same instrument with a power of attorney; thus holding the presumption conclusive *juris et de jure* that the party did not know and intend that the instrument should operate as a testamentary disposition.

The case of *Craig* v. *Lester* (*m*) followed not long after the

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(*e*) The section applies to wills of married women who die after December 5, 1893, the date of the commencement of the Act : *Wylie* v. *Moffat*, [1895] 2 Ch. 116.

(*f*) *Vide post*, pp. 256 *et seq.*

(*g*) *Zacharias* v. *Collis* (1820), 3 Phill. 176, 177; *vide post*, pp. 265, 266, 446.

(*h*) 28 & 29 Vict. c. 72.

(*i*) *I.e.*, a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of his Majesty's vessels, or otherwise belonging to his Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers and of kroomen : section 1 of the Act. *Vide post*, p. 446.

(*k*) 9 & 10 Will. 3, c. 41, s. 6, re-enacted 55 Geo. 3, c. 60, s. 4, re-enacted 11 Geo. 4 and 1 Will. 4, c. 20, s 48, re-enacted 28 & 29 Vict. c. 72, s. 4.

(*l*) 9 & 10 Will. 3, c. 41, s. 6.

(*m*) Deleg. June 11, 1714; cit. *Zacharias* v. *Collis* (1820), 3 Phill., at p. 189.

statute; and in that case Sir Charles Hedges decided, and his sentence was affirmed by the Delegates, that the will was invalid, though executed on a different instrument from the power of attorney. From this case, and subsequent decisions of the Prerogative Court (*n*), the result to be deduced is that, when the relation of agent and seaman exists, there must be clear proof, not only of the subscription by the deceased of the instrument, but also of his knowledge of its nature and effect; that wherever it is executed *merely* as a security for debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid (*o*).

and even if written on a separate instrument from the power of attorney, if executed *merely* as security for a debt.

The equity of the statutes never has been, and ought not to be, extended further than to the wills of mariners; there would be great mischief in extending it to the wills of people in general, for then no man could safely make his creditor his executor (*p*).

These principles are not to be extended to other wills.

Section 3.

PERSONS INCAPABLE ON ACCOUNT OF THEIR CRIMINAL CONDUCT.

Formerly a traitor attainted, from the time of the treason committed, could make no will of his lands or goods, for they were forfeited to the King; as were the lands and goods of one attainted or convicted of felony. Further, it was said that if a man killed himself, his will as to his goods and chattels was void, but as to his lands was good, because there was no attainder (*q*). Now, however, forfeiture of lands and goods for treason and felony (including *felo de se*) has been abolished by statute (*r*), and it follows that traitors, felons, and suicides are no longer incapacitated from making wills.

Formerly traitors, felons, and suicides were incapable of making a will,

but they are no longer under any incapacity;

By the civil law the wills of divers others, as excommunicate persons, heretics, usurers, libellers, and the like, are void; but by our law the wills of such persons are good (*s*).

nor are persons whose wills were void by the civil law.

In conclusion, all persons in general, male or female, old or young, lay or spiritual, at any time before their death, whilst

All persons, save those before mentioned, may make a will.

(*n*) The cases will be found collected in *Zacharias* v. *Collis* (1820), 3 Phill., at pp. 189—201.

(*o*) *Per* Sir John Nicholl in *Zacharias* v. *Collis* (1820), 3 Phill., at pp. 202—204; see *Deardsley* v. *Fleming* (1755), 2 Lee, 98.

(*p*) *Per* Sir George Lee in *Florance* v. *Florance* (1755), 2 Lee, at p. 89.

(*q*) Bac. Abr., tit. Will (B.).

(*r*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

(*s*) Bac. Abr., tit. Will (B.).

they are able to speak so distinctly or write so plainly that another can understand them, and perceive that they understand themselves, may make a will of their lands, goods, and chattels; and none are restrained of this liberty but such as are before named (*t*).

SECTION 4.

KNOWLEDGE AND APPROVAL: WORDS INTRODUCED INTO THE WILL BY MISTAKE.

He who propounds a will must satisfy the Court that the testator knew and approved its contents.

In all cases, the party who puts forward a document as the will of a testator must establish to the satisfaction of the Court that the testator knew and approved of its contents at the time when he signed it (*u*). For if the testator sign a document of the contents of which he is ignorant, that cannot be held to be a valid will (*x*). The testator's knowledge and approval of the contents of the alleged will is thus part of the burden of proof assumed by every one who propounds the document (*y*).

Knowledge and approval assumed where due execution and testamentary capacity are proved,

This burden is discharged, in the absence of special circumstances which excite the vigilance of the Court, by proof of capacity and of the fact of execution, from which knowledge and approval of the contents of the instrument are assumed (*z*). For if the execution of a will by a competent testator be duly proved, the presumption is that he was cognisant of the contents, and that the instrument expresses his will, unless some other

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(*t*) *Ibid.*

(*u*) *Barry* v. *Butlin* (1838), 2 Moo. P. C. 482; *Guardhouse* v. *Blackburn* (1866), 1 P. & D., at p. 116; *Atter* v. *Atkinson* (1869), 1 P. & D., at p. 670; *Cleare* v. *Cleare* (1869), 1 P. & D., at p. 657.

(*x*) It was at one time held that a plea that the deceased was ignorant of the contents of the will was a bad plea, for, it was said, the testator may, if he likes, authorise another to make a will for him, and may say, "I do not know what you have put down, but I am quite ready to execute it": Sir C. Cresswell in *Cunliffe* v. *Cross* (1863), 3 S. & T. 37; *Middlehurst* v. *Johnson* (1860), 30 L. J. P. 14; but in *Hastilow* v. *Stobie* (1865), 1 P. & D. 64, Sir J. P. Wilde negatived this proposition, and held that it was essential to the validity of a will that at the time of its execution a testator should know its contents and should also approve of them; and that therefore a plea that the deceased, at the time he signed his will, did not know and approve of the contents thereof was good in law. Such a plea is now frequently used in probate actions. A testator must also intend the paper he signed to operate as his will, and parol evidence is admissible to prove or disprove that fact: see *post*, pp. 121, 122.

(*y*) *Cleare* v. *Cleare* (1869), 1 P. & D., at p. 657.

(*z*) *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 484; *Fawcett* v. *Jones* (1810), 3 Phill., at p. 476; *Paske* v. *Ollat* (1815), 2 Phill., at p. 324; *Ingram* v. *Wyatt* (1828), 1 Hagg., at p. 401; *Durling* v. *Loveland* (1839), 2 Curt. 225; *Durnell* v. *Corfield* (1844), 1 Rob., at p. 63; *Browning* v. *Budd* (1848), 6 Moo. P. C., at p. 435; *Hastilow* v. *Stobie* (1865), 1 P. & D., at p. 68; *Guardhouse* v. *Blackburn* (1866), 1 P. & D., at p. 116; *Cleare* v. *Cleare* (1869), 1 P. & D., at p. 658.

circumstance leads to a different conclusion, or renders it too doubtful for the Court to act upon that presumption (*a*).

unless there are circumstances of suspicion, or the testator's capacity is doubtful,

But if there are circumstances surrounding the execution which rouse the suspicion and vigilance of the Court (*b*), or if the capacity of the testator at the time of execution were doubtful (*c*), the Court will not rest satisfied with such *prima facie* presumption of knowledge and approval as arises from mere proof of the execution of the paper by a testator of sound mind, and the party propounding it must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate (*d*).

or those who impeach the will succeed in displacing the *prima facie* case.

Knowledge and approval must also affirmatively be proved by the person propounding the will, if those who oppose it succeed, by cross-examination of the witnesses or otherwise, in meeting the *prima facie* case raised by proof of execution (*e*).

Affirmative proof of knowledge and approval may take any form.

Such affirmative proof of knowledge and approval may take any form, provided it satisfies the Court. The fact that the deceased gave instructions for the will, or that it was read over to him or by him, is, no doubt, the most satisfactory, but not the only satisfactory form of proof by which the cognisance of the contents of the will may be brought home to the deceased. The Court will naturally look for such evidence, in some cases it may be impossible to establish a will without it, but the Court will not in *every* case require it (*f*).

The will need not originate with the deceased.

It is not essential that a will should originate with the testator, and therefore proof of instructions may be dispensed with, provided it be proved that the testator completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied that disposition (*g*).

Where a testator gives instructions for the will

If a testator has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those

(*a*) *Browning* v. *Budd* (1848), 6 Moo. P. C., at p. 435. If the testator by mistake executes a will prepared for another, he cannot be held to have known or approved of any part of the instrument: *Hunt* (1875), 3 P. & D. 250; *Meyer*, [1908] P. 353.

(*b*) As, for example, the fact that the will was written or prepared upon the instructions of a beneficiary: *Paske* v. *Ollat* (1815), 2 Phill., at p. 324; *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 484; *Atter* v. *Atkinson* (1869), 1 P. & D., at p. 668; and *vide ante*, pp. 71 *et seq.*

(*c*) *Billinghurst* v. *Vickers* (1810), 1 Phill., at p. 193; *Ingram* v. *Wyatt* (1828), 1 Hagg., at p. 401; *Durling* v. *Loveland* (1839), 2 Curt., at p. 230; *Durnell* v. *Corfield* (1844), 1 Rob., at p. 63; *vide ante*, pp. 62, 76.

(*d*) *Cleare* v. *Cleare* (1869), 1 P. & D., at p. 658; *Durnell* v. *Corfield* (1844), 1 Rob., at p. 63; *Atter* v. *Atkinson* (1869), 1 P. & D., at p. 668.

(*e*) *Cleare* v. *Cleare* (1869), 1 P. & D., at p. 658.

(*f*) Parke, B., in *Barry* v. *Butlin* (1838), 2 Moo. P. C., at p. 485. See *Durnell* v. *Corfield* (1844), 1 Rob., at p. 56; *Mitchell* v. *Thomas* (1847), 6 Moo. P. C., at p. 150.

(*g*) *Constable* v. *Tufnell* (1833), 4 Hagg., at p. 477; *Forfar* v. *Heastie* (1756), 2 Lee, at p. 310.

while in health, and executes it while in illness.

instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out" (*h*). So where a testatrix, lying in a state approaching insensibility, executed a will, drawn up in accordance with her previous instructions, it was held that, though she might not remember them, though she could not have understood the will, even if read to her clause by clause, yet, since she was capable of understanding and did understand that she was engaged in executing the will for which she had given instructions, therefore she knew and approved of its contents (*i*).

Words introduced without the testator's knowledge and approval may be rejected,

The above rules apply equally to a portion of the will as to the whole (*k*); and, therefore, if it can be proved to the satisfaction of the Court that any word or words (*l*) or any clause (*m*) in the document propounded as a will have been introduced without the knowledge and approval of the testator, such word or words or such clause may be rejected, and the remaining portion of the will alone admitted to probate.

even though their rejection renders ambiguous or insensible the clause of which they formed a part,

For if the words introduced into the will are so distinct and severable from the rest of it that their rejection does not alter the construction of the part of which the testator knew and approved, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone (*n*).

A much more difficult question arises where the rejection of the words alters the sense of those which remain (*o*). But it has been held that the application of the principle of striking out words introduced into the will clearly without the knowledge and approval of the testator, may be extended to a case where the effect of their rejection is to render ambiguous, or even insensible, the clause of which the words formed part. The meaning of the words which remain is a question for the Court of construction; and even if to strike out words inserted in error and to leave a blank space will not give full effect to the testator's wishes, the Court of Probate will, so far as it can—

(*h*) Sir J. Hannen in *Parker* v. *Felgate* (1883), 8 P. D., at p. 173.

(*i*) *Parker* v. *Felgate* (1883), 8 P. D. 171; see *Goodacre* v. *Smith* (1867), 1 P. & D., at p. 361; *Perera* v. *Perera*, [1901] A. C., at p. 361.

(*k*) *Guardhouse* v. *Blackburn* (1866), 1 P. & D., at p. 116.

(*l*) *Morrell* v. *Morrell* (1882), 7 P. D., at p. 75.

(*m*) *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448; and see pp. 87—92, *post*, *passim*.

(*n*) *Rhodes* v. *Rhodes* (1882), L. R. 7 A. C., at p. 198. (*o*) *Ibid.*

though it may not completely—carry out the intentions of the testator by adopting this course (*p*).

So where words are introduced in a testamentary paper *per incuriam* without any instructions from the testator, and the testator executes the paper in ignorance of the fact of the insertion of such words, the will containing the words not having been read over to or by him in such a way as to bring them to his notice (*q*), such words form no part of his will, and probate may be granted of the remainder of the document, omitting the words so introduced (*r*).

(*p*) *Boehm*, [1891] P., at p. 251.

(*q*) *Vide post*, pp. 88 *et seq.*

(*r*) See *Duane* (1862), 2 S. & T. 590, where the paper propounded consisted of a skeleton printed form of a will, partly filled in, and one of the printed clauses contained a disposition of residue. This clause was inadvertently not struck out by the person who prepared the will; it was not read over to the testator, or his attention drawn to it in any way, when the will was executed. The Court admitted the will to probate, omitting the residuary clause.

In *Oswald* (1874), 3 P. & D. 162, a clause revoking all former wills was, *per incuriam*, introduced into the will without any instructions from the testatrix. The will was executed by the testatrix, but was not read over to her or by her, and she was not aware that it contained such words of revocation. The clause revoking all former wills was omitted from the probate. See *Moore*, [1892] P. 378, where a clause of revocation was part of the printed form of a will, filled in by the testatrix herself. The testatrix did not, however, fill up the blanks in that part of the form, and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause. The clause of revocation was omitted from the probate. And see *Marklew* v. *Turner* (1900), 17 T. L. R. 10; but see *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P., at p. 344.

In *Morrell* v. *Morrell* (1882), 7 P. D. 68, a testator, in the instructions for his will, directed that *all* his B shares should be given to his nephews, but in the will itself the word "forty" was several times inserted by the draftsman before the word "shares," and the will was executed in that state. The testator owned, in fact, 400 B shares. The jury found: 1. That the word "forty" was introduced by mistake. 2. That the particular mistake was in inserting the word "forty." 3. That the testator did not know of the insertion of the word; that the clauses in which it appeared were not read over to him. 4. That he only approved the will upon the supposition that all his B shares were given to his nephews. The Court ordered the word "forty," wherever it occurred in the will, to be struck out.

In *Boehm*, [1891] P. 247, a testator gave instructions that his will should contain a bequest of £10,000 to each of his daughters "Georgiana" and "Florence." The conveyancer who prepared the will, by inadvertence, inserted the name of Georgiana in *both* bequests of £10,000, and omitted the name of Florence altogether. The draft was not read over to the testator at any time, and the error was not brought to his notice. Held: That probate of the will might issue, omitting the name "Georgiana" in the second bequest of £10,000.

An attestation clause forms no part of a will or codicil, and therefore where, in the attestation clause of a third codicil, it was stated by mistake that the first codicil was cancelled, it was held that the words might be rejected, and the first codicil admitted to probate: *Atkinson* (1883), 8 P. D. 165.

The Court of Probate has authority to omit from the probate a clause introduced into the will by fraud, without the knowledge of the testator: *Barton* v. *Robins* (1775), 3 Phill. 455, n.; *Allen* v. *McPherson* (1845—7), 1 H. L. C. 191; *ante*, p. 78.

But a testator cannot make an approval of the words which have been put into his intended will conditional on their having in law the effect he desires. If he executes a will knowing and approving the words used, the

but the Court has no power to supply words accidentally omitted from the will.

But though the Court may, in certain cases, omit from the probate words introduced into the will by mistake, it has no power to supply words accidentally omitted from the will. The Wills Act provides that no will shall be valid unless it shall be in writing and unless executed in a certain manner, and this provision applies to every part of the will and admits of no qualification. Therefore the Court cannot admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be from oral or written instructions, that they were intended to be part of the will (*s*).

It is thus clear that, though words may be struck out of the will by the Court, no fresh word or words can be inserted.

It therefore becomes material, in cases where a mistake has been made in a will, to consider whether the mistake arose from the introduction into the will of words of which the testator did not know and approve, or from the omission of words which he intended to form part of his will (*t*). In the latter case, the error cannot be rectified; but where the mistake arose from the substitution of some word or phrase for another, such word or phrase may be struck out, although the effect of its rejection is to render ambiguous, or even meaningless, the clause of which it formed part (*u*).

How far the fact that the will was read over to or by the testator

It has been stated that words introduced into a will *per incuriam* may be rejected by the Court, if the will containing the words so introduced has not been read over to or by the testator. It remains to consider how far the fact that the will

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Court cannot afterwards exclude from probate words which have been put into the will on the ground that the testator has taken a view of their legal effect which turns out to be mistaken: *Beech* v. *Public Trustee*, [1923] P. 46.

(*s*) *Wilson* (1841), 2 Curt. 853; *Birks* v. *Birks* (1865), 4 S. & T., at p. 30; *Guardhouse* v. *Blackburn* (1866), 1 P. & D., at p. 114; *Harter* v. *Harter* (1873), 3 P. & D., at p. 19; *Morrell* v. *Morrell* (1882), 7 P. D., at p. 70. In *Bushell* (1887), 13 P. D. 7, Butt, J., substituted in the probate the word "Bristol" for the word "British," which occurred by mistake in the will. In *Huddleston* (1890), 63 L. T. 255, the same learned Judge substituted the word "excluding" for the word "including," which occurred by mistake in the will. But in *Schott*, [1901] P., at p. 192, Sir Francis Jeune, referring to these two cases, said: "I am afraid that it must be admitted that upon this point . . . the late Sir Charles Butt was heretical. I find that a note has been put, in manuscript, in the margin of *In the Goods of Bushell* in my copy of the Law Reports. It is in these words: 'By the President's direction this is not to be followed . . .' Under these circumstances I think that those two decisions of Sir Charles Butt must now be said to be finally disposed of." The law was different as to wills executed before the Wills Act, 1837, came into operation: see *Fawcett* v. *Jones* (1810), 3 Phill., at pp. 447 *et seq.*, and the cases there collected. These cases are of no authority in reference to wills made since 1838: see *Guardhouse* v. *Blackburn* (1866), 1 P. & D., at p. 114.

(*t*) *Harter* v. *Harter* (1873), 3 P. & D., at p. 19; *Morrell* v. *Morrell* (1882), 7 P. D., at p. 70.

(*u*) *Boehm*, [1891] P., at p. 251; *vide ante*, p. 86.

was read over to or by the testator must be taken as conclusive proof of his knowledge and approval of the whole of its contents.

is conclusive as to his knowledge and approval of *all* its contents.

In *Guardhouse* v. *Blackburn* (*x*) Lord Penzance laid down the following proposition : " Although the testator did know and approve the contents, a paper may be refused probate if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Subject to this proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. The above rules apply equally to a portion of the will as to the whole."

That fact conclusive of knowledge and approval in the absence of fraud.

In *Atter* v. *Atkinson* (*y*) the same learned Judge restated this proposition in the following terms : " The question of fact is," he said, in his charge to the jury, " did the testatrix really ever read the contents of this document [*i.e.*, the will] ? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity, she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents. . . . Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered. The real, practical question in this case is, did the testatrix ever read the residuary clause ? Was it ever brought to her notice in that or any other way before the execution ? If you think she was of a sound and capable mind, and really did read the will through, and put her name to it, she was bound by that act, and there is an end of the matter " (*z*).

This proposition was considered by the House of Lords in the case of *Fulton* v. *Andrew* (*a*), and the decision in that case —though not throwing any substantial doubt upon the proposition as a rule of law—is greatly to weaken the universality and unyielding character of its application (*b*). The Lord Chancellor, after stating that he should greatly deprecate in a matter of this kind the introduction or creation of fixed and

(*x*) (1866), 1 P. & D., at p. 116. (*y*) (1869), 1 P. & D., at p. 670.
(*z*) See *Fawcett* v. *Jones* (1810), 3 Phill., at p. 489; *Hastilow* v. *Stobie* (1865), 1 P. & D., at p. 69; and see *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.
(*a*) (1875), L. R. 7 H. L. 448.
(*b*) *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P., at p. 341.

But this rule must be read with two reservations:

unyielding rules of law which are not imposed by Act of Parliament, quoted the passage which has been cited from Lord Penzance's charge to the jury in *Atter* v. *Atkinson* (*c*). He then continued (*d*): "I do not know that there is anything in that direction, taken as a whole, to which I could venture to make any objection; but you will observe the very important qualification—I say, 'taken as a whole.' In the first place the jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now applying those observations to the present case . . . It appears that the witnesses stated either that the will was read over to the testator, or that it had been left with him overnight for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause—and it may well be that the jurors . . . were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

(1) The reading of the will to or by the testator may not have been such a proper reading or explanation as would apprise the testator of its contents,

and (2) failure to bring home to the mind of the testator the effect of his act may, under certain circumstances, amount to fraud.

"Moreover, how does the qualification that there must be no fraud bear upon the present case? It is very difficult to define the various grades or shades of fraud; but it is a very important qualification to engraft upon the general state of things that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favour of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, to bring home to the mind of the testator the effect of his testamentary act and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of fraud on their part. The qualification of Lord Penzance in the charge I have read may entirely apply to such a case" (*e*).

It is still open to the Court to consider

It therefore follows that, where there are strong reasons for supposing that the will or any particular part of it does not

(*c*) (1869), 1 P. & D., at p. 670; quoted *ante*, p. 89.
(*d*) L. R. 7 H. L., at p. 462.
(*e*) *Per* Cairns, L.C., in *Fulton* v. *Andrew* (1875), L. R. 7 H. L., at pp. 462—464; see also the remarks of Lord Hatherley at pp. 469, 473.

meet the testator's intentions, it is still open for the tribunal —without impugning the general rule of law that a competent testator to whom a will is read is to be held to have approved of its contents—to consider whether the will was read over in a proper way (*f*). And if the tribunal finds as a fact that a particular portion of the will was not brought to the knowledge of the testator in such a way that he must be assumed to have confirmed it by his subsequent execution of the will, and that the words were introduced by mistake, its duty is to hold that those words do not form part of the will of the testator (*g*).

whether the will was read over in a proper way.

Where words which do not express the intention of the testator have been introduced into a will by the draftsman, a distinction exists between cases in which such words were unintentionally and inadvertently introduced, and cases in which they were introduced by the draftsman with the intention of carrying out the instructions of the testator but from ignorance or error inappropriate terms were used. It is a matter of some difficulty to extract a definite principle from the cases on this subject, but it is submitted that they establish the following rules :—

Words introduced into the will by mistake of the draftsman.

First. Where the mind of the draftsman has really been applied to the particular clause (*h*), then, whether the error has arisen from the fact that he misunderstood the instructions of the testator (*i*), or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executes the will is—in the absence of fraud (*k*)—bound by the error so made as if it were his own,

(1) Where the testator instructs another person to draw up the will, and the draftsman misunderstands, or uses inappropriate

(*f*) *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P., at p. 341. Thus for the testator merely to cast his eye over his will might not be deemed enough : *Ibid.*, at p. 343; or that a draft was sent to the testatrix for perusal, accompanied by a letter to the effect that there had been no material departure from the instructions : *Brisco* v. *Baillie Hamilton*, [1902] P. 234. See also *Atter* v. *Atkinson* (1869), 1 P. & D., at p. 669; *Fulton* v. *Andrew* (1875), L. R. 7 H. L., at p. 473. But see *Gregson* v. *Taylor*, [1917] P. 256 (the presumption of knowledge and approval which arises from the reading of the will by a competent testator can be set aside only by the clearest evidence).

(*g*) *Brisco* v. *Baillie Hamilton*, [1902] P., at p. 237.

(*h*) See *Dyke* (1881), 6 P. D., at p. 208; *Stedham*, *ibid.*, at p. 206; and see *Chilcott*, [1897] P. 223.

(*i*) But see *Brisco* v. *Baillie Hamilton*, [1902] P. 234. In that case the solicitor who drew the will mistook the extent of the testatrix's interest in certain landed estates, and the will was accordingly executed devising only "her undivided moiety of and in" the said estates. The estates, in fact, belonged entirely and absolutely to the testatrix. The Court, notwithstanding the fact that the draft of the will had been sent to her for her approval, and that she had returned the draft with certain alterations in other parts, found as a fact that she did not know and approve of the clause so drawn, and directed that the restrictive words should be eliminated from the probate. It is difficult to reconcile this case with those cited in note (*l*), *infra*, but the draft was accompanied by a letter from the solicitor which in effect stated that there had been no material departure from the terms of the sister's will, on which it was modelled : see *Gregson* v. *Taylor*, [1917] P., at p. 262.

(*k*) See *Collins* v. *Elstone*, [1893] P., at p. 5.

language, the testator is bound by the mistake.

even if the mistake were not directly brought to his notice; and the Court will not omit from the probate the words so introduced into the will (*l*).

(2) Where the words are introduced by the draftsman *per incuriam*, the testator is not bound by the mistake.

Secondly. Where the mind of the draftsman has never really been applied to the words of the particular clause, and the words are introduced into the will *per incuriam*, without advertence to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice (*m*).

(*l*) *Harter* v. *Harter* (1873), 3 P. & D. 11 (where the draftsman, instead of disposing of the residue, as instructed, disposed only of the residue of the real estate; see the observations of Sir J. Hannen, 3 P. & D., at p. 20); *Morrell* v. *Morrell* (1882), 7 P. D. 68 (see the observations of Sir J. Hannen at pp. 70, 73); *Rhodes* v. *Rhodes* (1882), L. R. 7 A. C. 192 (where the words "from and after the decease of my said wife without issue" were inserted by the draftsman without reason or special instructions"; see the observations of Lord Blackburn at pp. 199 *et seq.*); *Collins* v. *Elstone*, [1893] P. 1 (where a clause revoking former wills was introduced, and the testatrix was assured that to erase it might invalidate the will, and that it would not revoke an earlier will and codicil; see the observations of Sir F. H. Jeune at pp. 4, 5); *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335 (several clauses including one of revocation alleged to have been introduced without instructions: see *per* Sir F. H. Jeune, at p. 343); *Gregson* v. *Taylor*, [1917] P. 256 (where the words alleged to have been introduced by mistake were "To Maud Adelaide Ashwin, daughter of Francis Manley Bird Ashwin, the sum of £4,000"); *Beech* v. *Public Trustee*, [1923] P. 46 (if a testator executes a will knowing and approving the words used, the Court cannot afterwards exclude from probate words which have been put into the will on the ground that the testator has taken a view of their legal effect which turns out to be mistaken). See also *Durlacher* (1896), 75 L. T. 664.

(*m*) Thus, the word "Georgiana," introduced into the will by the draftsman in mistake for the word "Florence," was omitted from the probate: *Boehm*, [1891] P. 247; the figures "103," introduced by the draftsman in mistake for the figures "105," were omitted: *Walkeley* (1893), 69 L. T. 419; the word "British," introduced by the draftsman in mistake for the word "Bristol," was omitted: *Bushell* (1887), 13 P. D. 7; the word "including," introduced into the will by the engrosser in mistake for the word "excluding," omitted: *Huddleston* (1890), 63 L. T. 255 (see as to these two cases *Schott*, [1901] P., at p. 192); the word "revenue," inserted in the will by the draftsman in mistake for "residue," omitted: *Schott*, [1901] P. 190; the words "undivided moiety of and in" (applying to the testator's interest in certain estates), introduced into the will by the draftsman in ignorance of the extent of the testator's share in the estates, omitted: *Brisco* v. *Baillie Hamilton*, [1902] P. 234 (*vide supra*, p. 91, note (*i*)). The word "real" introduced into the will in the process of copying in mistake for the word "said," struck out: *Vaughan* v. *Clerk* (1902), 87 L. T. 144; and see *Wrenn*, [1908] 2 Ir. R. 370; *Cooper*, [1899] P. 193. See also *Morrell* v. *Morrell* (1882), 7 P. D. 68 (*supra*, p. 87, note (*r*).

Will wrongly dated.

Parol evidence is admissible to show that a will or codicil has, by mistake, been wrongly dated. The wrong date cannot be altered, but probate will issue of the document "as having been executed on" the correct date: *Randfield* v. *Randfield* (1860), 6 Jur. (N.S.) 901; *Thomson* (1865), 1 P. & D. 8; *Reffell* v. *Reffell* (1866), 1 P. & D. 139. If probate has issued of the will so wrongly dated, before the mistake is detected, the Court may order a memorandum to be endorsed on the probate as to the true date on which the will was executed: *Allchin* (1869), 1 P. & D. 664. For cases in which the testator—intending to confirm an earlier will—has by mistake inserted the date of a will other than that which he intended to confirm, see *post*, pp. 198 *et seq.*

CHAPTER III.

THE FORM AND MANNER OF MAKING A WILL.

Wills made since January 1, 1838.

For a will to be duly executed according to the law of England (*a*), its execution and attestation must be in accordance with the provisions of the Wills Act, 1837 (*b*), as amended by the Wills Act Amendment Act, 1852 (*c*).

By section 5 of the Statute of Frauds, wills of real estate were required to be executed in accordance with certain prescribed formalities,

Prior to the year 1837, the execution and attestation of wills of real estate was regulated by section 5 of the Statute of Frauds (*d*), which provides that from and after June 24, 1677, all devises and bequests of any lands or tenements "shall be in writing, signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

but no formalities were required for the execution of wills of personal estate.

This section did not, however, extend to wills of personal property; and until the passing of the Wills Act, 1837, wills of that description were not required to be signed or attested; it was sufficient that the will was reduced into writing in the lifetime of the testator, and that it contained his real wishes and intentions (*e*).

The Wills Act, 1837, applies to all wills, whether of real or personal estate.

The Wills Act, 1837, repeals the sections of the Statute of Frauds which relate to wills (*f*), and extends to all wills executed on or after January 1, 1838, whether they dispose of real or personal property; and its effect is to abolish the distinction between wills disposing of real and wills disposing of personal property, so far as the formalities for their due execution and attestation are concerned.

(*a*) Under certain circumstances wills of personal estate are entitled to probate in England though not executed in accordance with English law, *e.g.*, where they are executed with the formalities prescribed by the law of the testator's domicil, or under the provisions of Lord Kingsdown's Act: *Vide ante*, Chapter I, section 3.

(*b*) 1 Vict. c. 26.

(*c*) 15 Vict. c. 24.

(*d*) 29 Car. 2, c. 3; *post*, p. 649.

(*e*) See *Ferraris* v. *Hertford* (1843), 3 Curt., at p. 477; sections 19 and 20 of the Statute of Frauds.

(*f*) Sections 5, 6, 12, 19—24; *post*, pp. 649—651.

Provisions of the Wills Act, 1837, ss. 9, 13.

Sections 9 and 13 of the Wills Act, 1837, are as follows :

Section 9. " No will (*g*) shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned : (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Section 13. " Every will executed in manner hereinbefore required shall be valid without any other publication thereof."

It will be observed that section 9 of the Wills Act, 1837, though departing from the provisions of section 5 of the Statute of Frauds in several important respects, yet reproduces in identical language some of the expressions used in the latter section. It has been said that where there have been no decisions as to the statute in question, recourse may be had to decisions upon preceding statutes *in pari materia* (*h*), and decisions upon the construction of expressions in section 5 of the Statute of Frauds are, therefore, referred to occasionally in the succeeding pages.

It is proposed to deal with the requirements of section 9 of the Wills Act, 1837, in their order.

Section 1.

A WILL MUST BE IN WRITING.

Provision of Wills Act, 1837, s. 9.

The first provision of the section is : " No will shall be valid unless it shall be in writing."

What the expression " in writing " includes.

Section 20 of the Interpretation Act, 1889 (*k*), provides that in every Act of Parliament expressions referred in writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

A will may be written in pencil, or in a foreign language.

A will may be written in pencil wholly or in part (*l*); neither

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(*g*) This term includes a testament, codicil, an appointment by will in exercise of a power, and any other testamentary disposition : see section 1 of the Act.

(*h*) Dr. Lushington in *Hudson* v. *Parker* (1844), 1 Rob., at p. 23.

(*k*) 52 & 53 Vict. c. 63.

(*l*) *Rymes* v. *Clarkson* (1809), 1 Phill. 22, 35. As to the presumption which arises when a will is altered partly in pencil and partly in ink, see *Hall* (1871), 2 P. & D. 256; *Adams* (1872), 2 P. & D. 367; and *post*, p. 178.

is it material in what language a will is written, whether in Latin, French (*m*); or any other tongue (*n*).

The effect of this provision of the Wills Act, 1837, is to invalidate all nuncupative wills made after January 1, 1838, except the nuncupative wills of soldiers in actual military service, and mariners or seamen at sea, which are excepted from the operation of the Act by section 11 thereof (*o*).

But no will may be made by word of mouth.

Section 2.

THE TESTATOR'S SIGNATURE.

The section further provides that the will must be signed by the testator, or by some other person in his presence and by his direction.

Provision of Wills Act, 1837, s. 9.

A mark.—If the testator, instead of signing his name to the will, place his mark upon it, that is a sufficient signing; and it is not necessary to prove that he could not write his name at the time (*p*). The testator's mark is sufficient, even though his hand is guided in making it (*q*).

A mark is sufficient, though the testator is able to write his name,

It is immaterial that the name of the testator is not placed against the mark, even though the name does not appear anywhere upon the face of the instrument (*r*); or even though a wrong name is written against the testator's mark by another person, for the mark is a sufficient execution, and that which some one else wrote cannot vitiate it (*s*).

though the testator's name is not written against the mark,

or a wrong name is written.

But probate will not be granted where there is no evidence, or only highly suspicious evidence, to identify the person affixing the mark and executing the will with the testator (*t*).

Initials.—The initials of a testator's name placed by him upon the will are a valid signature (*u*).

Initials.

Wrong name.—If the testator, intentionally or unintentionally, signs under a wrong or assumed name, still if he signs

A wrong name signed *animo testandi* will suffice.

(*m*) See *Whiting* v. *Turner* (1903), 89 L. T. 71.

(*n*) Swinb., Part IV, s. 28, pl. 3; *Foubert* v. *Cresseron* (1698), Show. P. C. 194; *Reynolds* v. *Kortright* (1854), 18 Beav. 417.

(*o*) *Vide post*, pp. 256 *et seq.*

(*p*) *Baker* v. *Dening* (1838), 8 A. & E. 94; *Field* (1843), 3 Curt. 752.

(*q*) *Wilson* v. *Beddard* (1841), 12 Sim. 28.

(*r*) *Bryce* (1839), 2 Curt. 325.

(*s*) *Clarke* (1858), 1 S. & T. 22, where a will purporting to be that of S. Clarke was executed by a mark, against which appeared the name of S. Barrel (the testatrix's maiden name); and see *Douce* (1862), 2 S. & T. 593, where a testator was wrongly named in the body of the will, and the wrong name was also placed against his mark.

(*t*) *Edmonds* v. *Lewer* (1865), 11 Jur. (N.S.) 911.

(*u*) *Savory* (1851), 15 Jur. 1042; *Wingrove* (1850), 15 Jur. 91; *Hinds* (1852), 16 Jur. 1161.

animo testandi, that is a sufficient signature, for the name so written may stand for and pass as the mark of the testator (*x*).

Sealing with an ordinary seal, *semble*, will not suffice,

Sealing.—It was at one time held, on the construction of section 5 of the Statute of Frauds, that sealing was signing, on the analogy of a signature by a mark (*y*); but upon a review it was held that sealing without signing is not a sufficient execution of a will (*z*). For it was said, " any one may put a seal, no particular evidence arises from that seal; common seals are alike, and one man's may be like another's; no certainty or guard therefore arises from thence " (*a*).

On the analogy of these cases, it would seem that sealing with an ordinary seal, with nothing to identify it with that of the testator, is not a sufficient signature under the Wills Act, 1837 (*b*).

but if the seal is inscribed with the testator's initials or name,

But where a seal inscribed with the initials of the testator was affixed to the will by him in the presence of the witnesses, and he placed his finger upon the seal and said " This is my hand and seal," that was held to be a sufficient signature (*c*).

that may be regarded as a signature by mark.

And where a testator, towards the end of his life, had his usual signature engraved so that it might be stamped on documents requiring his signature, and his will was so stamped with his name by a person in his presence and by his direction, Sir Cresswell Cresswell said : " Whether the mark is made by a pen or some other instrument cannot make any difference, neither can it in reason make a difference that a facsimile of the whole name was impressed on the will instead of a mere mark or cross. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature " (*d*). Accordingly the learned Judge held the will to have been validly executed.

A will may be signed for the testator by some other person.

Signature by another for the testator.—The section provides that the will may be signed by some other person in the presence of the testator and by his direction.

(*x*) *Redding* (1850), 2 Rob. 339, where the will was signed under an assumed name; *Glover* (1847), 11 Jur. 1022; 5 N. C. 553, where a woman whose name was " Glover " signed her name as " Reed," that being the name of her first husband; but with reference to the signatures of witnesses, see *Leverington* (1886), 11 P. D. 80, and *post*, p. 114.

(*y*) *Lemayne* v. *Stanley* (1685), 3 Lev. 1; *Warneford* v. *Warneford* (1727), 2 Str. 764.

(*z*) *Ellis* v. *Smith* (1754), 1 Ves. Jun. 11, 15; *Smith* v. *Evans* (1751), 1 Wils. K. B. 313; see *Wright* v. *Wakeford* (1810), 17 Ves., at p. 459.

(*a*) *Grayson* v. *Atkinson* (1752), 2 Ves. Sen. 454, at p. 458.

(*b*) See *Byrd* (1842), 3 Curt. 117, where it was held that the sealing by the witnesses did not amount to a subscription by them. *Sed quære*, whether even a common seal, if affixed by the testator by way of a signature, would not be sufficient : see *Jenkins* v. *Gaisford* (1863), 3 S. & T. 93, 96.

(*c*) *Emerson* (1882), 9 L. R. Ir. 443.

(*d*) *Jenkins* v. *Gaisford* (1863), 3 S. & T. 93, 96.

Such person may be one of the attesting witnesses or the person who drew the will,

The person who signs the testator's name in his presence and by his direction may be one of the witnesses who attests the execution of the will (*e*), or the person who drew the will (*f*).

and may sign in his own name,

It is a sufficient compliance with the Act if some other person, at the testator's request, signs the will for him, not in the testator's name, but his own (*g*).

or by a mark,

or by impressing a facsimile of the testator's signature on the will.

It has been held that the word "signed" in the section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence and by his direction; therefore a mark made by some other person under such circumstances must suffice (*h*). And whether the mark is made by a pen or by some other instrument can make no difference; neither can it make any difference that a facsimile of the whole name was impressed on the will instead of a mere mark or cross, provided the mark made by the instrument or stamp used, was intended to stand for and to represent the signature of the testator (*i*).

The testator must indicate to the witnesses that the signature is placed on the will at his request.

When the will is signed by a third party in the presence of the testator and of the attesting witnesses, it has been held that the testator must, by act or word, in some way indicate to the two witnesses present that the signature was put there at his request. If a previous positive direction had been given to the agent to sign the will, it might not be that the testator would repeat that direction in the presence of the witnesses; but he must do something to show that he understood at the time that the other party was signing for him (*k*).

Quære, is it necessary to call affirmative evidence that the signature was made in the testator's presence and by his direction?

Where a will was produced bearing the name of the testator, and there was no evidence that the name was in his handwriting, it was suggested that there ought to be some evidence that the signature was made in his presence, and by his direction. Sir H. J. Fust observed, "Surely, if a testator acknowledges a signature to be his, that is sufficient, unless the contrary be proved" (*l*).

(*e*) *Bailey* (1838), 1 Curt. 914; *Smith* v. *Harris* (1845), 1 Rob. 262.

(*f*) *Elcock* (1869), 20 L. T. 757.

(*g*) *Clark* (1839), 2 Curt. 329, where the other person wrote "Signed on behalf of the testator, in his presence and at his direction by me. C. F. F., Vicar of Warfield"; *Blair* (1848), 6 N. C. 528, where the words were "This will was read and approved by G. F. B. (the testator) by C. C. in the presence of," etc.

(*h*) *Jenkins* v. *Gaisford* (1863), 3 S. & T. 93, at p. 96.

(*i*) *Ibid.* A name pencilled beforehand merely to indicate where the testator is to sign is not sufficient: *Reeves* v. *Grainger* (1908), 52 Sol. Jo. 355.

(*k*) *Marshall* (1866), 13 L. T. 643; and see *Summers* (1850), 2 Rob. 295; *Morritt* v. *Douglas* (1872), 3 P. & D. 1.

(*l*) *Gaze* v. *Gaze* (1843), 3 Curt. 451.

The third person must sign "in the presence" of the testator.

With regard to the signature being made in the presence of the testator, it is assumed that the cases which relate to the presence of the witnesses would apply (*m*).

Section 3.

POSITION OF TESTATOR'S SIGNATURE.

Provision of Wills Act, 1837, s. 9: the will must be signed "at the foot or end." Restrictive interpretation of this provision cause grave injustice.

Section 9 (*n*) of the Wills Act, 1837, provides that the will must be signed "at the foot or end thereof" by the testator, or by some other person in his presence and by his direction.

This provision, designed perhaps to prevent future controversy whether a will containing the name of the testator only at the commencement—thus: "This is the last will and testament of A. B."—was a complete and perfect instrument (*o*), gave rise to much litigation, with the result that probate of a very great number of wills was refused on the ground that they were not properly signed at the foot or end. For it was held that these words invalidated all wills in which the signature was not so affixed as to leave no blank space for any interpolation between the end of the will and the signature (*p*).

But this construction was found to produce such extensive injustice that the Legislature intervened to alter the law so established.

Accordingly the Wills Act Amendment Act, 1852, was passed, by which a very wide construction is placed upon the words "at the foot or end."

The Wills Act Amendment Act, 1852 (*q*), provides:

Section 1. "Where by [the Wills Act, 1837] it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*r*); and that no such will shall be affected by the circum-

(*m*) See *post*, pp. 112, 113.
(*n*) *Ante*, p. 94.
(*o*) *Smee* v. *Bryer* (1848), 1 Rob. 616, 623.
(*p*) *Smee* v. *Bryer* (1848), 1 Rob. 616; 6 Moo. P. C. 404; and see *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 457.
(*q*) 15 Vict. c. 24.
(*r*) *Beside.*—See *Jones* (1865), 4 S. & T. 1, where the signature was written down the lower part of the edge of the paper; *Wright* (1865), 4 S. & T. 35, along the sides of the will upon the third page; *Coombs* (1866), 1 P. & D. 302, on the second page, crossways, the will ending

stance that the signature shall not follow or be immediately after the foot or end of the will (*s*), or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*t*), or by the circumstance that the signature shall be placed among the words of the testimonium clause (*u*), or of the clause of attestation (*x*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening (*y*), or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*z*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on

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at the bottom of the third page: see, as to this case, *Royle* v. *Harris*, [1895] P. 163, 166; *Ainsworth* (1870), 2 P. & D. 151, beside the two last lines of the will; *Usborne* (1909), 25 T. L. R. 519, in the side margin of the will.

Opposite.—See *Williams* (1865), 1 P. & D. 4, signature on the third page, opposite to the conclusion of the will in the middle of the second page. A signature to a codicil in the margin of the *will* was held not to be a due execution of the codicil: *Hughes* (1887), 12 P. D. 107. As to the intention of the testator to give effect to the will by his signature, see *post*, pp. 101, 102.

Under.—See *Woodley* (1864), 3 S. & T. 429, where the signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line; *Powell* (1865), 4 S. & T. 34, where the attestation clause and names of the attesting witnesses were at the bottom of the second side; a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side.

(*s*) See *Page* v. *Donovan* (1857), Dea. & Sw. 278, at the end of a notarial minute which followed the last dispositive clause of the will.

(*t*) *Vide post*, p. 100, note (*a*).

(*u*) See *Mann* (1858), 28 L. J. P. 19, where the will ended "In witness whereof I, M. H. M., have hereunto set my hand," and that was the only signature; *Trott* v. *Skidmore* (1860), 2 S. & T. 12, where the concluding words of the will, all in the handwriting of the testator (Joseph Skidmore), were "a receipt to be provided by the receiver from all further claim upon the estate of their departed brother Joseph Skidmore," and that was the only signature; and see *Winsor* v. *Pratt* (1821), 5 J. B. Moore, 484, where it was held that a testator's signature at the foot of a will is sufficient, even if the testimonium clause refers to other signatures to the preceding pages which were in fact not made.

(*x*) See *Walker* (1862), 2 S. & T. 354, where it was held that the deceased intended to give effect to his will by his signature in the attestation clause, in spite of the fact that there was a subsequent unattested signature by him; *Huckvale* (1867), 1 P. & D. 375; *Casmore* (1869), 1 P. & D. 653, where the circumstances were similar to those in *Walker* (*supra*); *Pearn* (1875), 1 P. D. 70; *Harris* (1875), 23 W. R. 734; *Torre* (1862), 8 Jur. (N.S.) 494.

(*y*) See cases in note (*z*), *infra*.

(*z*) See *Puddephat* (1870), 2 P. & D. 97, where the name of the deceased was written beneath the signatures of the attesting witnesses, and no evidence could be given of the order in which the signatures were made; *Jones* (1877), 46 L. J. P. 80, where the circumstances were similar to those in *Puddephat* (*supra*); *Horsford* (1874), 3 P. & D. 211, where the signature of the testator was on the sixth page of a will, the attestation clause and the signatures of the witnesses appearing at the bottom of the fifth page.

or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*a*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it (*b*), nor shall it give effect to any disposition or direction inserted after the signature shall be made " (*c*).

Section 2. The Act to extend to certain wills already made.

Section 2. " The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will."

(*a*) See *Wright* (1865), 4 S. & T. 35, where the will filled two pages of a sheet of notepaper, and the signatures were written along the sides of the will upon the third page; *Williams* (1865), 1 P. & D. 4, on the third page, the will ending in the middle of the second page, and see *Derinzy* v. *Turner* (1851), 1 Ir. Ch. Rep. 341; *Hunt* v. *Hunt* (1866), 1 P. & D. 209, on the top of the fourth page, the will ending in the middle of the third page; *Coombs* (1866), 1 P. & D. 302, crossways on the second page, the will filling the first and third pages; *Fuller*, [1892] P. 377, on the fourth page, the will being written on the first page, the second and third pages blank, see *Rice* (1870), 5 Ir. R. Eq. 176; *Millward* v. *Buswell* (1904), 20 T. L. R. 714, where the will, written on three pages, was signed only on the first page, and that page was admitted to probate.

Back.—When the signature is so placed that the witnesses are unable to see the body of the will or codicil, there must be some evidence to satisfy the Court that the will was written on the paper before the signatures were put there : *Hammond* (1863), 3 S. & T. 90. In *Archer* (1871), 2 P. & D. 252, where the signatures were written on the back of a sheet of paper, which was otherwise blank, the will being wholly written on the other side, the Court, on proof that the deceased wrote the whole will in the presence of the witnesses, held that it was well executed.

On separate sheet attached to the will.—If the signatures are upon a separate piece of paper, attached to the end of the will, the Court must be satisfied that the piece of paper was so attached at the time the signatures were made. See *Gausden* (1861—2), 2 S. & T. 362, where the signature was upon a piece of paper pasted on the right-hand bottom corner of the parchment on which the will was written; *Cook* v. *Lambert* (1863), 3 S. & T. 46, which is a similar case to *Gausden* (*supra*); *Horsford* (1874), 3 P. & D. 211, where the paper on which the signature was written was attached to the body of the will with string; *Lewis* v. *Lewis*, [1908] P. 1, where the two pieces of paper were, at the time of the execution, held together for the moment by the testator's finger and thumb; but see *Lambert* (1862), 31 L. J. P. 118; *West* (1863), 32 L. J. P. 182. And see *post*, p. 116, note (*g*).

(*b*) See *post*, pp. 102 *et seq.*

(*c*) See *Arthur* (1871), 2 P. & D. 273, where the testator, after signing his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature.

Section 3. "The word 'will' shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the [Wills Act, 1837]."

Section 3. Interpretation of "will."

It is to be observed, with reference to the provisions of this statute, that whatever position the signature of the testator occupies, the Court must be satisfied that the testator intended to give effect, by such signature, to the writing signed as his will.

Whatever be the position of the testator's signature, it must be intended to give effect to the will.

Thus, where one of two sisters prepared two wills for their respective execution, the legacies in each and the disposition of the residue being almost identical, and in each case a life interest being given to the survivor in the bulk of her sister's property, and the deceased by mistake executed the will prepared for her sister, the Court held that, as she did not know and approve of any part of the contents as the will she had signed, and as it was quite clear that if she had known of the contents she would not have signed it, probate of the paper so executed must be refused (*d*).

A signature made to the *wrong* document by mistake will not give effect to it as a will.

And where the will is in several sheets, and each sheet is signed by the testator, such signatures upon all sheets *except the last* will *prima facie* be regarded as placed there by the testator merely to authenticate the sheets so signed and to guard against other sheets being interpolated, and not effective as an execution of the whole will or any part thereof (*e*).

Prima facie, signatures on all sheets except the last are signatures of authentication and not of execution.

(*d*) *Hunt* (1875), 3 P. & D. 251; *Meyer*, [1908] P. 353. See *Anon.* (1850), 14 Jur. 402.

(*e*) *Ewen* v. *Franklin* (1855), Dea. & Sw. 7. In this case a will was signed by the testator and the witnesses in the margin of the first four sheets, but the testator alone signed the fifth and last sheet. Sir J. Dodson thought that the signatures on earlier sheets were intended only to prevent the interpolation of other sheets, and that there was nothing from which it could be inferred that the signatures on the four sheets were intended to attest the signature of the testator to the whole will.

Again, in *Sweetland* v. *Sweetland* (1865), 4 S. & T. 6, the deceased signed his name on five sheets of a testamentary paper, which consisted of six sheets; the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared an attestation and testimonium clause, and the names of the witnesses, but not the signature of the deceased; the writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet. Sir J. P. Wilde said: "It was contended that probate might be granted of the first five sheets, and the signature at the bottom of the fifth sheet treated as an execution of the will. . . . The first difficulty is, *quo animo* did the testator sign the fifth sheet? Ordinarily such a signature would be, I think, intended to guard against other sheets being interpolated. Certainly no one would, on the face of the will, conclude that it was intended as the final signature by which the testator's affirmation of the will was to be signified." On these grounds, and on others which will presently be discussed (*post*, p. 104), the learned Judge refused to regard such signature as an execution of the whole or any part of the will. And see Lord Mansfield's judgment in *Right* v. *Price* (1779), 1 Doug., at p. 243.

See *Dilkes* (1874), 3 P. & D. 164, where the will extended over the first and second sides of a sheet of foolscap paper, and there was a printed attestation clause at the foot of each side; the deceased made a mark on

Prima facie the signature at the end of the will applies to all that is written above it.

On the other hand, where there was a duly executed will followed by a number of additions and alterations, some of which were informally executed, and at the end of them all appeared the signatures of the testator and attesting witnesses, with an attestation clause, the presumption was held to be that the signatures applied to all that stood written above them at the time when they were placed there, and all the alterations and additions were admitted to probate (*f*).

No signature shall give effect to anything written beneath or following it, or inserted after the signature is made.

The statute also provides that "no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

Words physically occupying a position beneath or following the

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such parts or part may be admitted to probate (*g*).

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each side in the blank space left for the purpose in both clauses. The witnesses signed their names at the bottom of the first side only, and before the deceased made her mark on the second side. Sir J. Hannen said: "The question in this case is with what intention the deceased made her mark on the first side of the paper? . . . The signature on the first page was made merely to authenticate what was written thereon, and it was intended to execute the will by the subsequent signature; but such intention was not formally carried out. The mark at the end was made as an execution of the will, but then it was not attested by the witnesses." The learned Judge accordingly refused to grant probate of any part of the document. *Phipps* v. *Hale* (1874), 3 P. & D. 166, is a similar case; and see *Leonard* v. *Leonard*, [1902] P. 243; *Dearle* (1878), 47 L. J. P. 45; *Keating* v. *Brooks* (1845), 4 N. C. 253, 260. (*f*) *Cattrall* (1863), 3 S. & T. 419.

(*g*) Thus, in *Kimpton* (1864), 3 S. & T. 427, where the codicil was commenced low down upon a page and continued to the bottom, the words at the bottom being "In witness whereof, I the said," and then, on the *upper* part of the page, was written "Sarah Kimpton, the testatrix, have hereunto set my hand," etc., followed by the signatures of the testatrix and witnesses, and an attestation clause, Sir J. P. Wilde said: "Where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think from the case of *Peach* (1858), 1 S. & T. 138, that the late Sir C. Cresswell was inclined so to hold."

Again, in *Wotton* (1874), 3 P. & D. 159, the deceased had obtained a form of will lithographed on the first side of a sheet of foolscap paper; she wrote her will on the second and third sides, leaving the lithographed form not filled up, save as to the appointment of executors. She signed her name in the presence of witnesses, *at the foot of the lithographed form*. Sir J. Hannen said: "Must I hold that the dispositive part of the will follows the signature of the deceased and the attestation? I think I am not so bound, because it appears from the affidavit of the attesting witnesses that the whole document was written before the execution by the testatrix, and if so, the true way to look at the transaction seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and second pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed. The fact that the

Again, words which physically follow the signature of the testator may be admitted to probate if they can fairly be regarded as interlineations in the body of the will (*h*), or as incorporated by reference therein (*i*); but the question of incorporation can only arise if the Court is of opinion that the writing which follows the testator's signature was not parcel of the will, or so part of it as to invalidate the execution as not complying with the Wills Act Amendment Act, 1852. And in any event it must be established that the clause following the signature was written before execution, and it must be made manifest by words of reference in the executed part of the will that the testator was describing that clause (*k*).

signature, may be shown to be above it by the obvious sequence and sense of the context, or be regarded as interlineations, or as incorporated by reference in the body of the will.

But words which in point of fact follow the signature of the testator, and are neither incorporated in the will by any reference appearing above his signature nor shown by the context really to have preceded the signature which they appear to follow, cannot be included in the probate though written with testamentary intention before the testator affixed his signature to the will (*l*).

Except as aforesaid, words which follow the signature must be rejected.

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fourth side of the paper is in blank is immaterial. I hold that the will was duly executed."

This case was followed in *Gilbert* (1898), 78 L. T. 762, where the facts were very similar, save that the blanks in the lithographed form on the first page had been filled in more completely.

In *Royle* v. *Harris*, [1895] P. 163, the case of *Wotton* (*ubi supra*) was considered and explained. There the testamentary document consisted of a sheet of paper containing on the first page a lithographed form of will. The form on the first page was filled in by the testatrix, and contained bequests to "my sisters and friends." Her signature and those of the attesting witnesses were at the bottom of the form on the first page. The second and third pages contained a list of bequests to persons, some of whom were the sisters and other friends of the testatrix. Sir F. Jeune, after pointing out differences in the form of the document and in the evidence in the case of *Wotton*, and the case then under consideration, said: "I should be glad if in this case I could come to a conclusion similar to that reached in *Wotton*; but I cannot do so. I have no doubt that the fact is that the words on the second and third pages were not intended to commence the will." The learned Judge accordingly admitted the first page alone to probate. See also *Malen* (1885), 54 L. J. P. 91; *Madden*, [1905] 2 Ir. R. 612, where the sheets had been misplaced by accident.

(*h*) In *Birt* (1871), 2 P. & D. 214, there was in the body of a will, executed at the bottom of the first side of a sheet of paper, an incomplete sentence followed by an asterisk and the words "see over." On the second side was a corresponding asterisk, followed by words completing the unfinished sentence on the first side. These words were written before the will was executed. Lord Penzance held that the words on the second side might be regarded as an interlineation, and be read in the place in which the testator intended they should be read, and therefore preceding the signature: see *White* (1860), 30 L. J. P. 55; *Malen* (1885), 54 L. J. P. 91; *Greenwood*, [1892] P. 7. But the mere fact that the executed part of the will terminates with an incomplete sentence continued overleaf, is not sufficient to justify the Court in admitting the words following the signature to probate as interlineations: *Anstee*, [1893] P. 283; *Gee* (1898), 78 L. T. 843.

(*i*) See *Watkins* (1865), 1 P. & D. 19; *Dallow* (1866), 1 P. & D. 189; and see *post*, p. 190.

(*k*) *Dallow* (1866), 1 P. & D. 189; *Watkins* (1865), 1 P. & D. 19; and see *post*, p. 190.

(*l*) *Evans* (1923), 128 L. T. 669.

In what cases the Court will admit to probate all that is written above the signature, and reject what is written below.

The Court may admit to probate all that is written above the signature of the testator, and reject what is written below; but only if satisfied that such signature was intended by the testator to give effect to the words preceding it as his will (*m*). The Court will not take this course where it appears that the signature is one of authentication and not of execution of the part which precedes it (*n*), or where to do so would be to defeat the testator's intention and to make nonsense of his testamentary dispositions (*o*).

Where the will is written on several sheets, only the last sheet need be signed and attested.

Presumption where the will consists of several sheets.

A will may be written upon several separate sheets of paper, and when this is the case it will suffice if the last sheet alone is signed by the testator and attested by the witnesses. And where a will is found to be written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, the *prima facie* presumption is that all the sheets were in the room and formed part of the will at the time of its execution (*p*). This rule, which applies to a will composed of numerous papers which together make one instrument, cannot, however, be extended to a series of separate and independent documents (*q*).

Section 4.

ACKNOWLEDGMENT OF HIS SIGNATURE BY THE TESTATOR.

Provision of Wills Act, 1837, s. 9.

The section provides that the signature must be made "or acknowledged by the testator in the presence of two or more witnesses present at the same time."

(*m*) See *Anstee*, [1893] P. 283; *Royle* v. *Harris*, [1895] P. 163; *Millward* v. *Buswell* (1904), 20 T. L. R. 714; *Gee* (1898), 78 L. T. 843.

(*n*) See *Sweetland* v. *Sweetland* (1865), 4 S. & T. 6; *Phipps* v. *Hale* (1874), 3 P. & D. 166; *Dilkes* (1874), 3 P. & D. 164; *ante*, p. 101, note (*e*).

(*o*) In *Sweetland* v. *Sweetland* (1865), 4 S. & T. 6, Sir J. P. Wilde said: "The statute imperatively demands that a will should be signed at 'the foot or end thereof.' . . . To what has the word 'thereof' reference? Clearly, I think, to the whole will—to the whole of that which the testator then intended to execute as his will. . . . The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded it, and granting probate of so much of the will, to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes." So in *Margary* v. *Robinson* (1886), 12 P. D. 8, where the testator's mark was put by a blunder in the very middle of the will, Sir J. Hannen refused to give effect to all that was above the mark and reject what followed. The remarks of Sir J P. Wilde in *Sweetland* v. *Sweetland* (*supra*) were quoted with approval by the learned Judge, and he refused to admit to probate any part of the document so signed. And see *Dilkes* (1874), 3 P. & D. 164; but see *Royle* v. *Harris*, [1895] P. 163, where these cases were distinguished.

(*p*) *Bond* v. *Seawell* (1765), 3 Burr. 1773; *Gregory* v. *The Queen's Proctor* (1846), 4 N. C. 620, 639; *Marsh* v. *Marsh* (1860), 1 S. & T. 528; *Rees* v. *Rees* (1873), 3 P. & D. 84; *vide post*, pp. 152, 178, 179.

(*q*) *Pearse* (1867), 1 P. & D. 382; *Hatton* (1881), 6 P. D. 204.

In cases where his signature is not written by the testator, or by another on his behalf (*r*), in the presence of the attesting witnesses, there cannot be a sufficient acknowledgment of the signature by him in their presence, unless the Court is satisfied :—

What is required in order to constitute a valid acknowledgment.

(1) That the signature of the testator was upon the document at the time of the acknowledgment, and that the witnesses saw or had an opportunity of seeing the signature at that time.

(2) That some words were spoken or some act done by the testator, or suffered by him to be spoken or done by another in his presence and on his behalf, that may properly be regarded as an acknowledgment of his signature to the document.

1. It must be taken as an established proposition of law that there can be no valid acknowledgment by a testator of his signature to a testamentary instrument, unless the witnesses at the time of the acknowledgment see or have the opportunity of seeing the signature. "What is the plain meaning," said Dr. Lushington in *Hudson* v. *Parker* (*s*), "of acknowledging a signature in the presence of witnesses? What do the words import but this : 'Here is my name written, I acknowledge that name so written to have been written by me;—bear witness'? How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator *said* he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged." And in the much later case of *Blake* v. *Blake* (*t*), Jessel, M.R., said : "What is in law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in Jarman on Wills (*u*) in the following terms : 'There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will'; and I may add," continued the learned Judge, "in my opinion, it is not sufficient even if the testator were to say 'My signature is inside the paper,' unless the witnesses were able to see the signature" (*v*).

There can be no valid acknowledgment unless the witnesses see or have an opportunity of seeing the signature.

This rule is now authoritatively settled.

(*r*) Some doubt was raised soon after the passing of the Act whether an acknowledgment was not confined to cases where the signature was made by "some other person" for the testator, but the Court was of opinion that the acknowledgment extended to the signature, whether made by the testator himself or by another for him : *Regan* (1838), 1 Curt. 908. A name pencilled beforehand by his solicitor merely to indicate where the testator is to sign cannot comply with the requirements of the section and cannot be acknowledged by the testator : *Reeves* v. *Grainger* (1908), 52 Sol. Jo. 355.

(*s*) (1844), 1 Rob. 14, at p. 25.

(*t*) (1882), 7 P. D. 102, at p. 107.

(*u*) 4th ed., at p. 108.

(*v*) In *Gwillim* v. *Gwillim* (1859), 3 S. & T. 200, neither of the witnesses recollected seeing the name of the testator upon the document when they

It is sufficient that the witnesses had the opportunity of seeing the signature at the time of acknowledgment even though they cannot state that they actually saw it.

But it is sufficient that the witnesses had an opportunity of seeing the signature of the testator at the time of the acknowledgment, even although they are not able affirmatively to state that they did see it. Thus Brett, J., in *Blake* v. *Blake* (*x*) said: "It has been brought to this: where the witnesses cannot see, *have no opportunity of seeing*, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there, and they see or *have the opportunity of seeing it*, then if the testator says 'this is my will,' or words to that effect, that is sufficient acknowledgment, although he does not say 'this is my signature'" (*y*).

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attested it. They did not deny it was there, but said they did not recollect seeing it there. Sir Cresswell Cresswell, from a consideration of the circumstances of the case, came to the conclusion that the name of the testator was written at the time of attestation, and that by asking the witnesses to witness his will the testator duly acknowledged his signature.

In *Beckett* v. *Howe* (1869), 2 P. & D. 1, the will was folded in such a way as completely to conceal the signature from the witnesses. The witnesses did not see and could not have seen the signature, the testator did not say it was there, but he told one of them that he was going to execute a will. Lord Penzance said: "The doctrine in *Gwillim* v. *Gwillim* (*supra*) is this, that if the testator produces a paper, and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the will at the time." Relying on that view of the proposition laid down by *Gwillim* v. *Gwillim*, his Lordship held that there had been a valid acknowledgment of his signature by the testator.

But in *Blake* v. *Blake* (1882), 7 P. & D. 102, Jessel, M.R., held that no such proposition had been laid down by Sir C. Cresswell in *Gwillim* v. *Gwillim* (*supra*), for in that case it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the only question was whether the Court was satisfied that the signature was there or not. "I cannot find one word," said the learned Judge (7 P. D., at p. 110), "in the judgment in *Gwillim* v. *Gwillim* (*ubi supra*) to show that Sir C. Cresswell was of opinion that, if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson* v. *Parker* (*ante*, p. 105). The existence of any such doctrine rests entirely upon the statement of Lord Penzance in *Beckett* v. *Howe* (*supra*), and, as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett* v. *Howe* is no authority." This view of the Master of the Rolls as to the effect of *Gwillim* v. *Gwillim* (*supra*) was confirmed by the Earl of Selborne, L.C., in *Wright* v. *Sanderson* (1884), 9 P. D. 149, at p. 153.

(*x*) (1882), 7 P. D. 102, at p. 114.

(*y*) See *Gwillim* v. *Gwillim* (1859), 3 S. & T. 200. Thus in *Blake* v. *Knight* (1843), 3 Curt. 547, where the witnesses were unable to state positively that they saw the signature, but would not swear that it was not there at the time, and there was nothing to prevent them from seeing it had it been there, the Court, on coming to the conclusion that the signature was there at the time, held that there had been a valid acknowledgment. And see *Davis* (1843), 3 Curt. 748; *Cooper* v. *Bockett* (1843), 3 Curt. 648; *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580; *Huckvale* (1867), 1 P. & D. 375; *Pearn* (1875), 1 P. D. 70. In *Daintree* v. *Fasulo* (1888), 13 P. D. 102, at p. 103, Cotton, L.J., stated that if the signature was so placed that the witnesses could see it, *whether they actually did see it or not*, and the paper bearing the signature of the testatrix was put before two persons who were

The Court must be satisfied that the signature was upon the will at the time of the acknowledgment.

Where the witnesses cannot positively affirm that they saw the signature at the time of the acknowledgment, the Court must be satisfied that it was upon the paper at that time (*z*); and, in cases where the witnesses saw no writing at all upon the paper, the Court must be satisfied that the will itself existed in writing on the paper at the time of the acknowledgment (*a*).

It is not, however, necessary to adduce positive affirmative evidence of these facts.

It is not, however, essential that there should be positive affirmative evidence of these facts. The Court is at liberty to judge, from the circumstances of the case, whether the name of the testator was on the will at the time of the attestation or not. Thus Sir J. P. Wilde said in *In the Goods of Huckvale* (*b*), "Where there is no direct evidence on the point one way or the other, but a paper is produced to the witnesses and they are asked to witness it as a will, the Court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from those circumstances, and from the appearance of the document itself, whether the name of the testator was or was not upon it at the time of the attestation" (*c*). This conclusion has been arrived at as the result of a series of cases; but since these raise the question as to what evidence will satisfy the Court that the requirements of the statute generally have been complied with, they are dealt with in detail in a later section (*d*).

If the witnesses at the time of the acknowledgment neither saw nor had an opportunity of seeing the signature of the testator, the acknowledgment is invalid (*e*).

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asked by her or in her presence to sign as witnesses, that was an acknowledgment of the signature by her.

(*z*) Thus where there was no proof that the signature was upon the paper at the time of the acknowledgment, and the testatrix did not inform the witnesses that the paper was a will, nor was either of them aware of its nature, probate on motion was refused: *Ashton* (1847), 5 N. C. 548; *Swinford* (1869), 1 P. & D. 630. In *Pearson* v. *Pearson* (1871), 2 P. & D. 451, in the absence of all evidence that the signature was upon the will when the witnesses signed, the Court held that the mere asking of persons to sign as witnesses was not enough without any statement that the document was a will, and without any proof that there was a signature upon it. See, as to this case, *Daintree* v. *Fasulo* (1888), 13 P. D. 102, at p. 104; and see *Fischer* v. *Popham* (1875), 3 P. & D. 246; but see *Pascoe* v. *Smart* (1901), 17 T. L. R. 595.

(*a*) *Hammond* (1863), 3 S. & T. 90; *Pearsons* (1864), 33 L. J. P. 177; *ante*, p. 100, note (*a*); but see *Lloyd* v. *Roberts* (1858), 12 Moo. P. C. 158.

(*b*) (1867), 1 P. & D. 375, at p. 378.

(*c*) And see *Pascoe* v. *Smart* (1901), 17 T. L. R. 595.

(*d*) *Post*, pp. 123 *et seq.*; see *Blake* v. *Knight* (1843), 3 Curt. 547; *Cooper* v. *Bockett* (1843), 3 Curt. 648; *S. C.* on appeal, 4 Moo. P. C. 419; *Gwillim* v. *Gwillim* (1859), 3 S. & T. 200; *Huckvale* (1867), 1 P. & D. 375; *Pearn* (1875), 1 P. D. 70; *Wright* v. *Sanderson* (1884), 9 P. D. 149, at pp. 153, 160.

(*e*) Thus in *Ilott* v. *Genge* (1842), 3 Curt. 160, *S. C.* on appeal, 4 Moo. P. C. 265, where the paper was so folded that the witnesses did not see any writing upon it, and they neither saw nor was there any possibility of their seeing the signature if there, and the testator did not state the nature of the document, it was held that there had been no valid acknowledgment, and this decision was affirmed on appeal. And see *Hudson* v. *Parker* (1844),

Some act equivalent to an acknowledgment of his signature must be done by the testator.

2. The Court must be satisfied that some words were spoken or act done by the testator, or suffered by him to be spoken or done in his presence, that may properly be regarded as an acknowledgment of his signature to the document.

No particular form of expression is required.

Dr. Lushington, in *Hudson* v. *Parker* (*f*), after stating that the word "acknowledgment" imports: "Here is my name written, I acknowledge that name so written to have been written by me; bear witness," proceeds as follows:—

"Acknowledgment may be expressed in any words that will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge,' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there and seen at the time, for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation."

Mere production of the will, with a request to the witnesses to attest it, may constitute an acknowledgment,

Again, in *Ilott* v. *Genge* (*g*), Sir H. J. Fust said: "The production of a will by the testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment." And in *In the Goods of Thomson* (*h*) the same learned Judge said: "When a paper is produced by a testator to the witnesses, with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature by the testator" (*i*).

even though the witnesses are not told the nature of the document.

Even though the witnesses are not told that the document is a will or a testamentary paper, yet if they see or have an opportunity of seeing the signature of the testator and are asked to sign their names as witnesses, that is a sufficient acknowledgment (*k*). And it has been said that the result of section 13

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1 Rob. 14, *ante*, p. 105; *Croft* v. *Croft* (1865), 4 S. & T. 10; *Blake* v. *Blake* (1882), 7 P. D. 102 (C. A.), overruling *Beckett* v. *Howe* (1869), 2 P. & D. 1 (*ante*, p. 106, note (*v*)).

(*f*) (1844), 1 Rob. 14, at p. 25.

(*g*) (1842), 3 Curt. 160, at p. 172.

(*h*) (1846), 4 N. C. 643, at p. 644.

(*i*) This case was held not to have been overruled or contrary to any other decision by Cotton, L.J., in *Daintree* v. *Fasulo* (1886), 13 P. D. 102, 103. It had previously been suggested that it was inconsistent with *Ilott* v. *Genge* (1844), 4 Moo. P. C. 265; see *Pearson* v. *Pearson* (1871), 2 P. & D. 451. See also *Keigwin* v. *Keigwin* (1843), 3 Curt. 607, at p. 611; *Leech* v. *Bates* (1849), 6 N. C., at p. 704.

(*k*) All doubt as to the validity of this proposition, which was first laid down in *Thomson* (1846), 4 N. C. 643—if doubt there had been—was finally set at rest by the decision of Butt, J., in *Daintree* v. *Fasulo* (1888), 13 P. D. 67, affirmed by the Court of Appeal (13 P. D. 102). In that case the learned Judge laid down the proposition substantially as given in the text.

The previous cases in which language was used which might seem to

of the Wills Act, 1837, which provides that every will executed in the manner therein mentioned shall be valid without any other publication thereof, is to render valid the execution of a will even if the testator deceives the witnesses and leads them to believe that the instrument is a deed and not a will (*l*).

If the witnesses are asked to sign the document by some person in the presence and hearing of the testator, and see or have an opportunity of seeing the signature, that may be a valid acknowledgment of his signature by the testator, though he himself speak no word; for the request of another in the presence of the testator may be equivalent to a request by the testator himself (*n*).

If the witnesses are asked to sign by some person in the presence and hearing of the testator.

If, however, the signature has not been written by the testator, but by some person in his presence and by his direction, it would seem that a more formal acknowledgment is necessary (*n*),

Acknowledgment where the signature has been written for the testator.

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imply that there could not be a good acknowledgment unless the witnesses were aware that the document which they were attesting was testamentary, were cases in which the witnesses neither saw nor had an opportunity of seeing the signature of the testator at the time of the suggested acknowledgment.

Thus in *Ilott* v. *Genge* (1844), 4 Moo. P. C. 265, Lord Lyndhurst said: "We are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator." But in that case, as Cotton, L.J., pointed out in *Daintree* v. *Fasulo* (*ubi supra*), the paper was so folded that the witnesses could not see the signature; so that there is nothing in that case inconsistent with the rule in the text.

Again, in *Pearson* v. *Pearson* (1871), 2 P. & D. 451, where Lord Penzance appears to cast doubt on the decision in *Thomson* (*ubi supra*) as inconsistent with *Ilott* v. *Genge* (*ubi supra*), there was no evidence that there was any signature on the will when the witnesses signed. And an examination of the following cases, where it was suggested that in order to constitute a valid acknowledgment the witnesses must know that they were signing a testamentary instrument, will show that in all of them there were other grounds for holding the acknowledgment invalid: *Ashton* (1847), 5 N. C. 548; *Blake* v. *Blake* (1882), 7 P. D. 102; *Swinford* (1869), 1 P. & D. 630.

Further in support of the proposition in the text, see *Keigwin* v. *Keigwin* (1843), 3 Curt. 607; *Ashmore* (1843), 3 Curt. 756; *Faulds* v. *Jackson* (1845), 6 N. C. Suppl. i.

(*l*) Sugden's Essay, p. 140, citing *Trimmer* v. *Jackson*, 4 Burn. Eccl. Law, 102 (9th ed.); *British Museum* v. *White* (1829), 3 Moo. & P. 689.

(*m*) Thus in *Faulds* v. *Jackson* (1845), 6 N. C. Suppl. i., the testator having signed his will showed it to his clerk, and then sent him to fetch a second witness. When the latter came into the room, the first witness said, "William, Mr. Jackson [*i.e.*, the testator] wants you to sign this paper." Whilst the second witness was in the room, the testator spoke no word. Held: that there had been a valid acknowledgment. And see *Bosanquet* (1852), 2 Rob. 577; *Jones* (1855), Dea. & Sw. 3. Again, in *Inglesant* v. *Inglesant* (1874), 3 P. & D. 172, the deceased signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the first witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. Sir J. Hannen, following *Faulds* v. *Jackson* (*ubi supra*), and being satisfied that the words were heard by the testatrix, held that there had been a valid acknowledgment.

(*n*) Thus where the name of the testator had been signed to his will at his request by the drawer thereof, who on a subsequent day asked two persons, in the presence of the testator, to sign their names as witnesses, which they did, and the testator *then* placed his seal on the paper and said,

Acknowledgment by gestures.

The testator may acknowledge his signature by means of gestures (*o*).

The subscription by *both* witnesses must be *after* the testator has signed or acknowledged his signature to *both* of them, present at the same time.

The section is not complied with unless *both* witnesses attest and subscribe the will *after* the testator's signature has been made or acknowledged to them, when *both* were present at the same time (*p*).

In *Moore* v. *King* (*q*) Sir H. Jenner Fust said : " If the one witness has previously subscribed the paper, and merely points out that subscription when the testator acknowledges his signature in his presence and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient : I have no explanation why the first witness did not resubscribe (*r*). The Act says the testator may acknowledge his signature, but does not say that the witnesses may acknowledge their subscriptions " (*s*).

The execution is invalid if the testator signs *after* the witnesses.

It seems scarcely necessary to add that, if the witnesses subscribe before the signature of the deceased is upon the will, the will is not duly executed, though the testator afterwards sign in their presence (*t*).

The witnesses must be both mentally and bodily present.

Further, the statute is not satisfied, even if the signature is made in the presence of the two witnesses, if they are ignorant

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" I deliver this as my act and deed," Sir H. J. Fust refused to consider such request as an acknowledgment by the testator himself of the signature made for him by the drawer : *Summers* (1850), 2 Rob. 295. See also *Morritt* v. *Douglas* (1872), 3 P. & D. 1. And in *Marshall* (1866), 13 L. T. 643, it was held that if the signature of a testator be signed in his presence and that of the attesting witnesses to a will by a third party, the testator must, by act or word, in some way indicate to the two witnesses present that the signature was put there at his request : he must do something to show that the other party was signing for him.

(*o*) *Davies* (1850), 2 Rob. 337.

(*p*) *Moore* v. *King* (1842), 3 Curt. 243.

(*q*) 3 Curt., at p. 253.

(*r*) As to what amounts to a resubscription, see *post*, p. 114.

(*s*) *Hindmarsh* v. *Charlton* (1861), 2 H. L. C. 160, is to the same effect; and see *Casement* v. *Fulton* (1845), 5 Moo. P. C. 130, 138; *Allen* (1839), 2 Curt. 331; *Simmonds* (1842), 3 Curt. 79. See also *Hudson* v. *Parker* (1844), 1 Rob. 14, at p. 35; *Faulds* v. *Jackson* (1845), 6 N. C. Suppl. i. In *Wyatt* v. *Berry*, [1893] P. 5, the testator produced his will to the first witness (A) alone, and A signed it; the second witness (B) was then called in and was asked to sign the paper, and B then signed the will, all three being present. Sir Gorell Barnes, following *Moore* v. *King* (1842), 3 Curt. 243, and *Hindmarsh* v. *Charlton* (*ubi supra*), held that the will was not duly executed. And in *Brown* v. *Skirrow*, [1902] 2 P. 3, the same learned Judge said : " According to the decided cases the acknowledgment must be made in the presence of the two witnesses, who must *afterwards* attest it." See *Swift* (1900), 17 T. L. R. 16; and see, on the point that the witnesses may not acknowledge their signatures, *Betts* v. *Gannell* (1903), 19 T. L. R. 304.

(*t*) *Cooper* v. *Bockett* (1843), 3 Curt. 648, at p. 659; *Brenchley* v. *Still* (1850), 2 Rob. at p. 167; see *Olding* (1841), 2 Curt. 865; *Byrd* (1842), 3 Curt. 117. In *Henderson* v. *Priestman*, [1918] 2 I. R. 90, a testatrix signed her will, but not in the presence of the witnesses. Later she signed it again in the presence of two witnesses, who signed above her later signature, and before she had written it. The words " signed again in the presence of," etc., appeared above the witnesses' signatures. This was held to be a good acknowledgment of the earlier signature, and the will was admitted to probate.

of that fact. The witnesses must see and be conscious of the act done and be able to prove it by their own evidence : they must be both mentally and bodily present, for if not, they might be asleep or intoxicated or of unsound mind (*u*).

If the witnesses see the testator writing what the Court is satisfied was his signature to the will, that is sufficient, although they do not see the signature and the testator does not acknowledge it (*x*).

If the witnesses see the testator writing what the Court is satisfied was his signature, that will suffice.

Section 5.

ATTESTATION OF WILLS.

The section further provides that the witnesses "shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Wills Act, 1837, s. 9.

In this connection a distinction has been drawn between attestation and subscription. For by attestation is meant bearing witness to the making of the signature or its acknowledgment, which, as has already been seen, must be made in the presence of both witnesses, present at the same time. "Here are two things which the witnesses are to do," said Dr. Lushington (*y*) : "they are to *attest* and to *subscribe*—mark the words : 'shall attest and shall subscribe,' the word 'shall' is repeated; subscription alone will not do, it will not satisfy the statute. . . . Then if 'attest' means something more than subscription, what does it mean? To attest is to bear witness to a fact; . . . the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say that no form of attestation shall be necessary, still the witnesses must attest, although the outward work of attestation be subscription only" (*z*).

Distinction between attestation and subscription.

(*u*) *Per* Dr. Lushington in *Hudson* v. *Parker* (1844), 1 Rob. at p. 24; and see *Thomson* v. *Hall* (1852), 2 Rob. 426. Thus in *Brown* v. *Skirrow*, [1902] P. 3, a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time engaged at the other side of the shop, did not see them sign and did not know or have an opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness. It was held that the testatrix did not sign "in the presence" of the second witness. Sir Gorell Barnes said : "You cannot be a witness to an act that you are unconscious of. . . . In my view, at the end of the transaction the witness should be able to say with truth 'I know that this testator or testatrix has signed this document.'" See *Killick* (1864), 3 S. & T. 578; and *post*, p. 112.

(*x*) *Smith* v. *Smith* (1866), 1 P. & D. 143.

(*y*) In *Hudson* v. *Parker* (1844), 1 Rob. 14, at p. 26.

(*z*) The distinction is a somewhat barren one, but is the basis of the rule that the witness must be mentally as well as bodily present when the signature is made or acknowledged. The words quoted in the text do not mean that the attestation can be independent of the subscription, but only that subscription does not necessarily amount to attestation : *Charlton* v. *Hindmarsh* (1859), 1 S. & T. 433, 439.

The witnesses need not subscribe in the presence of one another.

The two witnesses, when they subscribe the will, need not be simultaneously present; but each must subscribe in the presence of the testator (*a*).

The expression "in the presence" of the testator means actual visual presence.

The witnesses must attest and subscribe the will "in the presence of the testator." This expression must be taken to mean visual presence (*b*). The witnesses must be within the reach of the organs of sight (*c*). But it is not necessary that the testator should actually see the witnesses sign, provided he is in such a situation that he might see them if he chose to look (*d*).

(*a*) Thus in *Faulds* v. *Jackson* (1845), 6 N. C. Suppl. i., it was held that the statute does not require that both witnesses should sign in the presence of one another, so long as the signature of the testator is made or acknowledged in the presence of both before either has signed; and see *Cooper* v. *Bockett* (1843), 3 Curt. 648, 659; *Webb* (1855), Dea. & Sw. 1. *Casement* v. *Fulton* (1845), 5 Moo. P. C. 130, is a decision to the contrary, but this case has not been followed.

(*b*) *Brown* v. *Skirrow*, [1902] P. 3; *vide ante*, p. 111, note (*u*).

(*c*) Lord Ellenborough, C.J., in *Doe* v. *Manifold* (1813), 1 M. & S. 294, 295.

(*d*) *Ibid.* In *Hudson* v. *Parker* (1844), 1 Rob. 14, at p. 35, Dr. Lushington said: "The witnesses are to see the signature made or acknowledged, because they are to attest it and to bear witness thereof; the witnesses are to subscribe in the presence of the testator for another and different purpose, for the completion of the instrument. . . . It may therefore be that the words 'subscribe in the presence of the testator' may be satisfied with less stringent proof; that the cognisance of the subscription of the witnesses may not be so absolutely necessary, or may be inferred by bodily presence."

In *Shires* v. *Glascock* (1688), 2 Salk. 688, 1 Lord Raym. 507, the testator was ill in bed, and signed, published, and declared his will in his bedchamber, and the witnesses subscribed their names in the dining-room, and, because there was a possibility that if the testator had been raised up in his bed he might have seen through glass doors the witnesses subscribing their names, it was held to be a good will.

In *Casson* v. *Dade* (1781), 1 Bro. C. C. 99, the testatrix executed her will in her carriage, which stood at the office of her solicitor. The witnesses retired into the office to subscribe it, and it was proved that the carriage was accidentally put back, so that the testatrix was in such a situation that she might see, through the window of the office, the witnesses sign the will; this was held to be tantamount to being present. Sir Herbert Jenner in *Newton* v. *Clarke* (1839), 2 Curt., at p. 323, referring to this case, said that it carried the doctrine of constructive presence to a great length.

In *Newton* v. *Clarke* (1839), 2 Curt. 320, the testator signed the codicil while lying in bed, there being present in the room the two attesting witnesses; the curtains of the bed were drawn, so that one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe. Sir H. Jenner held that the will was subscribed in the presence of the testator, and said: "I am of opinion . . . where a paper is executed by the deceased in the same room where the witnesses are, and they attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign."

But in *Tribe* v. *Tribe* (1849), 1 Rob. 775, where the testator lay in bed with the curtains closed, and it was impossible, from the state in which the testator was, for him to have turned himself in his bed so as to have seen the witnesses sign, the same learned Judge said that he could not consider that there had been a sufficient compliance with the statute. The distinction between the cases would appear to be that in the former the testator could have seen the witnesses sign if he chose to look, in the latter he could not.

Thus in *Trimnell* (1865), 11 Jur (N.S.) 248, 249, Sir J. P. Wilde laid

If a testator is in a state of insensibility when his will is attested, the will is not duly executed, although he is corporally present when the witnesses subscribe their names (*e*). And it would seem that the testator must be aware of the presence of the attesting witnesses (*f*).

If the testator is in a state of insensibility, the will is not duly executed.

Though the testator is blind, it must be shown that he could, had he had his eyesight, have seen the witnesses sign (*g*).

Where the testator is blind.

To constitute a valid subscription by a witness, the witness must place upon the will his name, or some mark intended to represent and stand for his name, with the intention of attesting the execution of the will.

Form of subscription.

It is not necessary that the witnesses should subscribe their names. The mark of a witness is sufficient, if placed on the will by him for his signature as attesting the execution, though another person writes the witness's correct name (*h*), or even a wrong name, against it (*i*). If a witness puts a mark, though he can write, it is a good subscription (*k*). So also if he puts his initials (*l*). For, as Lord Chelmsford said in *Hindmarsh* v. *Charlton* (*m*), "The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials or by writing the name in full." A witness, instead of signing his name, may describe himself in some other way, provided it is clear that he intended what he wrote to be his subscription as attesting the will (*n*). Thus where a witness subscribed the will "servant to Mr. Sperling" without any name, the Court held the subscription sufficient (*o*).

A mark is sufficient, though another writes a wrong name against it; even though the witness can write.

Initials.

Description.

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it down that the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names.

In *Longford* v. *Eyre* (1721), 1 P. Wms. 739, Lord Chancellor Macclesfield said that the bare subscribing the will by the witness in the same room did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine, fraudulent way.

In the following cases it was held that the witnesses had not subscribed the will "in the presence" of the testator: Where the witnesses subscribed the will in an adjoining room to that in which the testator then was, but the latter was not in such a position that he could have seen them: *Doe* v. *Manifold* (1813), 1 M. & S. 294; and see *Newman* (1838), 1 Curt. 914; *Ellis* (1840), 2 Curt. 395; *Colman* (1842), 3 Curt. 118; *Jenner* v. *Ffinch* (1879), 5 P. D. 106; *Carter* v. *Seaton* (1901), 85 L. T. 76; *Betts* v. *Gannell* (1903), 19 T. L. R. 304.

(*e*) *Right* v. *Price* (1779), 1 Dougl. 241.

(*f*) *Killick* (1864), 3 S. & T. 578; *Jenner* v. *Ffinch* (1879), 5 P. D. 106.

(*g*) *Piercy* (1845), 1 Rob. 278.

(*h*) *Ashmore* (1843), 3 Curt. 756; *Harrison* v. *Harrison* (1803), 8 Ves. 185; *Addy* v. *Grix* (1803), 8 Ves. 504.

(*i*) *Ashmore* (cited *supra*).

(*k*) *Amiss* (1849), 2 Rob. 116.

(*l*) *Christian* (1849), 2 Rob. 110; and see *Blewitt* (1880), 5 P. D. 116; but see *post*, p. 116, note (*e*).

(*m*) (1861), 8 H. L. C. 160, 171.

(*n*) *Duggins* (1870), 39 L. J. P. 24.

(*o*) *Sperling* (1863), 3 S. & T. 272; *Olliver* (1854), 2 Ecc. & Adm. 57.

Seals.

It appears that the witnesses do not validly subscribe by placing their seals alone upon the paper (*p*).

A witness's hand may be guided, but another may not sign on his behalf.

The hand of the witness may be guided in subscribing the will (*q*), but the witness must himself subscribe, another cannot do it for him. One witness cannot subscribe for the other even at the desire of the latter (*r*), and where a witness subscribed in the name of her husband, who was not present, it was held that the will was not properly executed (*s*).

A witness may not acknowledge his signature already on the will.

It has already been pointed out (*t*) that the witnesses must *both* subscribe the will *after* the signature of the testator has been made or acknowledged in the presence of *both* of them. If the signature of the testator is made in the presence of one witness, who subscribes his name to the will, and the second witness is then called in, it is not sufficient for the first witness to acknowledge his signature already upon the will; he must resubscribe the will after the signature of the testator has been acknowledged in the presence of both witnesses (*u*). It is not a resubscription if he traces over with a dry pen the signature already written, for that at most can only amount to an acknowledgment, which, as has just been said, will not suffice (*x*). "It cannot be too well understood," said Sir C. Cresswell in *In the Goods of Cunningham* (*y*), "that tracing with a dry pen is not equivalent to a signature."

Tracing over his signature with a dry pen is not a resubscription.

The subscription must be intended to represent the name of the witness as attesting due execution.

Whatever form the attestation may take, the Court must be satisfied that what was written upon the will by the witness was intended to represent his name, and was so written by him for the purpose of attesting the due execution of the will (*z*).

(*p*) *Byrd* (1842), 3 Curt. 117.

(*q*) *Harrison* v. *Elvin* (1842), 3 Q. B. 117; *Frith* (1858), 1 S. & T. 8. In *Kileher* (1848), 6 N. C. 15, where the two attesting witnesses were able to write, and merely held the top of the pen while another wrote their names, Sir H. J. Fust held that was not a good subscription; but in *Lewis* v. *Lewis* (1861), 2 S. & T. 153, where the circumstances were similar, save that the witnesses could not write, Sir C. Cresswell held that, as the witnesses took some share in the act of signing, the subscription was good. It was suggested that in *Kileher* (*ubi supra*) there were other circumstances of suspicion which led Sir H. J. Fust to reject the motion, rather than the mere fact of the witnesses' names having been so written.

(*r*) *Cope* (1850), 2 Rob. 335; *White* (1843), 2 N. C. 461; *Duggins* (1870), 39 L. J. P. 24.

(*s*) *Leverington* (1886), 11 P. D. 80. (*t*) *Ante*, p. 110.

(*u*) *Moore* v. *King* (1842), 3 Curt., at p. 253; *Casement* v. *Fulton* (1845), 5 Moo. P. C. 130. See, as to the latter case, *ante*, p. 112, note (*a*).

(*x*) *Playne* v. *Scriven* (1849), 1 Rob. 772; *Cunningham* (1860), 4 S. & T. 194; *Maddock* (1874), 3 P. & D. 169.

(*y*) Cited *supra*.

(*z*) Thus in *Trevanion* (1850), 2 Rob. 311, where an attesting witness attested and subscribed a second execution of the will by adding the word "Bristol" (the name of the city) at the end of her name and address which had been written on the former execution, but did not otherwise resubscribe, that was held to be an insufficient attestation and subscription of the re-execution.

In *Charlton* v. *Hindmarsh* (1859), 1 S. & T. 433, *S. C.* on appeal, 8 H. L. C.

Where the signature of a legatee appears upon the will.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the Court will receive evidence to explain why such signature was written, and if satisfied that it was not written with the intention of attesting the signature of the deceased, will order it to be omitted in the probate (*a*).

Position of witnesses' signatures.

It has been held in several cases that the signatures of the witnesses need not be in any particular part of the will, but that they will suffice wherever placed if intended to attest the operative signature of the testator (*b*).

The witnesses may subscribe on any part of the will.

In *Roberts* v. *Phillips* (*c*) it was held that the word "subscribe" in the Statute of Frauds might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that if the witnesses signed their names on any part of the will at the testator's request with the intention of attesting his signature, that is a sufficient subscription (*d*).

160, the testator signed in the presence of F W; F W subscribed; B was then called in, and after the testator had acknowledged his signature in the presence of both, B signed. F W thereupon wrote the date upon the will, and, noticing that he had inadvertently signed his name as T W, corrected the first initial of his signature by crossing the T and so making it F. It was held that that was not a sufficient subscription and attestation. The Lord Chancellor (Lord Campbell) said: "I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was intended to represent the name."

In *Eynon* (1873), 3 P. & D. 92, the deceased executed his will in the presence of two witnesses, one of whom made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and of the first witness against their respective marks, and also the word "witness" against the mark of the latter, but did not subscribe his own name. Sir J. Hannen held that the second witness did not validly subscribe the will, for "he never made any mark with an idea of attesting the execution of the will."

In *Maddock* (1874), 3 P. & D. 169, the deceased executed her will in the presence of two witnesses, one of whom signed his name thereto, but the other, after writing his Christian name (Saml.) was unable, through feebleness, to complete his signature. Sir J. Hannen said: "I take it as a rule that if a witness makes any mark with an intention thereby to subscribe the will, it will be sufficient. . . . In this case I think the witness has failed to do what is necessary. I have come to the conclusion that . . . the witness did not put the word 'Saml.' on the paper with the intention at the time that it should be a perfect subscription to the will. Having done something, he broke off without completing the intention."

In *Griffiths* v. *Griffiths* (1871), 2 P. & D. 300, where against the name of one of the witnesses the word "executors" was written, and it appeared that the deceased intended that witness to be one of his executors, and asked him to sign his name in that character, Lord Penzance came to the conclusion that such person did not sign the will exclusively as executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid.

(*a*) *Vide post*, p. 266, note (*m*).

(*b*) *Per* Sir J. Hannen in *Phipps* v. *Hale* (1874), 3 P. & D. 166, 168.

(*c*) (1855), 4 El. & Bl. 450.

(*d*) Accordingly, in *Chamney* (1849), 1 Rob. 757, where the attesting

But the position of the signatures is material in ascertaining the intention with which they were written.

But in considering whether persons have subscribed a will as attesting witnesses, the position of the signatures may be most material. If they are written under the attestation clause no difficulty arises, but if they are placed under a particular clause or statement the inference is, *prima facie*, that they were put there to give effect or to testify to the words of that clause or statement (*e*).

Subscription must be on same sheet as testator's signature, or on a paper physically connected with that sheet at time of execution.

The subscription by the witnesses, if not upon the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet at the time of execution. No particular mode of affixing one piece of paper to another is prescribed by law (*f*), and if the pieces of paper are attached to one another at the time of execution, it does not matter if they should afterwards become detached (*g*).

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witnesses subscribed their names, not under the signature of the testator upon the first page of the will, but under an endorsement upon the fourth page, Sir H. J. Fust said: "The statute does not point out the place where the witnesses are to sign. In the absence of such a direction I am not prepared to say they have not duly subscribed the will by signing in the manner they have."

In *Davis* (1843), 3 Curt. 748, where the signatures of the witnesses were on the second side of the sheet of paper, after a clause appointing executors, the signature of the testator being on the first side of the sheet, Sir H. J. Fust pronounced for the will.

In *Braddock* (1876), 1 P. D. 433, 434, Sir J. Hannen said: "The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting."

And in *Streatley*, [1891] P. 172, where the attesting witnesses signed their names in the margin of the first and second sheets opposite to certain amendments, Butt, J., following *Roberts* v. *Phillips*, on proof that the witnesses signed with the intention of attesting the testator's signature, held that this was a valid subscription; and see *Ellison*, [1907] 2 Ir. R. 480, where the witnesses signed in the body of the will, in a blank space left for the names of the executors.

(*e*) *Per* Sir J. P. Wilde in *Wilson* (1866), 1 P. & D. 269, at p. 271. Thus in *Martin* (1849), 1 Rob. 712, where a will purported to have been re-executed after certain alterations had been made, and the attesting witnesses placed their initials in the margin opposite those alterations Sir H. J. Fust held that there was no evidence that they subscribed the re-execution of the *will*; as the instrument appeared upon the face of it, they attested the alterations only.

In *Ewen* v. *Franklin* (1855), Dea. & Sw. 7, where a will was signed by the testator and the witnesses in the margins of the first four sheets, but the fifth sheet was signed by the testator only, it was held that the attestation was insufficient, Sir J. Dodson thinking that there was nothing from which it could be inferred that the signatures of the witnesses on the four sheets were intended to attest *the signature of the testator to the whole will*.

This case was followed by Sir J. Hannen in *Phipps* v. *Hale* (1874), 3 P. & D. 166; and see *Dilkes* (1874), 3 P. & D. 164; *Sweetland* v. *Sweetland* (1865), 4 S. & T. 6; *ante*, p. 101, note (*e*).

In *Wilson* (1866), 1 P. & D. 269, where the names of three persons were subscribed under a memorandum not testamentary, upon a page following the end of the will, which was signed by the testator and one witness, the Court came to the conclusion, from the position of the three names and the circumstances of the case, that they were not placed there for the purpose of attesting the will, and therefore pronounced the execution invalid.

(*f*) *Braddock* (1876), 1 P. D. 433.

(*g*) *Lewis* v. *Lewis*, [1908] P., at p. 5. Thus in *Braddock* (1876), 1 P. D. 433, the witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the Court that the will and codicil were pinned

Section 6.

THE FORM OF A WILL.

A will need not be in any particular form, provided it is dependent on the death of the maker for its vigour and effect.

The law has not made requisite to the validity of a document as a will that it should assume any particular form or be couched in language appropriate to its testamentary character (*h*). Any document duly executed in accordance with the requirements of the statute, however irregular in form or inartificial in expression, is entitled to operate as a will and to be admitted to probate, provided the person executing it intended that it should not take effect until after his death, and it is dependent upon his death for its vigour and effect (*i*).

Parol evidence of intention admissible.

If the document itself is equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition (*k*), for evidence to show *quo intuitu* a paper was executed has always been received in the Court of Probate (*l*); and the cases clearly show that, in order to ascertain whether a paper writing was intended by the testator to take effect as his will, the Court may admit parol

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together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil. Sir J. Hannen held that the codicil was entitled to probate; and *vide ante*, p. 100, note (*a*). See also *Re Nicholls, Hunter* v. *Nicholls*, [1921] 2 Ch. 11, where an Englishman domiciled in Chili executed a closed or secret will according to the Chilian code, by which a closed will was deemed to include the cover which contained it. The cover was the only document on which the names of the testator and the witnesses were signed together, the will itself being signed by the testator alone. It was held that the indorsement on the envelope and the document enclosed constituted one testamentary disposition, and that the will was well executed according to the law of England and was therefore capable of passing real estate in England.

On the other hand, in *Pearse* (1867), 1 P. & D. 382, where the testatrix wrote three separate lists of legacies on three separate sheets of paper, and signed all three sheets in the presence of the witnesses, but they subscribed upon one sheet (A) only, Sir J. P. Wilde refused to grant probate of the two sheets which were unattested. "It does not appear," said the learned Judge, ". . . that papers B and C were in any way attached to paper A when they were signed, nor is there anything . . . from which it can be inferred that the three formed one document." And where there were two testamentary instruments, both written on the same piece of paper, and the witnesses subscribed at the end of the first alone, Sir H. J. Fust rejected the second, on the ground that it was unattested: *Taylor* (1851), 2 Rob. 411.

In *Hatton* (1881), 6 P. D. 204, where an intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses, it was held that neither paper was entitled to probate.

(*h*) Jarman on Wills (5th ed.), p. 19.

(*i*) *Cock* v. *Cooke* (1866), 1 P. & D., at p. 243. See *Masterman* v. *Maberley* (1829), 2 Hagg., at p. 248; *Robertson* v. *Smith* (1870), 2 P. & D., at p. 45; *Coles* (1871), 2 P. & D., at p. 364.

(*k*) *King's Proctor* v. *Daines* (1830), 3 Hagg., at p. 221.

(*l*) *Jones* v. *Nicolay* (1850), 2 Rob., at p. 292.

The *onus probandi* where a person sets up a paper upon the face of it not testamentary.

evidence (*m*), if the language of the paper is insufficient (*n*). The *onus probandi* that it is a will lies upon the party setting up as testamentary an instrument which upon its face has no such import (*o*).

Documents, not testamentary in form, admitted to probate.

In numerous cases documents, not testamentary in form, have been admitted to probate on proof of due execution, there being evidence which satisfied the Court that their maker intended them to operate as his will (*p*).

(*m*) *English* (1864), 3 S. & T. 586; *Cock* v. *Cooke* (1866), 1 P. & D. 241.

(*n*) *Robertson* v. *Smith* (1870), 2 P. & D., at p. 45; *Slinn* (1890), 15 P. D., at p. 158.

(*o*) *King's Proctor* v. *Daines* (1830), 3 Hagg., at p. 231. See *Whyte* v. *Pollok* (1882), L. R. 7 A. C., at p. 406.

(*p*) *Orders on a savings bank, and on a banker.*—*Marsden* (1860), 1 S. & T. 542; *Cock* v. *Cooke* (1866), 1 P. & D. 241; *Jones* v. *Nicolay* (1850), 2 Rob. 288.

A cheque to take effect after death.—In this case the drawer had made a subsequent will revoking all former wills and codicils, and the Court of Chancery held the gift of the cheque to have been in effect revoked: *Bartholomew* v. *Henley* (1820), 3 Phill. 317; but see *post*, p. 135, note (*i*).

Letters.—A letter beginning "This is my will and letter to you": *Towers* v. *Hogan* (1889), 23 L. R. Ir. 53. A letter containing "death-bed request": *Mundy* (1860), 2 S. & T. 119. Other letters containing testamentary dispositions: *Denny* v. *Barton* (1818), 2 Phill. 575; *Drybutter* v. *Hodges* (1793), cited 2 Hagg. 247; see *Passmore* v. *Passmore* (1811), 1 Phill. 216. Papers containing wishes and a dying request: *Lowrey* (1847), 5 N. C. 619.

Promissory notes contained in a letter.—In this case the gift failed, as the notes were not properly attested: *Gough* v. *Findon* (1851), 7 Ex. 48; 21 L. J. Ex. 58; see *Maxee* v. *Shute* (1799), cited 2 Hagg. 247.

Receipts for stock and bills endorsed.—*Sabine* v. *Goate* (1782), cited 2 Hagg. 247.

Bond endorsed.—*Musgrave* v. *Down* (1784), cited 2 Hagg. 247.

Papers in the following terms were admitted to probate, there being evidence to show that they were intended to have a testamentary operation, and not to take effect as immediate gifts:—A paper containing the words "I hereby make free gift to A of £60, the sum deposited, etc.": *Robertson* v. *Smith* (1870), 2 P. & D. 43; *Slinn* (1890), 15 P. D. 156. A paper containing the following: "I have given all to A and her sons," and containing directions for the payment of certain sums to persons specified, and for the division of the residue between A and her sons: *Coles* (1872), 2 P. & D. 362. A paper containing the following: "I wish A to have my bank-book for her own use": *Cock* v. *Cooke* (1866), 1 P. & D. 241.

Instructions for a will.—The following instruments, duly executed, were admitted to probate, the evidence showing that they were intended to operate as testamentary in the absence of a more formal instrument:—Instruments headed "Head of Instructions," a most informal will of the Earl of Scarborough: *Torre* v. *Castle* (1836), 1 Curt. 303. "Heads of a will": *Bone* v. *Spear* (1811), 1 Phill. 345. "Sketch of my will": *Hattatt* v. *Hattatt* (1832), 4 Hagg. 211. "Memorandum of my intended will": *Barwick* v. *Mullings* (1829), 2 Hagg. 225. "Instructions for a will": *Fisher* (1869), 20 L. T. 684. "Notes of an intended settlement": *Whyte* v. *Pollok* (1882), L. R. 7 A. C. 400. See also *Burton* v. *Collingwood* (1832), 4 Hagg. Ecc. 176; *Slinn* (1890), 15 P. D. 156. On the other hand, the memorandum was held deliberative or initiatory and not admitted to probate in *Mathews* v. *Warner* (1798), 4 Ves. 186; 5 Ves. 23 ("only a project of a will," not a completed definite rule of law for settling his fortune); see also *Rymes* v. *Clarkson* (1809), 1 Phillim. 22; *Blewitt* v. *Blewitt* (1833), 4 Hagg 410; *Elsden* v. *Elsden* (1832), 4 Hagg. 183; *Gillow* v. *Bourne* (1931), 4 Hagg. 192; *Bragge* v. *Dyer* (1830), 3 Hagg. 207. A paper merely expressing an intention of directing a solicitor to prepare a will for the purpose of leaving a certain legacy will not be admitted to probate in the absence of evidence that such paper was intended to have a testamentary operation: *Coventry* v. *Williams* (1844), 3 Curt. 787; and see *Pascall* (1868),

In these cases the instruments were intended by their makers to operate as wills, but it is settled law, and several cases have decided, that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will or other testamentary instrument, but an instrument of a different shape; yet, if it cannot operate in the latter, it may nevertheless operate in the former character (*q*); provided always that the document is duly executed in accordance with the provisions of the Wills Act, 1837.

And a paper which contains dispositions to be made after death, though not intended to be a will, if invalid in the form in which it is drawn, may be admitted to probate, provided it is duly executed.

"The form of the instrument," said Sir John Nicholl in *King's Proctor* v. *Daines* (*r*), "is not conclusive against its testamentary effect; although it may not be valid in the form in which it was drawn up as a deed of gift, yet it may operate as a will. If there is any proof, either in the paper itself, or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to

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1 P. & D. 606; *Boughton-Knight* v. *Wilson* (1915), 32 T. L. R. 146. The cases are fully discussed and analysed in the judgment of Scrutton, L.J., in *Godman* v. *Godman*, [1920] P. 261, at pp. 281 *et seq.*, where the learned Lord Justice points out (at p. 282) that before the Wills Act, 1837, there was and still in exceptional circumstances may be) another class of imperfect or unfinished documents, where the writer obviously contemplated doing something more, which might be admitted to probate if two conditions were satisfied. (1) That the deceased had finally decided to make the disposition expressed in the imperfect paper, and (2) that he had never abandoned the intention, but was only prevented by the act of God from proceeding to the completion of his will.

Deeds.—In many cases deeds (duly executed in the form required by the statute) have been permitted to operate as wills, there having been evidence to show that they were intended by the grantor to be testamentary in their effect.

An instrument commenced as an indenture and ended as a will. By it the grantor "bargained and sold" certain lands to B and C, on trust to sell them after his decease, and the money so raised was "given and bequeathed" to certain persons. The instrument appointed B and C "executors," and the grantor signed, sealed, published and declared the instrument as his will in the presence of several witnesses. Held: A good will: *Hixon* v. *Wytham* (1675), 1 Ch. Cas. 248; *S. C.* Finch, 195.

An instrument entitled "Articles of Agreement," and signed, sealed, and delivered as a deed, was held to be testamentary, there being evidence which showed that the person who prepared the instrument was instructed to make a will: *Green* v. *Proude* (1674), 1 Mod. 117; *S. C.* 3 Keb. 310.

A deed poll, duly executed and attested by two witnesses, but containing no reference to the death of the grantor, was admitted to probate, evidence having been admitted which showed that it was intended by the grantor to operate as a will: *Slinn* (1890), 15 P. D. 156.

(*q*) *Per* Sir John Nicholl in *Masterman* v. *Maberley* (1829), 2 Hagg., at p. 247.

(*r*) (1830), 3 Hagg., at p. 221.

probate as testamentary" if executed in accordance with the provisions of the statute 1 Vict. c. 26 (*s*).

But no case has gone to the length of deciding that because an instrument cannot operate in the form given to it, it *must* operate as a will; it *may* operate as a will if shown to have been written with a testamentary intention (*t*).

(*s*) See also *Milnes* v. *Foden* (1890), 15 P. D., at p. 107. The following cases illustrate the rule :—

A, by will duly executed and attested, devised his freeholds and copyholds to certain uses, with remainder "to such uses as he by deed or instrument in writing should appoint." On the following day A executed an instrument in the form of a deed-poll, which, after reciting the power in the will, directed the trustees to convey the estates to certain other uses. Held : That this second instrument could be considered as a codicil, sufficiently executed to pass copyhold, but not freehold. In this case Buller, J., said that the cases had established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will : *Habergham* v. *Vincent* (1793), 2 Ves. Jun. 204; 4 Bro. C. C. 353.

A, on the same day, made two instruments, one of which he called a deed and the other his will. By the deed he put £4,000 in the hands of B, directing him to pay an annuity to A for life, and afterwards on A's death to dispose of the money as therein directed. There was a proviso for the return of the money to A should the annuity be in arrear, in which case the capital sum was to be held jointly by A and B. By the will B was made executor and residuary legatee. Held : The will and the deed must be taken together as one testamentary act, and that therefore the deed must be regarded as testamentary, "though not strictly so because irrevocable" : *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127; Belt's Suppl. 80; and see *Tomkyns* v. *Ladbroke* (1755), 2 Ves. Sen. 591; *Hog* v. *Lashley* (1789), 3 Hagg. 415, n.

The drafts of three bonds, intended to be executed by the maker in favour of his three daughters, in substitution for legacies which he had revoked, were allowed to operate as testamentary, their execution having been prevented by his death : *Masterman* v. *Maberly* (1829), 2 Hagg. 235.

A deed-poll was executed with the formalities required for the execution of wills. Held : As it was a disposition of property to take effect after the death of the maker, it was capable of being admitted to probate : *Emley* v. *Davidson* (1881), 45 L. T. 418.

The deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until after his decease. Probate was granted of the three deeds as together containing the will of the deceased : *Morgan* (1866), 1 P. & D. 214.

Probate was granted of a will in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of its execution : *Colyer* (1889), 14 P. D. 48.

An indenture, attested by two witnesses, and admitted to probate as a will in the Isle of Man, was admitted to probate by the Court of Probate as a foreign will without inquiry into its testamentary character : *Cosnahan* (1866), 1 P. & D. 183.

A person abroad executed a power of attorney whereby he appointed his mother to receive the proceeds of his estate for her own use until his return to England, and, in the event of his death abroad, he assigned and delivered to her the whole claim to his lands; but her occupation was to cease upon his return from abroad. This instrument was duly executed as a will. Held : That the instrument operated, on the death of the maker abroad, as a devise of the lands to the mother : *Doe* d. *Cross* v. *Cross* (1846), 8 Q. B. 714.

A nomination paper, executed by the nominator under section 25 of the Industrial and Provident Societies Act, 1893, in the presence of two witnesses, who signed it in his presence, and invalid as a nomination by reason of the amount it purported to dispose of, held to be testamentary and admitted to probate as a will : *Baxter*, [1903] P. 12.

(*t*) *King's Proctor* v. *Daines* (1830), 3 Hagg., at p. 221. The question is

Secus, an instrument coming into operation immediately.

An instrument coming into operation immediately, especially if it involves anything in the nature of consideration, cannot operate as a will (*u*).

Where a deed is in part to take effect immediately, and partly on the death of the maker.

On the other hand, if a deed or document is in part clearly testamentary, it seems that such part may take effect as a will, though other parts are not testamentary (*x*).

Since the Wills Act, it can only be a matter of rare occurrence that any deed should be so attested as to enable it to operate as a will. The validity of the instrument will thus, in most cases, depend on the maintenance of its non-testamentary character (*y*). For if an instrument is clearly testamentary and not duly attested it will not be supported as a *donatio mortis causa* (*z*).

If an instrument is not testamentary in form or substance, and there is no evidence that it was intended to operate as a will, probate refused.

If an instrument is not testamentary either in form or substance (*i.e.*, if none of the gifts are expressed in testamentary language, and the operation of the instrument is not in terms postponed to the death of the maker), and if no extrinsic evidence is adduced which satisfies the Court that it was intended to operate as a will, probate will not be granted of the instrument (*a*).

A paper, clearly testamentary in

However clearly testamentary a paper may appear on the face of it, it will not be admitted to probate if the Court is satisfied by extrinsic evidence that the maker did not execute

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important with reference to liability for legacy duty. In *Att.-Gen.* v. *Jones* (1817), 3 Price, 368, it was held that property settled by deed, which deed contained a power of revocation by the maker, and was granted for a nominal consideration, was subject to legacy duty. But this decision has been universally condemned. See *Tompson* v. *Browne* (1835), 3 My. & K. 32; *Brown* v. *Advocate-General* (1852), 1 Macq. H. L. 78; *Majoribanks* v. *Hovenden* (1843), 1 Dru. 11, 27, 29; *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 83.

(*u*) See *Robinson* (1867), 1 P. & D. 384; *Thorncroft* v. *Lashmar* (1862), 2 S. & T. 479; *Halpin* (1874), Ir. R. 8 Eq. 567; *Jeffries* v. *Alexander* (1860), 8 H. L. C. 594; *Majoribanks* v. *Hovenden* (1843), 1 Dru. 11.

(*x*) In *Robinson* (1867), 1 P. & D. 384, Sir J. P. Wilde said that he had not met with a case in which such a principle had been laid down, but he "by no means said it could not be done." And see *Doe* d. *Cross* v. *Cross* (1846), 8 Q. B. 714, where the Court was clear that there was no objection to one part of an instrument operating immediately as a deed, and another *in futuro* as a will. See also *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127; *Bagnall* v. *Downing* (1754), 2 Lee, 3; and see *Wolfe* v. *Wolfe*, [1902] 2 Ir. R. 246.

(*y*) *Mitchell* v. *Smith* (1864), 33 L. J. Ch. 596.

(*z*) *Re Hughes*, [1888] W. N. 163.

(*a*) A paper containing the words "I, A B, in the presence of the two undersigned witnesses, do give all my goods and chattels to M D," and duly executed, rejected, the extrinsic evidence (which was conflicting) not satisfying the Court that it was intended to operate otherwise than as a present gift to M D: *King's Proctor* v. *Daines* (1830), 3 Hagg. 218. See *Langley* v. *Thomas* (1857), 26 L. J. Ch. 609; see also *Glynn* v. *Oglander* (1829), 2 Hagg. 428; *Griffin* v. *Ferard* (1835), 1 Curt. 97; *Shingler* v. *Pemberton* (1832), 4 Hagg. 356; *Majoribanks* v. *Hovenden* (1843), 1 Dru. 11, at pp. 27, 28; *Hodson* v. *Barnes* (1926), 43 T. L. R. 71 (where the words "Mag. Everything I possess," were written upon an egg-shell).

form, may be refused probate, if the Court is satisfied that it was not executed *animo testandi*.

it *animo testandi* (*b*). For it is said that "the second thing required to the making of a good testament is, that he that doth make it have, at the time of making it, *animum testandi*, *i.e.*, a mind to dispose, a firm resolution and advised determination to make a testament, otherwise the testament will be void. And therefore if a man rashly, unadvisedly, incidentally, jestingly or boastingly, and not seriously, writes or says that such a one shall be his executor, or shall have all his goods, or that he will give to such a one such a thing, this is no will, nor to be regarded. For it is the mind, and not the words of the testator, that giveth life to the testament" (*c*). The law in this respect has not been altered by the Wills Act (*d*). But the Court will not permit a will which bears on the face of it all the appearance of a regular testamentary act to be set aside on such grounds, unless the evidence is cogent and conclusive (*e*).

The Court cannot inquire into the testator's intention as to the *effect* of the instrument.

The intention of the testator, which is to be considered, is his intention whether the instrument should have any testamentary operation at all; if the instrument is manifestly intended to operate as a will, the Court cannot look at its effect; it must have legal operation, without regard to the testator's intention as to its effect (*f*).

A document stated on the face of it as not meant to operate as a will.

If the document, although in the form of a will, bears upon the face of it a positive assertion by the person who has executed it that it is not meant to operate as a legal will, it cannot be held to be a valid testamentary instrument (*g*).

But a mere ambiguity in the descriptive title will not destroy the validity of the document.

Where a paper is not clearly testamentary on the face of it, the burden of proof is on those who assert that the deceased intended it to operate as a testamentary paper (*h*). But a mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity

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(*b*) As where a will was signed by a testator in jest: *Nichols* v. *Nichols* (1814), 2 Phill. 180; or as a mere sham and pretence, never seriously intended as a paper of testamentary operation: *Lister* v. *Smith* (1863), 3 S. & T. 282. See *Trevelyan* v. *Trevelyan* (1810), 1 Phill., at p. 153; *Nosworthy* (1865), 11 Jur. (N.S.) 570. So where the wrong instrument is executed by a mistake: see *Hunt* (1875), 3 P. & D. 250; *Meyer*, [1908] P. 353.

(*c*) 2 Shep. Touch. by Prest. 404; Swinb., Part VII., s. 13; Bac. Abr., tit. Will (C); Comyns Dig., tit. Devises D 2.

(*d*) *Lister* v. *Smith* (1863), 3 S. & T. 282

(*e*) *Ibid.*, at p. 289.

(*f*) *King's Proctor* v. *Daines* (1830), 3 Hagg. 231; *Philipps* v. *Thornton* (1831), 3 Hagg. 753; cf. *Beech* v. *Public Trustee*, [1923] P. 46.

(*g*) *Ferguson-Davie* v. *Ferguson-Davie* (1890), 15 P. D. 109.

(*h*) *Thorncroft* v. *Lashmar* (1862), 2 S. & T., at p. 484; *King's Proctor* v. *Daines* (1830), 3 Hagg., at p. 231; *Griffin* v. *Ferard* (1835), 1 Curt. 97; *Coventry* v. *Williams* (1844), 3 Curt., at p. 790; *vide ante*, p. 118.

will justify inquiry; but should the parties lead no proof, or should the proof adduced be inconclusive, the document must receive effect according to its tenor and substance (*i*).

Section 7.

EVIDENCE OF DUE EXECUTION—PRESUMPTION OMNIA RITE ESSE ACTA.

Positive affirmative evidence of due execution is not absolutely necessary.

It has long been held that there is no absolute necessity for positive affirmative evidence of due execution in order to enable the Court to pronounce in favour of a will.

"Is it absolutely necessary," said Sir H. Jenner Fust in *Blake* v. *Knight* (*k*), "to have positive affirmative testimony by the subscribed witnesses, that the will was actually signed in their presence, or actually acknowledged in their presence; is it absolutely necessary under all circumstances that the witnesses should concur in stating that these facts took place; or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will? I think these are not absolute requisites to the validity of a will; I think the Court must take into its consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgment of a signature, clearly existing on the face of the will at the time of attestation."

The Court may take into consideration all the circumstances of the case.

What those circumstances are which the Court will weigh and consider may be gathered from the words of Dr. Lushington in *Thomson* v. *Hall* (*l*). "The character of the witnesses, the length of time which has elapsed since the transactions took place, the nature of the facts deposed to,—whether they are likely or not to have made an impression on the minds of the witnesses,—are circumstances to be taken into account; to which is to be added this consideration also, whether the case admits of the principle—the presumption—*omnia rite esse acta*." And to these may be added as circumstances which, if they exist, will assist the Court in coming to the conclusion that the will was duly executed, even in the absence of affirmative evidence on that point, the testator's desire to execute a valid will; his knowledge of what was necessary for that purpose; and the inherent improbability of his neglecting or omitting the

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(*i*) *Whyte* v. *Pollok* (1882), L. R. 7 A. C. 400
(*k*) (1843), 3 Curt. 547, at p. 561.
(*l*) (1852), 2 Rob. 426, at p. 432.

formalities which he knew to be essential (*m*). Of course, if the converse of these circumstances be proved, that will to some extent weaken the case in favour of the will (*n*).

When a will, regular on the face of it, and apparently duly executed, is before the Court, an inference arises that all the requirements of the statute have been complied with.

The learned Judge, it will be observed, refers to the principle —the presumption—*omnia rite esse acta*. That presumption arises whenever a will regular on the face of it, and apparently duly executed, is before the Court; and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute with reference to the execution have duly been complied with (*o*). The presumption applies with more or less force, according to the circumstances of each case (*p*). When there is a regular attestation clause (*q*), with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly (*r*); for the Court will assume that no one would have signed his name to the statement contained in such clause unless it were true (*s*). Where there is an informal attestation clause, which leads to the conclusion that the testator did not know the requirements of the Wills Act, the presumption still applies, but with less force (*t*); and even though the document be informal, and contain no attestation clause whatever, yet in the absence of evidence to the contrary the presumption will apply (*u*).

Meaning of the maxim "*omnia præsumuntur rite esse acta*."

"The maxim, '*omnia præsumuntur rite esse acta*,'" said Lindley, L.J., in *Harris* v. *Knight* (*x*), "is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an

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(*m*) *Cooper* v. *Bockett* (1843), 3 Curt. 648; 4 Moo. P. C. 419; *Wright* v. *Sanderson* (1884), 9 P. D. 149, *Lloyd* v. *Roberts* (1858), 12 Moo. P. C. 158.

(*n*) See *Harris* v. *Knight* (1890), 15 P. D., at p. 178.

(*o*) *Lloyd* v. *Roberts* (1858), 12 Moo. P. C. 158, 165; *Burgoyne* v. *Showler* (1844), 1 Rob. 5, 10; *Smith* v. *Smith* (1866), 1 P. & D. 143, 145.

(*p*) *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580, 582; *Harris* v. *Knight* (1890), 15 P. D. 170, 184.

(*q*) Where the attestation clause stated that the will had been signed by the testator in the presence of the witnesses, and the affidavit of one of them showed that the signature was merely acknowledged, probate on motion was allowed: *Moore*, [1901] P. 44.

(*r*) *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580, *per* Sir J. P. Wilde, at p. 582.

(*s*) Cotton, L.J., in *Harris* v. *Knight* (1890), 15 P. D. 170, 178; *Wright* v. *Rogers* (1869), 38 L. J. P. 67.

(*t*) *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580; *Rees* (1865), 34 L. J. P. 56. The maxim applies where some person signs for the testator in his presence and by his direction: *Clery* v. *Barry* (1887), 21 L. R. Ir. 152.

(*u*) *Peverett*, [1902] P. 205; distinguished in *Strong* v. *Hadden*, [1915] P. 211 (where there was no attestation clause, the evidence of the attesting witnesses was conflicting, and the document itself lent weight to the suggestion that the two witnesses signed at different times).

(*x*) (1890), 15 P. D. 170, at p. 179.

intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect" (*y*).

Be that as it may, the cases show that the Judges who have presided over the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred. And Fry, L.J., in *Wright* v. *Sanderson* (*z*) stated that in so doing they have, in his opinion, acted rightly and wisely.

Application of the presumption: (1) Where both attesting witnesses are dead.

(1) Where a will which bears upon the face of it what purport to be the signatures of the testator and two witnesses and appears in other respects to have been duly executed, is produced to the Court, and it is proved that both attesting witnesses are dead, the Court, on proof that the signatures of the testator and witnesses are in their respective handwriting (*a*), will assume that the testator and the subscribing witnesses all signed in the presence of each other, so as to satisfy the requirements of the statute (*b*), unless some irregularity upon the face of the will remain unexplained and raise a contrary presumption (*c*).

(*y*) Cf. the observations of O'Connor, M.R., in *Rolleston* v. *Sinclair*, [1924] 2 I. R. 157 (C. A.) (it is only when witnesses are dead, or cannot give evidence through incapacity, or their evidence cannot be accepted on account of unreliability, that the doctrine "*omnia præsumuntur rite esse acta*" can be applied. It is to be called in only when there is a void to be filled).

(*z*) (1884), 9 P. D. 149, 163.

(*a*) In *Harris* v. *Knight* (1890), 15 P. D. 170, Butt, J., assumed the signature of one of the witnesses, which was not directly proved, to be genuine, *vide post*, p. 126; in *Phibbs*, [1917] P. 93, neither attesting witness could be found or identified.

(*b*) *Trott* v. *Skidmore* (1860), 2 S. & T. 12; *Burgoyne* v. *Showler* (1844), 1 Rob., at p. 10; *Thomas* (1859), 1 S. & T. 255; *Spain* (1915), 31 T. L. R. 435. In *Peverett*, [1902] P. 205, the presumption was allowed to prevail although there was no attestation clause: and see *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580; but see *Strong* v. *Hadden*, [1915] P. 211, where there was no attestation clause, the evidence of the attesting witnesses was conflicting, and the document itself supported the suggestion that they signed at different times.

(*c*) *Trott* v. *Skidmore* (1859), 2 S. & T. 12; *Swinford* (1869), 1 P. & D. 631.

Thus in *Harris* v. *Knight* (*d*) the presumption prevailed. The testator died in 1877, and at his funeral his widow produced a document, which she stated to be the will of the deceased. The document was subscribed with three names, one of which purported to be the name of the deceased written in his own handwriting; the other two names were those of two of his friends. Thereupon the defendant, who was the eldest son of the deceased, said that the document was no will of his father's, and that the signature was not in his father's handwriting. He, however, took no steps to assert his right as heir-at-law, and the widow took no steps to prove or establish the will she produced. After the death of the widow the will could not be found; and the plaintiff, who was one of the daughters of the marriage, propounded the alleged will and pleaded that, although it was lost, the Court ought to grant probate of it. Both persons whose names were subscribed to the lost document as witnesses were dead. No copy or draft of the document could be found, and it was not proved that it had borne any date or had contained any attestation clause; but its existence and contents, and the handwriting of the testator and of one of the two friends of his who had subscribed it, were proved to the satisfaction of Butt, J., who thereupon inferred that the unproved signature was genuine and that everything was regularly done, and accordingly granted probate of the will. On appeal it was held by Lindley and Lopes, L.JJ. (Cotton, L.J., dissenting), that Butt, J., was justified in presuming that the lost will was duly executed.

(2) Where the recollection of the witnesses is vague or doubtful.

(2) The Court will not allow defective memory alone to overturn a will which is upon the face of it duly executed (*e*); if the witnesses are utterly forgetful of the facts, the presumption *omnia rite esse acta* will prevail (*f*). Thus in *Blake* v. *Blake* (*g*) Holker, L.J., said: "If the witnesses who came forward to prove the will had been in doubt, or could not remember whether they did or did not see the testatrix sign, the fact that everything appears to have been rightly done would entitle the Court to come to the conclusion that they did in fact see her sign" (*h*).

(*d*) (1890), 15 P. D. 170; cf. *Phibbs*, [1917] P. 93, where the will was accidentally destroyed or lost after the death of the testator, and the names of the attesting witnesses were unknown.

(*e*) *Thomson* v. *Hall* (1852), 2 Rob. 426, 436.

(*f*) *Burgoyne* v. *Showler* (1844), 1 Rob. 5, 10.

(*g*) (1882), 7 P. D. 102, 115.

(*h*) See also *per* the Earl of Selborne, L.C., in *Wright* v. *Sanderson* (1884), 9 P. D. 149, at p. 160. Thus, in *Blake* v. *Knight* (1843), 3 Curt. 547, where the witnesses would not swear positively that the deceased's signature was at the bottom of the will when they attested and subscribed, and would not swear negatively, and one of them swore "the testator dipped

(3) If one witness gives, or if both give, evidence negativing due execution.

(3) Even if the witnesses profess to remember the transaction and state that the will was not duly executed (that the testator did not make or acknowledge his signature in their joint presence, or so forth), this negative evidence may not only be rebutted by the evidence of other witnesses (*i*), but the Court may in this case also, from a consideration of all the circumstances of the case, and of the facts and circumstances which the attesting witnesses themselves state, come to the conclusion either that they are not to be credited or that their recollection fails them (*k*); and so the will may be admitted to probate in spite of their testimony.

And what is true of cases in which both witnesses negative due execution, is also true where the evidence of the two attesting witnesses conflicts, as where one negatives due execution, while the other affirms or is doubtful.

For where it is obvious that the testator meant the document to be his will, and thought he was complying with the Act of Parliament, the Court will presume that everything was right, and will not tie itself down to accept the evidence of the witnesses to the contrary. Where there is any doubt about the recollection of the attesting witnesses, where there is anything from which the Court can fairly say that the will ought to be held to be good, and that the recollection of the attesting witnesses ought not to be relied on as against the will, the

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the pen into the ink and gave it to us, but whether he wrote anything himself or signed his name I cannot say," Sir H. J. Fust, from a consideration of all the circumstances of the case, came to the conclusion that the name of the testator had been signed to the paper before the witnesses subscribed, and accordingly pronounced for the will. See *Moore*, [1901] P. 44. In *Burgoyne* v. *Showler* (1844), 1 Rob. 5, neither witness could positively affirm whether the other was present when the will was signed; they could not remember whether that was or was not the case; but both deposed that they did see the deceased sign or acknowledge his signature; Dr. Lushington held that the fair presumption was that the will was duly executed. See *Hare* (1842), 3 Curt. 54. In *Thomson* v. *Hall* (1852), 2 Rob. 426, and *Woodhouse* v. *Balfour* (1887), 13 P. D. 2, where the recollection of the witnesses was almost a blank with reference to the circumstances of the execution, the Court pronounced for the will. See *Holgate* (1859), 1 S. & T. 261; *Wright* v. *Sanderson* (1884), 9 P. D. 149; *Whiting* v. *Turner* (1903), 89 L. T. 71; *Vinnicombe* v. *Butler* (1864), 3 S. & T. 580, in which case there was an incomplete attestation clause; but see *Strong* v. *Hadden*, [1915] P. 211. In *Gwillim* v. *Gwillim* (1859), 3 S. & T. 200, where the attesting witnesses to a will, duly executed upon the face of it, did not recollect having seen the testator's signature to the will when they subscribed their names as witnesses, the Court held itself at liberty to judge from the circumstances of the case whether it was probable that the testator's name was or was not on the will and visible to the witnesses at the time of the attestation, and, being of opinion that it was, pronounced for the will. See *Beckett* v. *Howe* (1869), 2 P. & D. 1, and the remarks of Jessel, M.R., on these two cases in *Blake* v. *Blake* (1882), 7 P. D. 102, 109 (*ante*, p. 106, note (*v*); see also *Smith* v. *Smith* (1866), 1 P. & D. 143.

(*i*) Where one of the attesting witnesses deposed to due execution and the other negatived it, the Court allowed other persons who were present at the time to be examined: *Young* v. *Richards* (1840), 2 Curt. 371.

(*k*) *Burgoyne* v. *Showler* (1844), 1 Rob. 5, 11.

Court may say that it is satisfied that the will was duly executed (*l*).

(*l*) *Per* Sir Gorell Barnes, in *Wyatt* v. *Berry*, [1893] P. 5, 9. So in *Chambers* v. *The Queen's Proctor* (1840), 2 Curt. 415, where one witness swore that the testator signed the will in the presence of the attesting witnesses, and two others swore he did not, Sir Herbert Jenner came to the conclusion, from a consideration of the evidence, that the recollection of the two latter was at fault, and held that the will was duly executed. The remarks of the learned Judge on the comparative value of affirmative and negative testimony, though too long to quote, deserve attention: see pp. 434, 435; and see *Brenchley* v. *Still* (1850), 2 Rob., at p. 166.

In *Cooper* v. *Bockett* (1843), 3 Curt. 648; 4 Moo. P. C. 419, one of the attesting witnesses (the testator's porter) deposed positively and circumstantially that he saw the testator subscribe his name to the will *after* both the witnesses had signed; the other (the porter's wife), though speaking less positively, said "I cannot say that Captain Cooper's (the testator's) name was on the will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature." Sir H. Jenner Fust disregarded their evidence, saying, "Where the *res gestæ* do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do": 3 Curt., at p. 663. This decision was confirmed by the Queen in Council (4 Moo. P. C. 419), and their Lordships, pronouncing (as Sir H. Jenner Fust had done) for the will, said (at p. 438): "It is not to be forgotten that fraud is out the question; that Captain Cooper certainly intended the instrument to be his will; intended it to be effectual as his will; that he knew or believed his own signature to the paper to be essential, or advisable and desirable at least; that the purpose for which, and the object with which, he summoned these two servants to his room, was merely to substantiate the instrument as his will; that if they have not attested it effectually, their presence, their signature, and the whole transaction was idle and useless, and the intended testator's design and wishes have been absolutely and irremediably frustrated. It is the duty of a Court of Justice not to allow undue weight to these considerations. It seems equally its duty not wholly to lose sight of them. Their Lordships have next to consider whether, independently of them, the supposed fact stated by the porter is or is not in its nature improbable. . . . Their Lordships find themselves unable to think it consistent with probability that Captain Cooper, on the occasion in question, could have acted or allowed the witnesses to act, or could have been capable of acting or allowing them to act, in [the] manner [deposed to]; not that it is their opinion that he was fully aware, or accurately informed, of the legal formalities or ceremonies essential to the sufficient execution or attestation of a will."

In *Lloyd* v. *Roberts* (1858), 12 Moo. P. C. 158, the will was entirely in the handwriting of the testator, an attorney, without break or crowding, with an attestation clause in its proper place. One of the attesting witnesses was dead; the other deposed that when he signed the will, with the exception of the testator's signature and the signature of the other attesting witness, the paper was blank. From the appearance of the will, as well as the circumstance that the testator was a professional man well acquainted with the necessity of a proper execution, the Judicial Committee came to the conclusion that the witness must have been mistaken or that his memory failed him, and pronounced for the will.

In *Wright* v. *Rogers* (1869), 1 P. & D. 678, the facts were very similar to those in the preceding case. The deceased signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the deceased, the attorney swore an affidavit which contained a statement that the will had been duly executed. The attorney died, and after his death the clerk for the first time gave information that the will was not attested in the presence of the deceased. No other witness to disprove or corroborate this statement was called. The Court, on a review of all the circumstances, declined to rely upon the recollection of the surviving witness, and decreed probate of the will as duly executed. *Gove* v. *Gawen* (1842), 3 Curt. 151, is a similar case. Other instances of the application by the Court of the foregoing principle may be found in *Leech* v. *Bates* (1849), 1 Rob. 714; *Owen* v.

But where the evidence of the attesting witnesses directly negatives due execution, and their evidence is not rebutted either by direct or circumstantial evidence casting a doubt upon the veracity of the witnesses or the reliability of their recollection, the Court cannot presume a due execution in the teeth of such direct evidence to the contrary (*m*). As Dr. Lushington said in *Burgoyne* v. *Showler* (*n*), "If the witnesses profess to remember the transaction and state that the will was not duly executed, and this negative evidence be not rebutted by proof of circumstances showing that the witnesses are not to be credited; or that, from the facts and circumstances which they state, their recollection fails them; then, according to my apprehension, the will must be pronounced against" (*o*).

Williams (1863), 4 S. & T. 202; *Moore*, [1901] P. 44; *Pilkington* v. *Gray*, [1899] A. C. 401.

(*m*) *Croft* v. *Croft* (1865), 4 S. & T. 10.

(*n*) (1843), 1 Rob. 5, at p. 10.

(*o*) The case of *Wyatt* v. *Berry*, [1893] P. 5, well illustrates this proposition. There the evidence of both attesting witnesses directly showed that the testator acknowledged his signature first in the presence of one witness, who attested it, the other witness not being then present, this latter witness being afterwards called in and signing his name. The Court was asked to uphold the will on the ground that, as the will appeared to be in proper form and duly executed in all respects, the Court might hold that it was properly executed, notwithstanding the testimony of the attesting witnesses, if the Court did not feel certain that their memory could be relied upon. The learned Judge (Sir Gorell Barnes), after agreeing with that proposition, said: "If I felt any doubt, or saw any reason to believe that the witnesses were not accurate, my view would be the other way. But, unfortunately, the recollection of those two witnesses is too good for that. It appears to me . . . that their evidence must be accepted by me. Therefore, though I do it reluctantly, I must pronounce against the will." See also *Pennant* v. *Kingscote* (1843), 3 Curt. 642; *Croft* v. *Croft* (1865), 4 S & T. 10.

CHAPTER IV.

THE REVOCATION OF WILLS.

Revocable nature of wills.

As testamentary intention is ambulatory till death, a will is in its nature a revocable instrument (*a*); and that in all cases, so that if the testator make his will irrevocable by express words in the body of the instrument, yet he may revoke it, for his act or his words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable (*b*). "The making of a will is but the inception of it, and it doth not take any effect till the death of the devisor; then it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it" (*c*). For this cause a man may alter or make void his will at his pleasure. "A man," saith Swinburne (*d*), "may as oft as he will make a new testament, even until his last breath, neither is there any cautel under the sun to prevent this liberty."

Contracts not to revoke a will.

"Although a will is always revocable notwithstanding a contract not to revoke it, yet such a contract is not illegal and is binding if made for good consideration and in such form as to comply with the Statute of Frauds (*e*), and damages are recoverable for the breach thereof (*f*); but a contract not to revoke a will cannot be specifically enforced. A mere representation of an intention, however, as distinguished from a contract, is not binding, although such representation may have been intended to influence the conduct and action of the contemplated beneficiary, and in fact have been acted on by him" (*g*).

A mutual will may under certain circumstances be treated as irrevocable.

It will hereafter appear that mutual wills may under certain circumstances be regarded as irrevocable in equity to this extent, that on the death of the survivor of the two testators, who has revoked his part of the mutual will after the death of the first

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(*a*) *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 326.

(*b*) *Vynior's Case* (1609), 8 Co. Rep. 82 b.

(*c*) *Forse and Hembling's Case* (1588), 4 Co. Rep. 61 b. See as to the revocability of wills in general, reporter's note to *Hobson* v. *Blackburn* (1822), 1 Add., at pp. 278, 279. (*d*) Swinb., Part VII., s. 14.

(*e*) Wms. on Exors. (11th ed.), p. 93, citing *Hammersley* v. *de Biel* (1845), 12 Cl. & F. 45; *Robinson Ommaney* (1883), 23 Ch. D. 285. But the Probate Division is not the proper tribunal in which to enforce such a contract: *Heys*, [1914] P. 192.

(*f*) Wms. on Exors. (11th ed.), p. 93, citing *Re Parkin*, *Hill* v. *Schwarz*, [1892] 3 Ch. 510.

(*g*) Wms. on Exors. (11th ed.), p. 93, citing *Maddison* v. *Alderson* (1883), 8 A. C. 467, disapproving *Loffus* v. *Maw* (1862), 3 Giff. 592; *Humphreys* v. *Green* (1882), 10 Q. B. D. 148; *Re Fickus*, [1900] 1 Ch. 331.

testator, his personal representatives may be directed to hold the property in trust for the beneficiaries under the revoked will (*h*).

Testator prevented by force or threats from revoking his will.

Where a testator is prevented by force or threats from altering or revoking his will, and from executing a later will leaving his property to others, the Court may, it seems, declare that the executors of the former will are trustees for the persons who would have benefited had the later will been executed (*i*).

A testator cannot authorise a will to be destroyed after his death.

A testator cannot delegate his power of revoking his will by inserting a clause in it authorising another to destroy it after his death (*k*). But he may make the validity of the will contingent on the assent of a third person after his death, and, if that assent is withheld, probate of the instrument may be refused (*l*).

Modes of revocation.

Under the Wills Act, 1837 (*m*), there are four modes (*n*) in which a will or codicil may wholly or partially be revoked :

1. By marriage.

2. By another will or codicil duly executed.

3. By a writing declaring an intention to revoke, and duly executed.

4. By the burning, tearing, or otherwise destroying the will or codicil by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Additional modes of partial revocation.

There are, in addition, two modes in which a will or codicil may partially be revoked :

1. By a duly executed obliteration, interlineation, or other alteration made in the will or codicil.

2. By such an alteration in the will or codicil as renders the words or effect of the will or codicil before alteration no longer " apparent."

Section 1.

REVOCATION BY MARRIAGE.

All wills are revoked by marriage,

Section 18 of the Wills Act, 1837, enacts " that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appoint-

(*h*) *Vide post*, pp. 254 *et seq.*

(*i*) *Betts* v. *Doughty* (1879), 5 P. D. 26. *Vide ante*, p. 78, and see Swinb., Part VII, s. 18 (of forbidding or hindering the testator to make another testament).

(*k*) *Stockwell* v. *Ritherdon* (1848), 1 Rob. 661; *Smith* (1869), 1 P. & D., at p. 719.

(*l*) *Smith* (1869), 1 P. & D. 717.

(*m*) 1 Vict. c. 26, ss. 18-21. The sections will be found *in extenso* on pp. 658, 659 of Appendix I.

(*n*) A will may also be revoked by the republication of a prior will : see *post*, Chapter VI, Section 2, pp. 201 *et seq.*

except wills made in exercise of powers of appointment of a particular description, and wills in contemplation of marriage.

ment, when the real and personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions)."

The Law of Property Act, 1925 (*o*), s. 177, enacts, in relation to wills made after the commencement of that Act (*p*), that a will expressed to be made in contemplation of marriage shall, notwithstanding anything in section 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated (*q*).

Revocation by implication arising from change of circumstances, under the old law, abolished by the Wills Act, 1837, s. 19.

Prior to the Wills Act, 1837, the will of a woman was revoked by marriage, and that of a man by marriage and the birth of a child. There were also cases under the old law in which, apart from the concurrence of marriage, wills were held to be revoked by a change of condition in the testator (*r*).

Section 19 of the Wills Act provides "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

The marriage must be valid by the laws of this country, and must operate as a revocation by the law of the testator's domicil at the time.

To revoke a will the marriage must be valid by the laws of this country (*s*), and the testator must, at the time of his marriage, be domiciled in a country where marriage has the effect of revoking a previous will. Thus where a domiciled Scotsman made a will and afterwards married in Scotland, and subsequently acquired an English domicil which he retained until his death, it was held that the will was valid so long as he remained a domiciled Scotsman, and that it was not revoked by his subsequent change of domicil (*t*), in consequence of the provisions of Lord Kingsdown's Act, 1861 (24 & 25 Vict. c. 114), s. 3 (*u*).

(*o*) 15 Geo. 5, c. 20.

(*p*) *I.e.*, January 1, 1926: see section 209 of the Act.

(*q*) Before the Act, it was held that a valid marriage is an absolute revocation even of a will made in contemplation of marriage: *Cadywold* (1858), 1 S. & T. 34.

(*r*) Wms. on Exors. (11th ed.), p. 134.

(*s*) *Mette* v. *Mette* (1859), 1 S. & T. 416; *Warter* v. *Warter* (1890), 15 P. D. 152. The Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), which legalised marriages contracted before and after the Act between a man and his deceased wife's sister, provides by section 2 that no will shall be deemed to have been revoked by reason of any marriage contracted before the Act being made valid by the Act. Similar provisions apply to marriages between a man and his deceased brother's widow, by the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. 5, c. 24).

(*t*) *Reid* (1866), 1 P. & D. 74; *Westerman* v. *Schwab*, [1905] 8 F. 132, Ct. of Sess.; *vide ante*, p. 33.

(*u*) "No will . . . shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same." See also *Groos*, [1904] P. 269; and see *Loustalan* v. *Loustalan*, [1900] P. 211, as to the operation of section 18 of the Wills Act upon wills of foreigners domiciled abroad.

Reason for the exception in cases of wills made in exercise of a power.

The reason for excepting from the provision of section 18 of the Wills Act, 1837, wills made in exercise of the powers of appointment therein mentioned, is stated to be that a revocation of the will in a case to which the exception applies would operate only in favour of those entitled under the settlement in default of appointment, and the new family of the testator would derive no benefit whatever from such revocation (*x*).

The Court will endeavour to bring wills in exercise of a power within the exception.

The tendency of the cases decided upon the construction of the section appears to be in favour of the validity of an exercise of a power of appointment, if by any legitimate construction of the language of the section it can be brought within the terms of the exception (*y*).

Where a will exercises a power and also disposes of other property of the testator.

If a will, in addition to exercising a power of appointment of the excepted class, disposes of other property, the portion of the will disposing of other property is revoked by a marriage, and administration with the will annexed, limited to the property over which the testator had power of appointment, will be granted to the appointee (*z*).

Effect of subsequent marriage on the privileged wills of soldiers and seamen.

The extent to which section 18 of the Wills Act, 1837, must be held to apply to the privileged wills of soldiers and seamen, and the question whether such wills are in all circumstances revoked by subsequent marriage, will be discussed in a later chapter (*a*).

(*x*) Wms. on Exors. (11th ed.), p. 134, note (*f*), citing *Logan* v. *Bell* (1845), 1 C. B. 872.

(*y*) *Russell* (1890), 15 P. D. 111, 113; *Fenwick* (1867), 1 P. & D. 319. Thus in *Fitzroy* (1858), 1 S. & T. 133, the exception was held to extend to a case where the same persons as would have taken under the Statute of Distributions in the case of an intestacy, would take under the settlement creating the power, in default of appointment, and in the same proportions in both cases.

In *Fenwick* (1867), 1 P. & D. 319, the exception was held to extend to a case in which, in the event of certain contingencies happening, the property appointed would not pass, in default of appointment, to the persons who would have taken in case of intestacy under the Statute of Distributions.

In *McVicar* (1869), 1 P. & D. 671, the property appointed would have passed, in default of appointment, to the next-of-kin of the testator. But a distinction was drawn between the words "next-of-kin" standing alone and the words "next-of-kin under the Statute of Distributions." It was held that the two descriptions do not imply the same class, and on that ground the will exercising the power of appointment was held to fall within the exception: see *Worthington* (1872), 20 W. R. 260. See also *Re Paul, Public Trustee* v. *Pearce*, [1921] 2 Ch. 1.

(*z*) *Russell* (1890), 15 P. D. 111. In *Poole* v. *Poole*, [1919] P. 10, where the appointee (the testator's son by a former marriage) was of unsound mind, the Court refused to grant administration limited to the appointed fund to the receiver in lunacy of the son's estate, but made a general grant of administration to the testator's widow, with so much only of the will annexed as related to the appointed fund. In that case the power of appointment was a general power, and was so exercised as to make the appointed fund part of the testator's estate for payment of debts.

(*a*) *Post*, Part I, Chapter IX, Section 5, pp. 258 *et seq.*

SECTION 2.

REVOCATION BY A SUBSEQUENT TESTAMENTARY INSTRUMENT.

Provision of the Wills Act, s. 20.

Section 20 of the Wills Act, 1837, provides that a will or codicil or any part thereof may be revoked "by another will or codicil executed in manner hereinbefore required."

How far applicable to soldiers and seamen.

The words "in manner hereinbefore required" have been held to apply, not only to section 9 of the Wills Act, but also to the proviso in section 11 that any soldier in actual military service or mariner or seaman at sea may dispose of his personal estate as he might have done before the making of the Act. Therefore the informal will of a soldier or seaman, valid under the proviso, though not attested with the formalities prescribed by section 9 of the Wills Act, may revoke an earlier will (*b*).

The mere fact of executing a later will not necessarily a revocation of an earlier will.

Any number of testamentary papers may be admitted to probate as together containing the will of the deceased.

"The mere fact of making a subsequent testamentary paper," says Sir Edward Vaughan Williams in a passage in his work on Executors (*c*), which has repeatedly and emphatically received judicial affirmation (*d*), "does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together. . . . Any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of an earlier date, then such later instrument will revoke the earlier as to those parts only where they are inconsistent."

"This passage," said Sir J. P. Wilde in *Lemage* v. *Goodban* (*e*), "truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. . . . The intention of the testator in the matter is the sole

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(*b*) *Wood* v. *Gossage*, [1921] P. 194 (C. A.).

(*c*) Wms. on Exors. (11th ed.), p. 116. To guard against misapprehension, a slight alteration has been made in the concluding words of the passage.

(*d*) *E.g.*, in *Lemage* v. *Goodban* (1865), 1 P. & D. 57, 62; *Petchell* (1874), 3 P. & D. 153, 156; *Townsend* v. *Moore*, [1905] P. 66, 67; and see *Reeves* v. *Reeves*, [1907] 2 Ir. R. 421.

(*e*) (1865), 1 P. & D., at p. 62: see *Deakin* v. *Garvie* (1919), 36 T. L. R. 122 (C. A.).

guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend—not which or what number of papers did he desire or expect to be admitted to probate—is the true question. And so this Court has been in the habit of admitting to probate such, and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

The intention of the testator is the sole guide,

the question being "what dispositions did he intend to revoke or to retain."

(1) A clause of revocation, when it is in clear words, has the effect of revoking all former wills just as if they had never existed : it must be considered as leaving no operation whatever to any former will (*f*). But even if the second instrument contains a general revocatory clause, that is not absolutely conclusive, and the Court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will (*g*).

(1) The effect of a later testamentary instrument upon an earlier, where the former contains words of express revocation.

Thus in *Gladstone* v. *Tempest* (*h*) Sir Herbert Jenner said : "Generally speaking, there is no doubt that by a general clause of revocation there is a revocation of all prior testamentary acts. But it has been over and over again laid down, that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit" (*i*).

(*f*) *Sotheran* v. *Dening* (1881), 20 Ch. D. 99, 105.
(*g*) *Dempsey* v. *Lawson* (1877), 2 P. D. 98, 107.
(*h*) (1840), 2 Curt. 650, 653.
(*i*) Thus in *Denny* v. *Barton* (1818), 2 Phill. 575, a codicil in the form of a letter written by the testator in 1808 was held to be unrevoked by a will of 1812 which contained a clause revoking all former wills. Sir John Nicholl said : "I am clearly of opinion that it can operate, and that it was not intended to be revoked, notwithstanding the revocatory clause in the will."
In *Gladstone* v. *Tempest* (1840), 2 Curt. 650, cheques written in 1833 by the deceased, but not intended to have effect until after his death, were admitted to probate as part of the will of the deceased, notwithstanding the execution by him in 1834 of a will which disposed of the whole of his property and contained a full clause of revocation.
In *Doe* v. *Hicks* (1832), 8 Bing. 475, the deceased executed a codicil "revoking and making void *several* of the dispositions theretofore made by his will and codicils of all his freehold copyhold and personal estate and effects of every kind and description." The codicil concluded "hereby in all other respects but what is above mentioned confirming my said will and codicils." It was held that a devise of certain copyhold premises to the testator's wife, which was contained in the will, was not revoked. Tindal, C.J., said (at p. 480) : "If a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. For if there is only a reasonable doubt whether the

Where the subsequent will is made under the impulse of a mistaken belief of facts, the prior bequest not revoked.

It will hereafter appear that a will destroyed by a testator under an erroneous belief is not thereby revoked (*k*). And it has been held that a subsequent will or codicil, made under the impulse of a mistaken belief of facts, will not revoke a prior one.

Thus where a testator by his will gave legacies to the grandchildren of his sister, and subsequently, by a codicil, revoked the legacies and bequests, giving as a reason that the legatees were all dead, on it appearing that the legatees were in fact alive at the death of the testator, it was held that the bequests in the will were not revoked (*l*). "There is no revocation," said Lord Loughborough, "the cause being false; whether by misinformation or mistake is perfectly indifferent" (*m*).

So in *In the Goods of Moresby* (*n*) a testator, supposing his will to be lost, made in Peru a nuncupative will with a general revocatory clause. The former will was subsequently found, but he died in ignorance of that fact. The provisions of the two wills were very similar. Sir John Nicholl said: "It appears that the deceased did not intend to revoke the former will, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been

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clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand." See *Kiver* v. *Oldfield* (1859), 4 De G. & J. 30.

In *Howard* (1869), 1 P. & D. 636, a codicil to the last will absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will. The clause appointing executors and guardians in the will was held not to be revoked, and the will, therefore, admitted to probate; but in *Cottrell* v. *Cottrell* (1872), 2 P. & D. 397, where a subsequent will (executed in accordance with the law of Italy, where the testator was domiciled at the time of his death) contained the following words: "I erase, revoke, and annul every other act or last will which I may have made," Lord Penzance said: "Treating it as a question of intention, to be gathered from the construction of the last will, I am of opinion that it revoked the appointment of the executor in the preceding will." And see *Henfrey* v. *Henfrey* (1840), 2 Curt. 468; 4 Moo. P. C. 29, 36; *Griffith* (1872), 2 P. & D. 457.

In a testamentary suit, the parties came to an arrangement under the terms of which the Court was asked to grant probate of two testamentary instruments. Sir James Hannen said: "I hesitated because I found the later will contained a clause revoking all former wills. On reflection, I think that as the parties have agreed that the two documents shall be admitted to probate, I ought to accede to their wishes. . . . I think I ought not to refuse to carry out the terms agreed upon, unless I am prepared to hold that under no possible circumstances could the first document be taken as consistent with the last. I am not prepared to say that. I think there may be circumstances in which the two would operate together": *Robinson* v. *Clarke* (1877), 2 P. D. 269.

If a will which is conditional contains a clause revoking all former wills, the condition attaches to the whole document, and therefore, if the condition is not fulfilled, the will is inoperative to revoke a previous will: *Hugo* (1877), 2 P. D. 73.

(*k*) *Post*, pp. 163 *et seq.*

(*l*) *Campbell* v. *French* (1797), 3 Ves. 321.

(*m*) *Ibid.*, at p. 323.

(*n*) (1828), 1 Hagg. 378.

recovered, there is no objection to probate thereof being granted " (*o*).

Distinction between cases in which testator asserts his belief, and expresses a doubt.

There appears to be a distinction between cases in which the testator, as the foundation of his wish to change his former intent, positively asserts his belief in the existence of facts which have not happened, and cases in which he merely expresses his doubt, supposition, or advice as to their existence (*p*). The revocation grounded on an assumption of fact which is false, takes effect unless as a matter of construction the truth of the fact is the condition of the revocation (*q*).

Suggested application of the doctrine of dependent relative revocation to cases of revocation of an earlier by a later will.

It has been suggested that the doctrine of dependent relative revocation (*r*) may be applied to a case where a clause revoking former wills has been inserted into a later will, and the testator has not fully understood its legal effect. In *Garnett-Botfield* v. *Garnett-Botfield* (*s*) Sir F. H. Jeune said : " At one period of this case it did strike me that this might be treated as a matter of dependent relative revocation. I can conceive that, in the future, the Court may be called upon to consider very carefully whether in certain circumstances a revocation clause may be so dealt with as to make of an earlier and later will a composite document; and although this may appear very like a suggestion that a new will might be made for a testator, the true state of facts may possibly be that you cannot get at and give effect to the real wishes of a testator without putting two documents together." And in *In the Goods of Irvine* (*t*), where a testator signed a printed form of will containing blanks, the printed matter including a clause revoking former wills, and his signature was attested by two witnesses, but the blanks in the form were filled in afterwards, it was held by the Irish Court that the attempted revocation was merely the first step towards

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(*o*) See *Doe* v. *Evans* (1839), 10 A. & E. 228; *Kennell* v. *Abbott* (1799), 4 Ves. 802; *Crosthwaite* v. *Dean* (1868), L. R. 5 Eq. 245; but see *Re Churchill, Taylor* v. *Manchester University*, [1917] 1 Ch. 206 (a testator by his will gave all his coins to a university. By a codicil he revoked the gift, declaring that he had during his lifetime handed over to the university all the coins he intended to leave them. Subsequently he handed over to the university the greater part (but not the whole) of his coins. It was held that the revocation by the codicil was not conditional but absolute, and that the university were only entitled to the coins they had received in the testator's lifetime.)

(*p*) Wms. on Exors. (11th ed.), p. 125, citing *Att.-Gen.* v. *Lloyd* (1747), 3 Atk. 551, disapproved of in *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198, 211; *Att.-Gen.* v. *Ward* (1797), 3 Ves. 327, 331.

(*q*) *Re Faris, Goddard* v. *Overend* (*No.* 2), [1911] 1 Ir. R. 469 (where a testatrix by a codicil bequeathed certain legacies to be paid out of her " V. Bonds." By a second codicil she stated : " I find I have a sum of £700 V. Stock which I have not put into my will," and proceeded to make a number of bequests of the V. Stock, which was shown to be the same as the " V. Bonds "); *Adams* v. *Southerden*, [1925] P. 177 (C. A.).

(*r*) *Vide post*, pp. 164 *et seq.*

(*s*) [1901] P. 335, 344.

(*t*) [1919] 2 Ir. R. 485.

accomplishing the testator's design to make a new will, that it was dependent and conditional on a new will being made, and that as the new will was not effectively made, the doctrine of dependent relative revocation applied.

(2) Where the later instrument contains no words of express revocation.

(2) Where there are two instruments, the later of which in date, purporting to be the last will, does not contain words of absolute revocation, it is the duty of the Court to examine the provisions of the documents, and, having construed their words, to come to a conclusion, aye or no, did the testator intend that the provisions of the later document should be a revocation of the dispositions contained in the first, or did he intend that the two should be read together (*u*).

The Court may in certain circumstances admit extrinsic evidence of intention.

Where there is something upon the face of the later instrument raising doubt or ambiguity whether it was intended by the testator to be in substitution for or addition to a previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intention. But the external evidence which is admissible is, it seems, confined to such evidence of the circumstances which surrounded the execution of the later instrument as will suffice to place the Court in the same position as the deceased was in when he sat down to execute the last will—in other words, to enable the Court to ascertain what the deceased knew at that time (*x*).

In deciding what instruments were to be admitted to probate as together or separately constituting the testator's last will, the Prerogative Court did in some circumstances admit parol evidence with respect to the factum of the instrument, in order to investigate *quo animo* the act was done by the testator.

Thus in *Methuen* v. *Methuen* (*y*) the testator, having made one codicil, under which his wife and daughters took certain benefits, after the marriage of one of the daughters made a codicil in which he recited that he had made provision for this daughter, and proceeded to make dispositions in favour of the wife and daughters differing from those in the first codicil. There was nothing making it absolutely impossible that the testator meant the two sets of dispositions to be cumulative; but the property of the deceased would not have been equal to the payment of all the legacies that had been given. Sir John Nicholl said: "The question is whether the second codicil is to be considered as an addition to the first codicil, or as a substitute for and consequently revocatory of it. The first instrument remains uncancelled, and there are no revocatory

(*u*) See *Petchell* (1874), 3 P. & D., at p. 156; *Townsend* v. *Moore*, [1905] P., at p. 80.
(*x*) *Bryan*, [1907] P. 125, 130.
(*y*) (1817), 2 Phill. 416, 426.

words in the second. It is contended that the Court has no power to inquire any further; but the same rules do not apply in a case relating to the factum of a will which would apply if the inquiry were concerning the construction of it.

"In the Court of Probate the whole question is one of intention: the *animus testandi* and *animus revocandi* are completely open to investigation in this Court. It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence."

In *Greenough* v. *Martin* (*z*), where a similar question arose for consideration, the same learned Judge said: "In a Court of construction, where the factum of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate, the inquiry is not so limited; for the intentions of the deceased as to what instruments shall operate as and compose his will, are to be there collected from all the circumstances of the case taken together."

The subject of the admissibility of external evidence in such cases was very fully discussed by Sir H. Jenner in *Thorne* v. *Rooke* (*a*), and he came to the conclusion that the Court is justified in having recourse to external evidence to ascertain the testator's intentions only where there is something on the face of the instrument raising doubt or ambiguity whether it was intended by the testator to be in substitution for or addition to a previous will. In the case before him the learned Judge thought there was no such doubt or ambiguity, as there were no words in the later instrument from which the Court could infer that it was intended as a substitute; there were not the same causes expressed nor the same sum given by both instruments, nor dispositions of things *ejusdem generis*.

In *Jenner* v. *Ffinch* (*b*), Sir James Hannen accepted as correct Sir H. Jenner's limitation of the power of the Court to admit parol evidence to those cases in which the instrument itself (in connection with facts known to the testator) gives rise to doubt (*c*).

(*z*) (1824), 2 Add. 239, 243.
(*a*) (1841), 2 Curt. 799.
(*b*) (1879), 5 P. D. 106.
(*c*) As to what doubt arising on the face of the instrument, taken in connection with facts known to the testator, will be sufficient to justify the admission of external evidence, see *Methuen* v. *Methuen* (1817), 2 Phill., at p. 427; *Thorne* v. *Rooke* (1841), 2 Curt. 799, 828, 829; *Jenner* v. *Ffinch* (1879), 5 P. D., at pp. 112, 113. The following may be given as instances: The fact that the property of the testator would be wholly insufficient to meet the legacies if those given by the last instrument were to be considered cumulative to those given by the first; the fact that the same property is given to the

The nature of the extrinsic evidence which is admissible.

In *Townsend* v. *Moore* (*d*) Vaughan Williams, L.J., expressed a doubt whether this principle would extend to the admission of parol evidence of the intention of the testator according to the view of those who were present at the time of the execution of the testamentary document, and stated that probably the evidence in the case of *Jenner* v. *Ffinch* (*e*) was admitted only to show the intention with which some act was done by the testator. He added that if it was admitted to show the intention with which certain words were used, he would feel a difficulty in following the decision.

In *In the Goods of Bryan* (*f*) Sir Gorell Barnes said: "In regard to the further proposition that, if a perusal of the documents themselves does not satisfy the Court, external evidence may be looked at, I doubt whether this means anything more than that the Court may put itself in the same position as the deceased was in when he sat down to execute the last will—in other words, to enable the Court to ascertain what the deceased knew at the time."

Where the later will is intended to supersede the earlier, the earlier will is revoked,

If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a manner different from that in which he disposed of it by the earlier document, the earlier document will be revoked, and this although in some particulars the later will does not completely cover the whole subject-matter of the earlier (*g*).

Thus in *Dempsey* v. *Lawson* (*h*) the deceased executed a will in 1858 in which she disposed of the whole of her property. In 1860 she executed another will, which varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary or revocatory clauses. It was held that from the whole tenor of the last will it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. Sir J. Hannen said: "I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the

even though the later will does not dispose of the whole of the testator's property.

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same person in both instruments, etc.: see *Jenner* v. *Ffinch*, loc. cit.; *Bryan*, [1907] P., at p. 128; *Wainewright* v. *Wainewright* (1894), 71 L. T. 265. Bequests are, *prima facie*, to be taken cumulatively when they are in separate papers, unless they are revocatory of each other: *Bartholomew* v. *Henley* (1820), 3 Phill., at p. 319; *Townsend* v. *Moore*, [1905] P., at pp. 81, 82.

(*d*) [1905] P., at p. 80.

(*e*) (1879), 5 P. D. 106.

(*f*) [1907] P., at p. 130.

(*g*) *Dempsey* v. *Lawson* (1877), 2 P. D., at p. 105; see *Thorn* v. *Dickins*, [1906] W. N. 54, where a will in the following terms, "All for mother," was held to revoke all previous wills.

(*h*) (1877), 2 P. D. 98.

testamentary dispositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858."

And in *In the Goods of Bryan* (*i*) Sir Gorell Barnes held that a later will revoked an earlier, although the earlier document disposed of all the estate of the deceased, and although the later document contained no express clause of revocation and left the residue undisposed of (*k*).

The intention of the testator is to be gathered from the substance—not the form—of the instrument.

The fact that the later will is described as "the last will,"

In investigating the intention of the testator, the Court is necessarily called upon to put a construction upon the language of the instrument in question. But in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded (*l*). The true test of an intention to revoke the earlier will is the inconsistent character of the dispositions in the two instruments, and the mere fact that the later paper is described as the testator's "last will and testament" is not in itself conclusive or even presumptive evidence of an intention that all previous instruments should be revoked. For it is obvious that a man may sign a paper in which that language is used without any such intention (*m*).

(*i*) [1907] P. 125.

(*k*) In *Plenty* v. *West* (1845), 1 Rob. 264, the Court held, upon all the facts before it, that it was the intention of the testator that the later paper should stand alone, although it disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. In that case stress was laid upon the fact that the later paper was described as "the last will"; and to this extent the authority of *Plenty* v. *West* has been overruled, but that fact was only one circumstance in conjunction with others on which the Court founded its decision. See *Cutto* v. *Gilbert* (1854), 9 Moo. P. C. 131, at p. 146; *Dempsey* v. *Lawson* (1877), 2 P. D., at p. 106.

In *Henfrey* v. *Henfrey* (1840), 2 Curt. 468; 4 Moo. P. C. 29, it was decided that a second will disposing of the whole estate revoked a former disposition *in toto*. See *Methuen* v. *Methuen* (1817), 2 Phill. 416; *ante*, p. 138.

In *Chichester* v. *Quatrefrages*, [1895] P. 186, where two codicils were propounded, the Court held that the testator, in executing the second codicil, intended to revoke the first and substitute for it the second. See also *Jenner* v. *Ffinch* (1879), 5 P. D. 106; *Wainewright* v. *Wainewright* (1894), 71 L. T. 265.

The mere fact that the later document contains a clause disposing of the residue is not conclusive as to an intention to revoke the earlier: see *Lemage* v. *Goodban* (1865), 1 P. & D. 57; *Petchell* (1874), 3 P. & D. 153; *Townsend* v. *Moore*, [1905] P. 66; and *post*, p. 143.

A perfect and complete will, inconsistent with a former, is a revocation, though the devisee under the latter is prevented by personal incapacity from taking, and therefore derives no benefit from it: *Ilchester* (1803), 7 Ves., at p. 379.

(*l*) *Dempsey* v. *Lawson* (1877), 2 P. D., at p. 105.

(*m*) The case of *Plenty* v. *West* (1848), 1 Rob. 264, so far as it supports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, was overruled by *Cutto* v. *Gilbert* (1854), 9 Moo. P. C. 142, and *Stoddart* v. *Grant* (1851), 1 Macq. H. L., at p. 171. See *Lemage* v. *Goodban* (1865), 1 P. & D., at p. 61. Documents headed "the last will and testament" were admitted to probate as an addition to a former will in *Luffman* (1847), 5 N. C. 183; *Langhorn* (1847), 5 N. C. 512; *Summers* (1901), 84 L. T. 271. See also *Freeman* v. *Freeman* (1854), 5 De G. M. & G. 704; *Holt* (1848), 6 N. C. 93, 96; *Birks* v. *Birks* (1865), 4 S. & T. 23, 30; *Saussaye* (1873), 3 P. & D. 42; *Dempsey* v.

or appoints executors, is not conclusive of an intention to revoke.

It was at one time suggested that the fact that the later instrument appointed executors, constituted a revocation of previous instruments (*n*). But it is clear that an appointment of executors in the later will cannot alone suffice to show that the testator intended a previous will to be revoked (*o*).

In *Birks* v. *Birks* (*p*) Sir J. P. Wilde said: "For my own part I repudiate the notion that there are any particular words, or any particular forms of expression, on which one's finger can be put as an universal test of revocation."

Where the earlier and later wills are only partly inconsistent, both will be admitted to probate.

When there are two testamentary documents, and the Court is able to gather that one was not intended wholly to revoke the other, but that both were intended to be effective, at any rate to some extent, both documents will be admitted to probate as together constituting the last will of the deceased, so that effect may be given to them, so far at any rate as circumstances will permit. How far that can be done is, to a great extent, for a Court of construction to determine (*q*).

Where there are two documents, the Court will endeavour so to construe them as to support their admissibility to probate,

Prima facie, every document purporting to be testamentary, signed and witnessed in accordance with the provisions of the Wills Act, ought to be admitted to probate (*r*); and it has been said (*s*) that where there are two properly executed testamentary instruments, and it is contended that both ought to be admitted

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Lawson (1877), 2 P. D. 98. In *Simpson* v. *Foxon*, [1907] P. 54, the words "this is the last and only will" were held not to constitute a revocation of former wills, since the Court was satisfied that the will in question was not intended to be a complete disposition of the testator's property.

(*n*) *Plenty* v. *West* (1845), 1 Rob. 264; *Whitehead* v. *Jennings* (1714), cited 1 Phill., at p. 412; *Burt* v. *Burt* (1718), cited 1 Phill., at p. 412; see *Cutto* v. *Gilbert* (1854), 9 Moo. P. C., at p. 145.

(*o*) *Stoddart* v. *Grant* (1851), 1 Macq. H. L., at p. 173; *Birks* v. *Birks* (1865), 4 S. & T., at p. 39. A later will, disposing of all the testator's property, but containing no revocation of a prior one, and appointing no executors, may revoke the prior will *in toto*, including the appointment of executors contained in the prior will: *Henfrey* v. *Henfrey* (1842), 4 Moo. P. C. 29. But see *Leese* (1862), 2 S. & T. 442, and cases cited below; see also *supra*, p. 136, note (*i*); *post*, p. 217.

When probate is granted of two or more testamentary papers, as together containing the last will of the deceased, it is the practice of the Court to make the grant to all the executors named in the several papers: *Leese* (1862), 2 S. & T. 442; *Budd* (1862), 3 S. & T. 196; *Geaves* v. *Price* (1863), 3 S. & T. 71, where the executor of the later will was described as "sole executor of this my will"; *Nickalls* (1865), 4 S. & T. 40; *Morgan* (1867), 1 P. & D. 323; *Strahan*, [1907] 2 Ir. R. 484; but see *Baily* (1869), 1 P. & D. 628.

(*p*) (1865), 4 S. & T., at p. 30.

(*q*) *Townsend* v. *Moore*, [1905] P., at p. 84. See *Coward* v. *Marshall*, Cro. Eliz. 721, quoted 3 Mod. 204; 3 Wils. K. B. 507; *Phipps* v. *Anglesey* (1751), 7 Bro. P. C. 443, 453; *Sandford* v. *Vaughan* (1809), 1 Phill. 39, 128; *Harley* v. *Bagshaw* (1812), 2 Phill. 48; *Nickalls* (1865), 4 S. & T. 40. If two independent wills are made, one disposing of the testator's property in England and the other disposing of his property abroad, the former alone should be admitted to probate in England. But if the wills are not independent—*i.e.*, if one refers to the other in such a way as to incorporate it by reference—both wills should be admitted to probate: *Murray*, [1896] P. 65; and *vide ante*, p. 11.

(*r*) *Townsend* v. *Moore*, [1905] P., at p. 80.

(*s*) *Ibid.*, at p. 81.

to probate, the principle applied by the Court has been that, in construing the documents, it will endeavour so to read the words as to support the admissibility of both documents to probate; and that the Court ought not readily to conclude that the testator intended to revoke a properly executed testamentary document in the absence of express words of revocation, when the inference of revocation can arise only from the construction of the testamentary instrument in question (*t*).

even though the later instrument contains a clause disposing of the residue.

Thus in *Lemage* v. *Goodban* (*u*) there were two instruments, each purporting to be the last will and testament of the deceased. In each there was a residuary clause, but in the latter it was unintelligible, and it was impossible to give effect to it. The Court came to the conclusion that the testator did not, by executing the later will, intend to revoke the residuary clause in the earlier instrument, and, as effect could only be given to that disposition by granting probate of the earlier and later papers as together constituting the will, pronounced for the two documents.

In *In the Goods of Petchell* (*x*) the deceased executed a will in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and appointed her daughter executrix. The deceased subsequently executed another instrument, which purported to be her last will, but had no revocatory clause. By it she gave the whole property to her daughter for life and made her sole executrix. On the death of her daughter, legacies were given of a larger amount than in the first will, but the residue was not disposed of. Sir J. Hannen held that the testatrix did not intend to revoke the residuary clause contained in the earlier paper, and admitted both documents to probate as together containing the will of the deceased (*y*).

(*t*) Thus in *Stoddart* v. *Grant* (1851), 1 Macq. H. L., at p. 175, Lord Truro said: "These documents . . . are *prima facie* to be regarded as one will. They may be altered. They may be partially revoked. They may be partially inconsistent with one another. And yet the latter of them may not operate as an entire revocation of the former.

"The circumstance of a partial inconsistency as it is called, that is to say, the circumstance of there being dispositions in two documents, both of which cannot be fulfilled, is held by the Courts to operate as a revocation only *pro tanto*; bearing upon the particular legacy, but not necessarily affecting the testamentary character of the document.

"The general rule is, that the onus is upon those who impeach . . . I think it would tend very much to diminish the power of testators over their property, if you were to hold that slight or equivocal expressions found in a subsequent instrument would justify the conclusion that previous documents, otherwise entitled to probate, were to be regarded as revoked. In my apprehension, if you can execute the whole of the papers as one testament, you are bound to do so."

(*u*) (1865), 1 P. & D. 57.

(*x*) (1874), 3 P. & D. 153.

(*y*) See also *Saussaye* (1873), 3 P. & D. 42, and cases cited *supra*, p. 112.

(3) Where there are two inconsistent wills of the same date, or of unascertained dates (*i.e.* where their sequence is unknown), neither can be admitted to probate.

(3) Where there are two testamentary documents, both of which are proved to have been executed upon the same date and occasion or which are undated, and it is impossible to affirm that one has any priority of time over the other, then, if the documents are so inconsistent that they cannot stand together, neither document can be admitted to probate. For it is obvious that if there are two testamentary documents, and it is to be gathered that one was intended to revoke the other altogether, but it cannot be ascertained which was intended to be revoked, neither of them can be proved (*z*).

Secus where the wills are not inconsistent.

But when the provisions of two testamentary documents, the priority of which is uncertain, and in neither of which are express words of revocation, are apparently inconsistent, the Court will endeavour so to construe the words that, if possible, the two documents may stand together, and may both be admitted to probate as expressing together the whole testamentary intention of the testator (*a*).

Revocation of an earlier will by a will of later date, when the latter is not forthcoming.

The execution of a second will, which expressly revokes or is entirely inconsistent with the first, revokes the first, even though the second will is not forthcoming at the death of the testator (*b*).

To effect a revocation, there must be clear proof of the provisions of the missing will,

and that they were inconsistent with those of the earlier will.

But where the revocation of an existing will is sought to be established by proof of a subsequent will which is not forthcoming, and the execution of such subsequent will is to be proved by oral evidence only, such evidence, in order to satisfy the Court, must be clear, stringent and conclusive (*c*).

It is not sufficient to prove the mere execution of a subsequent will; there must be proof that the later will expressly revoked the earlier, or contained provisions of such a nature as to revoke the earlier by implication (*d*).

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note (*q*). In *Birks* v. *Birks* (1865), 4 S. & T. 23, a testator, having erased a clause in his will after its execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made; but the person who made it by mistake omitted several other clauses. The copy was duly executed, the omission passing unnoticed. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Upon parol evidence of the circumstances under which they were drawn up and executed, probate was granted of both documents as together containing the last will of the deceased.

(*z*) *Townsend* v. *Moore*, [1905] P., at pp. 77, 84. Two inconsistent wills of the same date, neither of which can be proved to be the last executed, are void for uncertainty, so far as they are inconsistent: *Phipps* v. *Anglesey* (1751), 7 Bro. P. C., at p. 452. See *Nosworthy* (1865), 4 S. & T. 44, where one of the two inconsistent documents was executed by mistake.

(*a*) *Townsend* v. *Moore*, [1905] P. 66.

(*b*) *Helyar* v. *Helyar* (1754), 1 Lee, 472, at p. 511, and cases there cited; *Brown* v. *Brown* (1858), 8 E. & B. 876, 886; *Wood* v. *Wood* (1867), 1 P. & D. 309.

(*c*) *Cutto* v. *Gilbert* (1854), 9 Moo. P. C., at p. 140.

(*d*) So if the later will is not forthcoming, and there is no evidence as to its contents, the earlier will is not revoked: *Hitchins* v. *Basset* (1689), 3 Mod.

Whether, on the revocation of a later will, a former revoked will shall revive.

In the Common Law Courts it was formerly held that on the revocation of a later will a former uncancelled will should revive, and that excluding all questions of intention (*e*).

The doctrine applied by the Ecclesiastical Courts was different, and it was held that the presumption was against the revival of the earlier will, and that the *onus* was upon the party setting it up to rebut that presumption (*f*).

Since the Wills Act, 1837, s. 22, the destruction of a second will, which revoked a will of earlier date, cannot revive the earlier will, or any part thereof which has been revoked.

Section 22 of the Wills Act provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the same; and since the statute there can be no revival of a will revoked by the execution of another will, except by one of the modes indicated in that section. It follows that the destruction of a second will, which revoked a will of earlier date, cannot, since the statute, revive or reinstate the earlier document, or any part thereof which has been duly revoked (*g*). Thus in *In the Goods of Hodgkinson* (*h*), a testator by his will gave all his property to A, and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister B, and appointed her sole executrix; but he did not expressly revoke the first will. He subsequently cancelled the second will. It was held by the Court of Appeal that the first will was partially revoked by the second, and that the parts of the first will so revoked were not revived by the cancellation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy (*i*).

Whether a clause of revocation in

If a special or general power of appointment has been exercised by will, and a subsequent will is made which, in

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203. And where a subsequent will, which was not forthcoming, was found by the jury to have contained a different disposition from the earlier, but in what particulars was unknown, the earlier will was pronounced for : *Goodright* v. *Harwood* (1774), 3 Wils. 497; 2 W. Black 937; 7 Bro. P. C. 489. See *Cutto* v. *Gilbert* (1854), 9 Moo. P. C., at pp. 143 *et seq*, and cases there cited. And see *Hellier* v. *Hellier* (1884), 9 P. D. 237 (a testator made a will in 1864 appointing his wife sole executrix, and executed another document in 1877. There was no evidence of the contents of the second instrument, except that after its execution the testator said : " I have made a will altering my affairs," and except a memorandum at the foot of the earlier will : " This will is now useless, a new will having been made in 1877, upon my wife telling me she was sorry she had ever seen me." It was held that the earlier will was not revoked).

(*e*) *Goodright* v. *Glazier* (1770), 4 Burr. 2512.

(*f*) *Moore* v. *Moore* (1817), 1 Phill., at pp. 412 *et seq.*, and cases cited.

(*g*) *Cutto* v. *Gilbert* (1854), 9 Moo. P. C., at p. 143; *Brown* (1858), 1 S. & T. 32; *Dickinson* v. *Swatman* (1860), 30 L. J. P. 84; *Brown* v. *Brown* (1858), 8 E. & B. 876; *vide post*, p. 197.

(*h*) [1893] P. 339.

(*i*) But *vide post*, pp. 169 *et seq.*

a later will revokes the exercise of a power of appointment in an earlier will.

addition to containing a clause revoking all previous wills, purports to exercise the particular power, or expressly refers to it, the exercise of the power of appointment in the earlier will is clearly revoked (*k*).

If the later will contains a clause revoking all former wills, but does not purport to exercise the particular power or expressly refer to it, there is some doubt how far the clause of revocation is conclusive as to the intention of the testator to revoke the appointment under the earlier will. The result of the authorities appears to be that a clause revoking all former wills is a revocation of every provision in a former will, including the exercise of a power of appointment; and that the Court will adhere to the words of the testator, and not attempt to speculate upon an intention not expressed by the words (*l*).

Effect of later will, which contains no clause of revocation, on earlier will exercising power.

If the later will contains no words of express revocation, the earlier testamentary appointment is not revoked (*m*), unless the testator has by his later will dealt with the subject-matter of the power in a way clearly intended to supersede the exercise of the power by the earlier will (*n*).

The duty of the Court in such cases.

It is the duty of the Court of Probate to decide, according to its ordinary rules, whether a will by which a power of

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(*k*) *Richardson* v. *Barry* (1830), 3 Hagg. 249; *Eustace* (1874), 3 P. & D. 183.

(*l*) The opinion of the Delegates in the case of *Hughes* v. *Turner* (1831), 4 Hagg. 30, would appear to be that a clause of revocation *per se* does not revoke the portion of an earlier will which has executed a power. A similar opinion was expressed by Sir Cresswell Cresswell in *Merritt* (1858), 1 S. & T. 112; *Meredith* (1860), 29 L. J. P. 155; and *Joys* (1860), 4 S. & T. 214. The principle upon which the learned Judge acted in these cases appears to be that if there is a testamentary appointment, and afterwards a will which does not affect to exercise the particular power, or refer to it, but deals with other property, then the will, although it contains an express revocation of all prior wills, must be held not to have revoked the testamentary appointment.

Some doubt was cast upon the authority of these cases in *Sotheran* v. *Dening* (1881), 20 Ch. D. 99, but whether the Court of Appeal overruled those authorities remained doubtful, as weight was given to the consideration, which arose in that case, that by section 27 of the Wills Act a general bequest operated on the subject-matter of the general power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. Baggallay, L.J., said: "It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. That view is adopted by Sir C. Cresswell in the two cases referred to. But it must be shown that it is entirely unreasonable that it should have that effect, otherwise it will be a revocation."

But in *Kingdon* (1886), 32 Ch. D. 604, the question of revocation by a general revocatory clause arose *simpliciter*, there being no subsequent provision relating to the subject-matter of the special power in question, and Kay, J., held that he was justified by the decision in *Sotheran* v. *Dening* (*supra*) in holding that a will executing a power was revoked *in toto* by general words of revocation in a subsequent will. And in *Cadell* v. *Wilcocks*, [1898] P., at p. 26, Sir Francis Jeune said: "The effect of his decision is, I venture to think, that on this point of law common sense has at last prevailed. I cannot understand why express words, revoking all previous wills, should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents."

(*m*) *Graham* (1863), 3 S. & T. 69; *Budd* (1862), 3 S. & T. 196.

(*n*) *Sotheran* v. *Dening* (1881), 20 Ch. D. 99; *Kent* v. *Kent*, [1902] P. 108.

appointment is exercised has or has not been revoked by a later will, and to decree or refuse probate of the earlier instrument accordingly in the ordinary course (*o*).

Revocation of a will by republication of an earlier will.

The republication of a will may operate to revoke another will, executed after the original execution, but before the republication of the will so republished (*p*).

Section 3.

REVOCATION BY A WRITING DECLARING AN INTENTION TO REVOKE.

Revocation by a writing declaring an intention to revoke.

The provisions of section 20 of the Wills Act, 1837, so far as they relate to this form of revocation, are as follows : " No will or codicil, or any part thereof (*q*), shall be revoked otherwise than . . . by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed."

When made by a soldier in actual military service.

The words " executed in the manner in which a will is hereinbefore required to be executed," have been held to refer, not only to section 9 of the Act, which prescribes the formalities for the due execution of wills, but also to the proviso in section 11 that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act. A letter declaring an intention to revoke a will, and written by a soldier when in actual military service, is therefore operative to revoke the will, although not executed in the manner prescribed by section 9 of the Wills Act, 1837 (*r*).

What shall be a sufficient declaration of intention to revoke.

The intention to revoke must be expressly declared. Although the words " I do declare that I intend to revoke my will " need not be used, there must be some words which amount to that (*s*).

(*o*) *Hughes* v. *Turner* (1831), 4 Hagg. 31; *Brenchley* v. *Lynn* (1852), 2 Rob. 441.

(*p*) See *post*, p. 202.

(*q*) As to partial revocation by memorandum, *vide post*, p. 177.

(*r*) *Wood* v. *Gossage*, [1921] P. 194, C. A.

(*s*) *Ford* v. *De Pontes* (1861), 30 Beav. 572, 594. In that case, a testatrix by her will devised real estates, and, by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. It was held that the deed (assuming it to be void as *turpis contractus*) was not such a " writing declaring an intention to revoke " the will as is required by section 20 of the Wills Act.

As to what is a sufficient declaration of intention to revoke, see *Brenchley* v. *Still* (1850), 2 Rob. 162; *Hicks* (1869), 1 P. & D. 683; *Fraser* (1869), 2 P. & D. 40; *Durance* (1872), 2 P. & D. 406, where a letter, signed by the testator and duly attested, directing his brother to obtain his will and burn it unread, was held sufficient; S. P., *Eyre*, [1905] 2 Ir. R. 540; *Gosling* (1886), 11 P. D. 79, where a testator obliterated the whole of a codicil by thick

Whether such a writing is entitled to be admitted to probate.

It was at one time held that a writing expressing an intention to revoke former wills, and duly executed, was entitled to probate, although it contained no disposition of the testator's property and appointed no executor (*t*).

But it has since been decided that a writing declaring an intention to revoke, by which the deceased in no way disposes of any property, is neither will nor codicil, and cannot be admitted to probate (*u*).

SECTION 4.

REVOCATION BY BURNING, TEARING, OR OTHERWISE DESTROYING THE WILL.

Provisions of the Wills Act, 1837, s. 20.

The provisions of section 20 of the Wills Act, 1837, so far as they relate to this mode of revocation, are as follows : " No will or codicil, or any part thereof, shall be revoked otherwise than . . . by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Whether applicable to soldiers and seamen.

The extent to which these provisions are applicable in the case of soldiers in actual military service, or mariners or seamen at sea, will be discussed in a later chapter (*x*).

SUB-SECTION 1.—*The Act of Destruction.*

Provisions of the Wills Act, s. 20, distinguished from those of the Statute of Frauds.

The section provides that the will shall be burnt, torn, or otherwise destroyed.

Under the Statute of Frauds a devise of lands might be revoked, *inter alia*, " by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent " (*y*).

It will be noticed that the section of the Wills Act adopts two of the modes of revocation prescribed by the Statute of

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black marks, and wrote at the foot " We are witnesses of the erasure of the above," these words being signed by the testator and attested by two witnesses; *Toomer* v. *Sobinska*, [1907] P. 106.

(*t*) *Brenchley* v. *Still* (1850), 2 Rob. 162; *Hubbard* (1865), 1 P. & D. 53; followed *dubitante* by Lord Penzance in *Hicks* (1869), 1 P. & D. 683.

(*u*) *Fraser* (1869), 2 P. & D. 40; *Eyre*. [1905] 2 Ir. R. 540; *secus* when the writing is also of a testamentary character, *Durance* (1872), 2 P. & D. 406. The practice is to make a grant as upon intestacy without annexing the writing, but with a note that the grant is so made in consequence of the execution of the document revoking the earlier will : *Toomer* v. *Sobinska*, [1907] P. 106. And see *Irvine*, [1919] 2 I. R. 485 (*supra*, p. 137).

(*x*) *Post*, pp. 258 *et seq.*

(*y*) 29 Car. 2, c. 3, s. 6. This section did not apply to wills of personalty, with respect to which section 22 merely provided that they shall not be repealed, altered, or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing and allowed by him, and proved to be so done by three witnesses at the least.

Frauds, viz., " burning " and " tearing "; the words " cancelling " and " obliterating " are omitted from the later enactment, and the words " or otherwise destroying " are substituted.

There appears to be no reason why cases decided upon the construction of the words " burning " and " tearing " in the Statute of Frauds should not be applied to the construction of the same words in the Wills Act (*z*).

" Burning or tearing."

In order effectually to revoke a will by burning or tearing, it is not necessary that the instrument be totally destroyed or consumed, burnt, or torn in pieces (*a*). If the will be burnt or torn in the slightest manner, this, joined with the declared intent, will be a good revocation (*b*).

Not necessary that the will should be totally destroyed.

The will need not be torn into more pieces than it originally consisted of.

The will need not be torn into more pieces than it originally consisted of; although no sheet of paper is completely divided, the tearing may be sufficient to revoke, if done with that intention (*c*). But there must be an actual, not a symbolical, burning or tearing (*d*) of the paper upon which the will itself is written (*e*). There must be such an injury with intent to revoke as destroys the entirety of the will, so that it may be said that the instrument no longers exists as it was (*f*).

The act of destruction must not be inchoate or incomplete.

Further, the act of destruction, in order to be effectual, must not be inchoate and incomplete; the testator must have intended that which he actually did to the will to have the effect of revocation without more (*g*). Thus where a will has been torn by a testator, and he has been interrupted in the act of tearing, and has desisted, the question arises : When he ceased tearing, had he done all that he contemplated doing for the purpose of revocation? If he had, the revocation was complete, and he could not recall his act; he could only recall the will by some

(*z*) *Clarke* v. *Scripps* (1852), 2 Rob., at p. 568.

(*a*) *Bibb* v. *Thomas* (1775), 2 W. Black., at p. 1045.

(*b*) Thus where a testator, intending to revoke his will, gave it " something of a rip with his hands," and so tore it as almost to tear a bit off, then rumpled it together, and threw it on the fire, but it fell off and was only slightly singed, it was held that there was a tearing and a burning sufficient within the statute : *Bibb* v. *Thomas* (1775), 2 W. Black. 1043.

(*c*) *Elms* v. *Elms* (1858), 1 S. & T., at p. 157.

(*d*) *Cheese* v. *Lovejoy* (1877), 2 P. D., at p. 253.

(*e*) *Doe* v. *Harris* (1837), 6 A. & E. 209, 216.

(*f*) *Doe* v. *Harris* (1837), 6 A. & E. 209, 217, *per* Coleridge, J.; and see *Hobbs* v. *Knight* (1838), 1 Curt., at p. 778; *The Glenlivet*, [1893] P., at p. 171; *Clarke* v. *Scripps* (1852), 2 Rob., at p. 569. The will, which was in a cover or envelope, was thrown by the testator on the fire, but a devisee under the will snatched it off, against the wish of the testator, and took it away; no part of the will was affected by the fire, but a corner of the envelope alone was burnt. It was held that the mere singeing of the corner of the envelope was insufficient. To hold that it was sufficient would be saying that a strong intention to burn was a burning. There must be an actual burning of the paper on which the will itself was written : *Doe* v. *Harris* (1837), 6 A. & E. 209. The same will was held to be revoked as to copyholds : 8 A. & E. 1.

(*g*) *Elms* v. *Elms* (1858), 1 S. & T., at p. 157.

of the means prescribed by section 22 of the Wills Act (*h*): but if the Court is satisfied that it was the intention of the testator, if he had not been stopped, to have done more in order to carry his purpose into effect, then the act not having been completed will not be sufficient to destroy the validity of the will (*i*).

"Otherwise destroying," implies some mode of destruction *ejusdem generis.*

The section, after referring to "burning and tearing" a will, continues "or otherwise destroying the same." It has been held that these words must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary sense of the word (*k*). Accordingly it has been held that cancelling a will by striking it through with a pen is not a destruction of the will within the meaning of the section (*l*). Cutting a will with the intention of revoking

Cancellation insufficient.

Cutting;

(*h*) *Elms* v. *Elms* (1858), 1 S. & T., at p. 157.

(*i*) *Doe* v. *Perkes* (1820), 3 B. & A., at p. 491. The testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of revoking it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no further, and, having fitted the pieces together and found that no material word had been obliterated, he said "It is well it is no worse." It was held that on these facts the case was properly left to the jury to say whether the testator had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court of King's Bench held that the verdict of the jury was right, and supported the will: *Doe* v. *Perkes* (1820), 3 B. & A. 489. Bayley, J., said: "Suppose a person having an intention to cancel his will by burning it were to throw it on the fire, and upon a sudden change of purpose were to take it off again, it could not be contended that it was a cancellation. So, here, there was evidence from which a change of purpose before the completion of the act might properly be inferred": *ibid.*, p. 491; and see Mr. Justice Holroyd's charge to the jury in the same case, Gow. N. P. 186.

In *Colberg* (1841), 2 Curt. 832, the testator, in a moment of irritation, tore his will into four pieces, but, afterwards repenting of what he had done, said he did not mean to destroy the will. Sir Herbert Jenner said that the deceased having torn the will into four pieces, it must be presumed *prima facie* that he intended to revoke it; that if the paper were propounded he should probably be of opinion that it was not revoked, as in *Doe* v. *Perkes*; but he refused to decree probate upon an *ex parte* motion without the consent of the next-of-kin.

The testator, having previously expressed his intention of making a new will, sent for his will and tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. He let the will fall on the ground, but presently picked it up and refused to burn it. The Court was not satisfied that the testator did all that the statute made necessary to work a revocation, viz., that he tore the will, meaning by that act without more to revoke it, and pronounced for the will. Sir C. Cresswell said: "In one sense it may be said that he tore the will with the intention to revoke it, for no doubt he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch he had torn it with the intention to revoke; but he did not intend to revoke it by that tearing only, he intended to tear it further": *Elms* v. *Elms* (1858), 1 S. & T. 155, 157.

(*k*) *Stephens* v. *Taprell* (1840), 2 Curt., at p. 465.

(*l*) *Stephens* v. *Taprell* (1840), 2 Curt. 458; such a cancellation, *animo revocandi*, was a mode of revocation under the old law (*ibid.* 463), but not under section 20 of the Wills Act, though the striking through be done *animo revocandi: Rose* (1845), 4 N. C. 101; *Brewster* (1860), 29 L. J. P. 69. A

it, is a mode of destroying as effectual as tearing, and is sufficient to effect a revocation of the will under the section (*m*); and it has been suggested that if a will be written in pencil, and the words are removed by means of an india-rubber, that would be a sufficient revocation (*n*). For in order to bring the act within the meaning of the words "otherwise destroying" it is sufficient that the essence of the instrument (not the material) is destroyed (*o*). So that if the operative signature of the testator is removed from the will by burning, tearing, or cutting it away, the entirety of the will is destroyed, and if the act is performed by the testator *animo revocandi* the will is revoked (*p*). And further, if the signature of the testator, which is essential to the will, be so obliterated that it can no longer be made out, it has been held that, having regard to the provisions of section 21 of the Act, a will may be revoked in that way as well as any other, provided the signature is obliterated *animo revocandi* (*q*). The same reasoning applies to the obliteration of the signatures of the attesting witnesses, and if these are completely erased by the testator *animo revocandi*, that would be, it seems, a sufficient revocation of the will (*r*). In

erasure with an india-rubber;

operative signature cut or torn away;

or obliterated;

signatures of attesting witnesses destroyed;

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testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. The will was found uninjured at his death, having been saved from destruction by the act of a servant. No question as to the sufficiency of the cancellation by the pen was raised; but it was suggested that the section was satisfied by throwing the will away with an intention that it should perish. It was held by the Court of Appeal that the will was not revoked: *Cheese* v. *Lovejoy* (1877), 2 P. D. 251.

(*m*) *Hobbs* v. *Knight* (1838), 1 Curt., at p. 779; approved *Clarke* v. *Scripps* (1852), 2 Rob., at p. 570.

(*n*) *Hobbs* v. *Knight* (1838), 1 Curt., at p. 779; see *Morton* (1887), 12 P. D., at p. 142.

(*o*) *Hobbs* v. *Knight* (1838), 1 Curt., at p. 779.

(*p*) *Hobbs* v. *Knight* (1838), 1 Curt. 768; *Clarke* v. *Scripps* (1852), 2 Rob., at p. 570. A will in which the part which contained the signature of the testator, the attestation clause, and the signatures of the attesting witnesses, was torn off and could not be found, held to be revoked: *Lewis* (1858), 1 S. & T. 31. See *North* v. *North* (1909), 25 T. L. R. 322; but see *Christmas* v. *Whinyates* (1863), 3 S. & T. 81; and *post*, pp. 153, 154.

(*q*) *Hobbs* v. *Knight* (1838), 1 Curt., at p. 780; *Clarke* v. *Scripps* (1852), 2 Rob., at p. 571. The signatures of the testator and of the attesting witnesses were scratched out with a knife. It was held that, although the paper was not pierced, yet the fact that the signatures were scratched away might be regarded as a lateral cutting out, and that the will was revoked: *Morton* (1887), 12 P. D 141.

But scratching out with a knife, which is a lateral cutting, unless carried by the testator to the extent of rendering his signature illegible, does not amount to a revocation within the terms of section 20: *Godfrey* (1893), 69 L. T. 22.

And complete erasure of the testator's signature will not effect a revocation of the will, unless the Court is satisfied that it was so erased by the testator *animo revocandi*: *King* (1851), 2 Rob. 403.

(*r*) *Hobbs* v. *Knight* (1838), 1 Curt., at p. 781; see *Margary* v. *Robinson* (1886), 12 P. D., at p. 12; *Coleman* (1861), 2 S. & T. 314; *vide post*, p. 176, note (*n*).

such a case, however, there would be greater difficulty in proving that the names of the witnesses were erased *animo revocandi* (*s*).

tearing off a seal;

Although a seal is not a necessary part of a will, yet where the testator has made it so by words in the testimonium clause, *e.g.*, "In witness whereof I have set my hand and seal," and the seal is subsequently torn off by the testator with the intention of revoking the will, the will is revoked (*t*).

tearing off by the testator of his signature to the earlier pages of the will.

Where a will was written upon several sheets of paper, and each of the sheets was signed by the deceased and *the testimonium clause referred to that fact*, it was held that the circumstance that the deceased had torn off his signature from every sheet except the last amounted to a revocation of the whole will (*u*); for it was said (*x*) that the deceased, having expressly noticed, in the testimonium clause, the circumstance of his having signed all the preceding pages of his will, made those signatures a part of the will, and therefore that their destruction amounted to a tearing of the will within the meaning of section 20 of the Act.

Presumption when the last page of a will is not forthcoming.

Where a will consists of several sheets, each of which has been signed by the testator and the attesting witnesses, and the last sheet, which alone contains the operative and essential signatures, is not forthcoming at his death, it will be presumed to have been destroyed by the testator *animo revocandi*, and the whole will regarded as revoked (*y*).

Consequences of the destruction of some one or more of the several sheets on which the will is written and the substitution of others.

Where a testator, after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses, took out three sheets and substituted three new ones, which he signed, but which were not attested, it was held that the will was not entitled to probate (*z*). And in *Leonard* v. *Leonard* (*a*), where a will originally consisted of five sheets, each of which had been signed by the deceased and the two attesting witnesses, the testator at a later date removed the first two sheets, and presumably destroyed them, substituting two other sheets, each of which was signed by him and

(*s*) See *Playne* v. *Scriven* (1849), 7 N. C. 122, where the name of one of the attesting witnesses was struck through but remained visible: *Coleman* (1861), 2 S. & T. 314; *Eeles* (1862), 2 S. & T. 600; *Greenwood*, [1892] P. 7.

(*t*) *Price* v. *Price* (1858), 27 L. J. Ex. 409. "As the will purported to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator proposed to execute and to publish": *ibid.*, *per curiam*, approved *Williams* v. *Tyley* (1858), Johns., at p. 533. See *Hare* v. *Nasmyth* (1815), 2 Add. 25 n.; *Lambell* v. *Lambell* (1831), 3 Hagg. 568; *Scruby* v. *Fordham* (1822), 1 Add., at p. 78.

(*u*) *Williams* v. *Tyley* (1858), Johns. 531; *Harris* (1864), 3 S. & T. 485; but see *Clarke* v. *Scripps* (1852), 2 Rob. 563; and *post*, p. 154.

(*x*) *Williams* v. *Tyley* (1858), Johns., at p. 534.

(*y*) *Gullan* (1858), 1 S. & T. 23.

(*z*) *Treloar* v. *Lean* (1889), 14 P. D. 49.

(*a*) [1902] P. 243.

attested by the persons who had witnessed the original will. There was no evidence as to the contents of the two missing sheets. It was held that the destruction of the two original sheets by the testator revoked the whole original will, as the Court came to the conclusion that he did not intend the last three pages to be his operative will without doing something more, *i.e.*, adding the two later sheets to them; and, further, that the two later sheets, although signed and attested, were only so signed and attested for the purpose of identification, and to make them valid if the will was valid at the end, and that therefore the whole must be pronounced against (*b*).

The act of destruction may be done by some person in the testator's presence and by his direction.

The act of destruction must be done by the testator, "or by some person in his presence and by his direction." Therefore, though the instrument be destroyed by the testator's direction with intent to revoke, if the destruction did not take place in his presence, it is ineffectual to revoke the instrument (*c*). And if the will is destroyed in the presence of the testator, but without his consent and authority, there can be no revocation, even though the testator subsequently acquiesce in the state of things brought about by the destruction and refuse to make a new will (*d*).

A testator cannot ratify an informal destruction, or delegate his power of revoking his will.

A testator cannot delegate his power of revoking the will by inserting in it a clause conferring on another authority to destroy it after his death (*e*).

Partial revocation by burning, etc. The intention of the testator determines the extent of the revocation.

Although, as has been seen, the destruction of part of the will may, under certain circumstances, operate as a revocation of the entire instrument, yet it is clear, from the wording of the section, that a part only of the will may be revoked in the manner described (*f*). The intention of the testator must govern the extent and measure of the operation to be attributed to the act of destruction, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what portion thereof (*g*).

(*b*) But see *infra*, p. 154, note (*i*), for cases in which a will has been held only partially revoked in consequence of the destruction of the earlier portion; and as to the effect of the interpolation of fresh pages after execution, see *post*, p. 178.

(*c*) *Dadds* (1857), Dea. & Sw. 290. Presumably the cases on the construction of the words "in his presence and by his direction" in section 9 would be applicable to the construction of the present section: *vide ante*, pp. 98, 112.

(*d*) *Mills* v. *Millward* (1889), 15 P. D. 20. A testator cannot subsequently ratify the destruction of a will which has been destroyed without his authority so as to render the revocation effectual within the terms of the section: *Gill* v. *Gill*, [1909] P. 157. See these cases discussed and commented on in *Booth* v. *Booth*, [1926] P. 118, 132.

(*e*) *Stockwell* v. *Rutherdon* (1848), 1 Rob. 661. See *Durance* (1872), 2 P. & D. 407: *vide ante*, p. 131.

(*f*) *Clarke* v. *Scripps* (1852), 2 Rob., at p. 567; *Lambert* (1841), 1 N. C. 131.

(*g*) *Clarke* v. *Scripps* (1852), 2 Rob., at p. 567; *Scruby* v. *Fordham* (1822), 1 Add., at p. 78.

That intention may be proved

"The intention of the testator to revoke wholly or in part," said Sir John Dodson in *Clarke* v. *Scripps* (*h*), "may be proved:

by evidence of the testator's expressed declaration,

"1. By evidence of the expressed declaration of the testator, especially if such declaration was contemporaneous with the act. . . .

or inferred from the nature and extent of the act,

"2. The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator; *i.e.*, it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred either that he did intend to destroy it altogether, or that he did not.

and from extrinsic circumstances.

"3. The intention may, in some degree at least, be inferred from extrinsic circumstances. There may have been declarations, not direct as to the revocation, but such as would lead to the inference whether he did intend to revoke the will or did not" (*i*).

(*h*) (1852), 2 Rob., at p. 568.

(*i*) After the death of the testator the will was found with certain parts of the first sheet cut away, and the latter part of that sheet affixed to the top of it by a wafer. The Court held that the testator intended to revoke the part removed, and that it was his own act; that the paper was revoked *pro tanto* and good for the other parts: *Lambert* (1841), 1 N. C. 131.

A will consisted of seven sheets, each signed and attested. On the death of the testator it was found in his repositories torn and mutilated. The signature of the testator was cut away from each of the sheets except the last. Parts of the third sheet were cut off and were not forthcoming; and part of the margin on the sixth page had been torn off. On the seventh and last sheet, the signatures and attestation clause remained undamaged, but the lower part of the sheet had been torn off. The will was altered in pencil and ink in several places. The Court, in the absence of extrinsic evidence, found that the testator intended the instrument to be the draft of a new will, but to remain in operation until converted into a more formal instrument, and came to the conclusion from the state of the document, and particularly from the preservation of the operative signature at the end, that he intended to revoke the will in part only. Accordingly the will as it stood was pronounced for, except the unattested alterations: *Clarke* v. *Scripps* (1852), 2 Rob. 563; cf. *Williams* v. *Tyley* (1858), Johns. 530; ante, p. 152.

A will was executed upon two sheets of paper, and a codicil upon the second side of the second sheet. On the death of the testator, part of the top of the second sheet was found to have been cut off, including the testator's signature at the end of the will, the names of the attesting witnesses being untouched. Held: That the will and codicil formed one testament which had been mutilated by cutting off a portion, and the presumption was that it had been so mutilated after the execution of the codicil; but that, having regard to the manner in which it was cut, the preservation of the rest of the will and codicil, and other circumstances, no presumption of total revocation arose from the destruction of the signature, and that the testator only intended to revoke so much of the will as was cut off: *Christmas* v. *Whinyates* (1863), 3 S. & T. 81; cf. *Scruby* v. *Fordham* (1822), 1 Add., at p. 78.

The first seven or eight lines of the will had been cut and torn off. Held: That it could not be inferred from that fact alone that the deceased intended to revoke the whole will, and the rest of the instrument was therefore admitted to probate. The force of the argument, that tearing off the beginning of a will is to destroy the statement that it is the last will and testament of the deceased, depends upon the consideration whether there was anything else in that part of the will destroyed which the testator might have wished to revoke: *Woodward* (1871), 2 P. & D. 206.

Destruction of one part of a will in duplicate.

If a will has been executed in duplicate, and one part is destroyed by the testator with the intention of revoking the whole will, such destruction will operate as a revocation of the other part; and the *prima facie* presumption is that the testator, by the destruction of the one part, did intend to revoke the other (*k*).

The reason of this rule is obvious; for why should a person destroy the duplicate of his will, if he meant the other part to operate? It may indeed be shown that it was done *diverso intuitu*, or by accident, or while of unsound mind, or for the sake of peace and to deceive and to impose upon persons who were importuning him; but *prima facie* the destruction of the one part infers the revocation of the duplicate (*l*).

Destruction of a codicil held to revoke an interlineation in a will.

Similar reasoning has been applied to a case in which the testator, intending to alter his will, interlined a fresh provision in that document, and also executed a codicil having the same effect as the interlineation. On proof of the destruction *animo*

See also *Maley* (1887), 12 P. D. 134, where a clause appointing executors was cut away, and the will held to be revoked *pro tanto; Cooke* (1847), 5 N. C. 390; *Roberts* v. *Round* (1830), 3 Hagg. 548; *infra*, note (*l*).

(*k*) *Colvin* v. *Fraser* (1829), 2 Hagg. at p. 329. It was so decided in *Sir Edward Seymour's Case*, quoted 2 Comyns, 453; see *Onions* v. *Tyrer* (1716), 1 P. Wms., at p. 345; and is expressly laid down in *Burtenshaw* v. *Gilbert* (1774), 1 Cowp., at p. 54; and in *Pemberton* v. *Pemberton* (1807), 13 Ves., at p. 308; *Welsh* v. *Gowland* (1804), Prerog. Mich. Term, cit. 2 Hagg., at p. 330; *Boughey* v. *Moreton* (1758), 2 Lee, at p. 533; *Rickards* v. *Mumford* (1812), 2 Phill., at p. 24.

(*l*) *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 330; see *Atkinson* v. *Morris*, [1897] P. 40, where it was held that declarations of the testator were not admissible to prove that a will was executed in duplicate. Four cases may arise according as the part destroyed is or is not the part in the possession of the testator :—

(1) Where one part is in the possession of the testator and the other in the hands of another, and the testator destroys the part in his own custody : the legal presumption is that the duplicate in the possession of another is not to prevail : *Pemberton* v. *Pemberton* (1807), 13 Ves., at p. 310; *Welsh* v. *Gowland* (1804), quoted 2 Hagg., at p. 330.

(2) Both parts are in the possession of the testator, he cancels one and preserves the other; the presumption holds, though weaker : *Pemberton* v. *Pemberton* (1807), 13 Ves., at p. 310; *Burtenshaw* v. *Gilbert* (1774), 1 Cowp., at p. 54, *per* Aston, J.

(3) Both parts are in the possession of the testator, he alters one, and then destroys that which he has altered : there is the same presumption, but weaker still : *Pemberton* v. *Pemberton* (1807), 13 Ves. 310.

(4) One part is in the possession of the testator and the other in the hands of his solicitor; he destroys the part in the hands of his solicitor, but preserves that in his own possession : the presumption still exists, but in a lesser degree : *Payne* v. *Trappes* (1847), 1 Rob., at p. 591.

But these presumptions, like all other legal presumptions, may be repelled by evidence that the destruction of the one part was not intended to revoke the other : *Burtenshaw* v. *Gilbert* (1774), 1 Cowp. 49; *Rickards* v. *Mumford* (1812), 2 Phill., at p. 24.

If both parts are in the testator's possession, and one is mutilated in such a way as would under ordinary circumstances operate as a partial revocation, but the other is preserved entire, the presumption is that by the preservation of one duplicate entire the testator did not intend to revoke the clauses mutilated in the other part, for otherwise he would have mutilated both parts : *Roberts* v. *Round* (1830), 3 Hagg., at p. 553.

revocandi of the codicil by the testator, the Court held that the interlineation was likewise revoked (*m*).

Whether destruction of a will revokes a codicil thereto.

It remains to consider the effect of the revocation of a will upon duly executed testamentary papers expressed to be codicils to the will so revoked.

Since the passing of the Wills Act, the mere fact of the revocation of a will cannot, it should seem, operate to revoke a codicil (*n*). Section 20 of the Wills Act expressly provides that no will or codicil or any part thereof shall be revoked otherwise than in manner there prescribed, and it has been held that, having regard to the provisions of this section, it is no longer competent for the Court to hold that a properly executed testamentary paper, whether will or codicil, can be revoked in any other manner than by the methods stated therein (*o*).

(*m*) *Utterson* v. *Utterson* (1814), 3 V. & B. 122.

(*n*) *Savage* (1870), 2 P. & D. 78.

(*o*) *Turner* (1872), 2 P. & D. 405. Cases decided before the Wills Act came into operation established the general proposition, with regard to codicils, that a codicil stands or falls with the will to which it belongs. The revocation of the will thus, *prima facie*, operated as an implied revocation of the codicil. But it was said to be a question of intention in each case, and if the Court were satisfied that the testator intended the codicil to operate as a substantive testamentary instrument independently of the will, then, though the will were revoked, the codicil might be admitted to probate: *Barrow* v. *Barrow* (1756), 2 Lee, 335; *Medlycott* v. *Assheton* (1824), 2 Add. 229; *Tagart* v. *Hooper* (1836), 1 Curt. 289; *Coppin* v. *Dillon* (1833), 4 Hagg., at p. 369.

In some early cases decided since the statute the same principle was upheld, and the revocation of the will said to operate as an implied revocation of the codicil unless the Court was satisfied that the intention of the deceased was that the codicil should operate separately from the will: *Halliwell* (1846), 4 N. C. 400; *Clogstoun* v. *Walcott* (1847), 5 N. C. 623; *Grimwood* v. *Cozens* (1860), 2 S. & T., at p. 368; *Dutton* (1863), 3 S. & T. 66; *Greig* (1866), 1 P. & D. 72.

But in *Black* v. *Jobling* (1869), 1 P. & D. 685; in *Savage* (1870), 2 P. & D. 78; and in *Turner* (1872), 2 P. & D. 403, Lord Penzance held that in these decisions the effect of the statute had not been fully considered by the Court. "The words of the statute," he said, "are decisive; and if on some speculation as to the testator's intention or supposed intention in reference to a connection between the will and the codicil, I were to hold that the codicil is revoked by some method not in accordance with the statute, I should be acting directly contrary to its provisions": *Turner* (1872), 2 P. & D., at p. 405.

In *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 206, Sir J. Hannen, on demurrer, held a plea that "the codicils were intended by the deceased to be dependent upon, and operate in conjunction with the will, and to have no force or effect apart therefrom; and together with such will to form one complete testamentary instrument and disposition; and the said deceased duly revoked the said codicils by destroying the said will with the intention of revoking the said complete testamentary instrument and disposition," to be a good plea in law. The learned Judge had already found the plea to be not true in fact, and therefore nothing turned upon his finding.

The reasoning of Lord Penzance in the three cases cited above was adopted by Butt, J., in *Gardiner* v. *Courthope* (1886), 12 P. D. 14, and the learned Judge considered himself bound by those decisions.

In *Beardsley* v. *Lacey* (1898), 78 L. T. 25, at p. 27, Sir F. H. Jeune, referring to the question whether the destruction of a will revoked a codicil thereto, said: "About this no question can now arise. *Gardiner* v. *Courthope* (*ubi supra*) is to be treated as the binding authority on the subject."

But where both will and codicil were executed upon the same sheet of paper, and the testator cut off his signature to the will, upon proof that he thereby intended to revoke both will and codicil, it was held that the codicil as well as the will was revoked (*p*).

A codicil which has not been revoked by any of the methods described in section 20 will therefore be admitted to probate, and that even though, by reason of the will having been destroyed, the codicil in great part is unintelligible (*q*).

Burden of proving revocation.

When a will is once proved to have been duly executed, the party who alleges that some act amounting to a revocation has been done by the testator must prove his allegation, and in the absence of proof the revocation falls to the ground (*r*). This proposition is subject to certain exceptions in cases where a will which has been in the custody of the testator is not forthcoming, or is forthcoming in a torn or mutilated condition at the time of his death.

Generally upon those who allege that the instrument is revoked.

Presumption with regard to mutilated wills.

If a will which has been in the custody of the testator during his lifetime is found in his repository after his death so torn or mutilated as to destroy the evidence of due execution (*e.g.*, where the testator's signature, or—before the Wills Act, 1837—his seal, has been cut off), the *prima facie* presumption is that the document was so torn or mutilated by the testator, and that he intended by his act to revoke the will. In such a case the onus is upon the person who propounds the will to show either that the act was not done by the testator, or that he did not intend by such tearing or mutilation to revoke the will (*s*). But partial tearing which leaves all the words distinct and legible does not necessarily show an intention to

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Sir Edward Vaughan Williams, in his work on Executors (11th ed.), pp. 110, 111, doubts whether the view taken by Lord Penzance is not too widely expressed, and suggests that the destruction of a will may still operate as an implied revocation of a codicil, if by destroying the will the testator intended to revoke the codicil as well. Having regard to the authorities cited above, it is submitted that the contrary view must now be held well established.

(*p*) *Bleckley* (1883), 8 P. D. 169. See *Gardiner* v. *Courthope* (1886), 12 P. D., at p. 16; *Christmas* v. *Whinyates* (1863), 3 S. & T. 81.

(*q*) *Turner* (1872), 2 P. & D., at p. 406; *Gardiner* v. *Courthope* (1886), 12 P. D. 14.

(*r*) *Benson* v. *Benson* (1870), 2 P. & D., at p. 176.

(*s*) *Davies* v. *Davies* (1753), 1 Lee, 444; *Boughey* v. *Moreton* (1758), 2 Lee, at p. 533; *Lambell* v. *Lambell* (1831), 3 Hagg., at p. 569; *Bell* v. *Fothergill* (1870), 2 P. & D., at p. 150. In *Hare* v. *Nasmyth* (1821), 1 Shaw App., at p. 73; *S. C.*, 2 Add. 25, n.; 3 Hagg. 192, n., before the House of Lords, Lord Chancellor Eldon said: "According to all principle, if a paper, cancelled and the seal cut off or the name erased, is found in a fast-locked place of the testator, the *prima facie* inference from that is, not that the testator meant it should continue to be his will, but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet."

revoke the will, and the burden of proving that such tearing was done *animo revocandi* is on those who allege revocation (*t*).

Presumption with regard to missing wills.

Where a will has been in the custody of the testator during his lifetime, and is not found at his death, the presumption arises that the will has been destroyed by the testator, with the intention of revoking it, and that presumption will prevail unless there is sufficient evidence to repel it (*u*). In such a case the burden of proving that the will was not destroyed by the testator *animo revocandi* is upon the person propounding its contents (*x*).

"The presumption," said Parke, B., in *Welch* v. *Phillips* (*y*), "is founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved by a person of ordinary caution in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable that the deceased himself has purposely destroyed

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(*t*) *Jinkin* v. *Cowling*, [1924] P. 113 (where the will was torn across, but so as to leave every word clearly legible, and had been carefully folded up by the testatrix and put in the place where she would naturally put her will. In the absence of evidence to show that the tearing was done by way of a symbol of the determination to make an end of the document, the Court pronounced for the will). See also *Hitchings* v. *Wood* (1838—41), 2 Moo. P. C. 355, where a codicil which had been sent anonymously by the post to one of the legatees named therein, though partially burnt and torn, was admitted to proof; the Court being satisfied that it was a genuine instrument. Held, also, that, under the circumstances of the case, the onus of proving that the cancellation was the act of the testator, and with what intention it was done, lay on the parties opposing the proof; and see *Mackenzie*, [1909] P. 305.

(*u*) *Rickards* v. *Mumford* (1812), 2 Phill., at p. 24; *Colvin* v. *Fraser* (1829), 2 Hagg., at pp. 325—328; *Lillie* v. *Lillie* (1829), 3 Hagg., at p. 189; *Welch* v. *Phillips* (1836), 1 Moo. P. C., at p. 302; *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 217; *Mitcheson* (1863), 32 L. J. P. 202; *Drake* v. *Sykes* (1907), 23 T. L. R. 747. The presumption is usually said to arise "when the will is shown to have been in the custody of the testator": *Sugden* v. *Lord St. Leonards* (*ubi supra*, at p. 217), or "when the will is traced to the possession of the deceased and last seen there": *Welch* v. *Phillips* (*ubi supra*, at p. 302); but the language of Sir John Nicholl in *Wargent* v. *Hollings* (1832), 4 Hagg., at p. 249, suggests that the burden of proving that the testator had no opportunity of destroying the will is upon those who propound it. He said: "In case the will was in the custody or power of the testator, or rather, *unless it appears that it was not in his custody or power*, the presumption of law is that the destruction was his own act; and that presumption must be repelled by the party setting up the copy; he must show negatively that the deceased had no opportunity or that he was incapable of destroying it," etc. But see *Hitchings* v. *Wood* (1838), 2 Moo. P. C., at p. 447. If the will is traced out of the deceased's possession and custody, it rests with the other party either to show by some sort of evidence that it came again into his possession or custody, or that it was destroyed by his direction or with his privity and consent: *Lillie* v. *Lillie* (1829), 3 Hagg. 184, 185, n.; *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 327.

(*x*) *Colvin* v. *Fraser* (1829), 2 Hagg. 266, 325; *Lillie* v. *Lillie* (1829), 3 Hagg. 184, 189; *Welch* v. *Phillips* (1836), 1 Moo. P. C., at p. 302.

(*y*) (1836), 1 Moo. P. C., at p. 302.

it " (*z*). It cannot be presumed that the destruction has taken place without his knowledge or authority, for that would be presuming a crime (*a*).

The presumptions may be rebutted by evidence.

The presumption of intentional destruction by the testator which arises in cases where a will is not forthcoming, or is forthcoming in a torn and mutilated condition at his death, may, like every presumption of fact, be rebutted by evidence which raises a higher degree of probability to the contrary (*b*).

Circumstances which tend to rebut the presumptions.

The person who propounds the will may show that the testator had no opportunity, or was incapable of destroying the will, or may establish a strong combination of circumstances leading to a moral conviction that the testator did not himself destroy it; or he may show positively that the instrument was in existence since the testator's death, or that the testator destroyed it when of unsound mind, or by error, or under force *sine animo revocandi*, or that it was destroyed in his lifetime by some person without his privity or approbation (*c*).

The presumption additionally strong where an individual is charged with the guilt of fraudulent spoliation.

Such circumstances as these, if proved, will suffice to rebut the presumption of intentional destruction by the testator; but an additional presumption is brought to bear against the paper if any individual is charged with the guilt of a fraudulent spoliation. In such a case the charge must be clearly established, and if the proof remains doubtful the presumption of innocence must turn the scale (*d*).

Evidence in rebuttal need not amount to positive certainty.

The evidence which is offered to repel the presumption need not amount to positive certainty; it is sufficient if it reasonably produces moral conviction (*e*). The acts, declarations, and conduct of the deceased may raise such an extremely strong improbability of his having himself destroyed the will *animo revocandi* as to rebut the *prima facie* legal presumption (*f*).

The contents of the will itself may afford strong evidence.

The contents of the will itself and declarations of unchanged affection and intention made by the testator are all circumstances which may assist the Court is coming to the conclusion that the will was not intentionally destroyed by the

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(*z*) And see Sir John Nicholl's remarks in *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 326.

(*a*) *Rickards* v. *Mumford* (1812), 2 Phill., at p. 24.

(*b*) *Welch* v. *Phillips* (1836), 1 Moo. P. C., at p. 302.

(*c*) *Wargent* v. *Hollings* (1832), 4 Hagg., at p. 249; *Colvin* v. *Fraser* (1829), 2 Hagg., at pp. 325, 326.

(*d*) *Wargent* v. *Hollings* (1832), 4 Hagg., at pp. 249, 259; *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 326; *Allan* v. *Morrison*, [1900] A. C. 604. See *post*, p. 161.

(*e*) *Davis* v. *Davis* (1824), 2 Add., at p. 226; *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 325; but see *Eckersley* v. *Platt* (1866), 1 P. & D. 281.

(*f*) *James* v. *James* (1829), 3 Hagg., 185, n.; *Patten* v. *Poulton* (1858), 1 S. & T. 55.

deceased (*g*). In *Saunders* v. *Saunders* (*h*), Sir H. Jenner Fust said: "The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself" (*i*).

Those who propound the will need not show how the instrument was destroyed or lost.

It is no part of the burden of proof cast upon the persons propounding a missing will that they should show how the original instrument was in fact destroyed or lost (*k*).

Evidence of declarations made by the testator admissible to rebut or to strengthen the presumption.

Evidence of declarations made by the testator showing an intention to adhere to the will is admissible in order to rebut the presumption of intentional destruction; and evidence of declarations of an intention not to adhere to the will is admissible to confirm it (*l*). But declarations alone, unsupported by circumstances strongly marking their sincerity and confirming their probability, are of themselves insufficient to repel the presumption (*m*). "Few declarations," said Lord Eldon in *Pemberton* v. *Pemberton* (*n*), "deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon themselves to judge of their own claims, must be taken into consideration." "Such declarations are generally intended to mislead" (*o*).

But declarations coupled and consistent with conduct and acts are of weight in proof of intention; so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications (*p*).

The presumptions do not arise unless the Court is satisfied that the will was not in existence at the testator's death.

Before any presumption arises on either side the Court must be satisfied that the will was not in existence when the testator died, *i.e.*, that it was not found at his death in his depositories or elsewhere. In most cases the solution of this question presents no difficulty, for the depositories of the deceased are

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(*g*) *Patten* v. *Poulton* (1858), 1 S. & T., at p. 61; see *Mackenzie*, [1909] P. 305.

(*h*) (1848), 6 N. C., at p. 522.

(*i*) And see *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at pp. 176, 195. The character and habits of the deceased may be taken into consideration: *ibid.*, at p. 219.

(*k*) *Patten* v. *Poulton* (1858), 1 S. & T. 55.

(*l*) *Keen* v. *Keen* (1873), 3 P. & D. 105; *Bell* v. *Fothergill* (1870), 2 P. & D. 148; *North* v. *North* (1909), 25 T. L. R. 322. A letter written by the testator after the execution of the will stating that he had cancelled it is not evidence of an effective revocation, but it is admissible in evidence as showing the state of mind and intention of the testator: *Drake* v. *Sykes* (1907), 23 T. L. R. 747 (C. A.).

(*m*) *Colvin* v. *Fraser* (1829), 2 Hagg., at pp. 345—347.

(*n*) (1807), 13 Ves., at p. 301.

(*o*) Lord Eldon in *Pye* (1811), 18 Ves., at p. 148, quoting Lord Thurlow; but see *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 225, where Cockburn, C.J., expressed the diametrically opposite opinion.

(*p*) *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 361.

duly searched by those whose good faith is not impugned, who vouch for the fact one way or another (*q*). But where the depositories of the deceased, before they could be searched by an independent person, were clearly accessible to and are proved in evidence to have been investigated by the only person who was interested in destroying the will, the Court may refuse to presume that the missing will was destroyed by the testator *animo revocandi*, unless satisfied by the evidence produced that it was not in existence at the death of the testator (*r*). For though there is a presumption against the fraudulent abstraction of a missing will either before or after the death of the testator, circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence (*s*).

In coming to a conclusion on this point the Court will have regard to the possibility of a fraudulent abstraction.

A will destroyed by the testator while he is of unsound mind is not revoked (*t*).

Testator of unsound mind.

The presumption that a will which was in the testator's custody during his lifetime and cannot be found at his death was destroyed by him *animo revocandi*, does not apply to a case where the testator became insane after the execution of the will. In such a case the burden of showing that the will was destroyed whilst the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction the contents of the will are entitled to probate (*u*).

No presumption of destruction *animo revocandi* arises where the testator became insane after the will was executed.

Similarly, if a will has been in the custody of the testator at times when he was of unsound mind, as well as at times when he was of sound mind, and is found to have been torn or mutilated by him, the burden of proving that the mutilation was not done after he became insane, but at a time when he was of sound mind, is cast upon the person who sets up the revocation of the instrument (*x*).

Where a will, to which a codicil has been executed, is found at the death of the testator in a mutilated state, and there is no evidence as to the date of the mutilation, the presumption is

Presumption as to time of mutilation, where there is a codicil.

(*q*) *Podmore* v. *Whatton* (1864), 3 S. & T., at p. 451.

(*r*) *Podmore* v. *Whatton* (1864), 3 S. & T. 449; *Finch* v. *Finch* (1867), 1 P. & D. 371, 373, 374; but see *per* Buckley, L.J., in *Drake* v. *Sykes* (1907), 23 T. L. R. 747, at p. 749.

(*s*) *Allan* v. *Morrison*, [1900] A. C. 604. "The presumption will be more or less strong according to the character of the custody which the testator had over the will": *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 217.

(*t*) *Vide infra*, p. 162.

(*u*) *Sprigge* v. *Sprigge* (1868), 1 P. & D. 608; *Crandon* (1901), 84 L. T. 330; *National Provincial and Union Bank of England* v. *Taylor* (1920), 64 S. J. 148.

(*x*) *Harris* v. *Berrall* (1858), 1 S. & T. 153; *Benson* v. *Benson* (1870), 2 P. & D., at p. 176.

that the will was mutilated after the execution of the codicil (*y*).

Cases are seldom decided upon the mere presumption.

It seldom happens that cases which set out upon legal presumptions require to be decided upon the mere presumption; the general circumstances of the case usually lead to a tolerably satisfactory conclusion of the real fact, either by confirming or by repelling the legal presumption (*z*).

Sub-section 2.—*The Intention to Revoke.*

The destruction must be accompanied by an "intention to revoke."

The "burning, tearing, or otherwise destroying" the instrument must be done "with the intention of revoking the same" (*a*). It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law: the act must be accompanied with the intention of revoking; there must be the *animus* as well as the act; both must concur in order to constitute a legal revocation (*b*). "All the destroying in the world without intention," said James, L.J., in *Cheese* v. *Lovejoy* (*c*), "will not revoke a will, nor all the intention in the world without destroying: there must be the two."

A will destroyed by a testator while of unsound mind is not revoked.

It follows that if the testator was of unsound mind when he destroyed the will, the will is not revoked (*d*). For if the deceased was insane, or in a state of mental excitement and not master of his actions, he cannot be considered responsible for his act as if it had been the act of a competent person; and consequently the destruction of the instrument by a person in such a state of mind has no effect (*e*).

(*y*) *Christmas* v. *Whinyates* (1863), 3 S. & T. 81.

(*z*) *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 327.

(*a*) Wills Act, 1837, s. 20; see *Clarke* v. *Scripps* (1852), 2 Rob., at p. 567. The law was the same under the Statute of Frauds: *Bibb* v. *Thomas* (1775), 2 W. Black., at p. 1044.

(*b*) *Clarke* v. *Scripps* (1852), 2 Rob., at p. 567.

(*c*) (1877), 2 P. D., at p. 253. If the destruction were not performed *animo revocandi* at the time, it seems that no subsequent ratification can render the revocation effectual: *Mills* v. *Millward* (1889), 15 P. D. 21; *Gill* v. *Gill*, [1909] P. 157; *vide supra*, p. 153, note (*d*).

(*d*) *Brunt* v. *Brunt* (1873), 3 P. & D., at p. 38.

(*e*) *Borlase* v. *Borlase* (1845), 4 N. C. 106, 139. A will destroyed by a testator while under the influence of drink and not responsible for his actions is not revoked: *Brassington*, [1902] P. 1. In *Scruby* v. *Fordham* (1822), 1 Add. 74, a will partially defaced by a testator whilst of unsound mind was pronounced for in its integral state. Sir John Nicholl said that in the absence of evidence as to the sanity of a testator (whose general sanity is impeached) at the time of the destruction, he is to be inferred rational or the contrary from the character, broadly taken, of his act: *ibid.*, p. 90. See also *Brand* (1831), 3 Hagg. 754; *Brunt* v. *Brunt* (1873), 3 P. & D. 37, where a will torn in pieces by the testator while suffering under an attack of *delirium tremens*, was held not revoked; *Borlase* v. *Borlase* (1845), 4 N. C. 106. And see as to the burden of proof when a will of a lunatic testator is not forthcoming at his death, *supra*, p. 161.

Will destroyed by accident or in mistake.

All questions of revocation are questions, to some degree, of intention (*f*); but this is particularly the case in questions of revocation by destruction. For all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal (*g*); and although the ordinary inference, deducible from every act of destruction by the testator, is that he intended to revoke the instrument (*h*), that presumption may always be rebutted by evidence which satisfies the Court that the destruction was referable to accident or mistake.

"With respect to the revocation of a will by the act of cancelling," said Lord Mansfield in *Burtenshaw* v. *Gilbert* (*i*), "it is in itself an equivocal act; and in order to make it a revocation, it must be shown *quo animo* it was cancelled, for, unless that appears, it will be no revocation. If a man were to throw the ink upon his will, instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; or suppose a man, having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will; or suppose a man having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, which must govern in such cases" (*k*).

In the instances given, the destruction has been brought about by accident, or by a mistake as to the identity of the document. But if it can clearly be shown, in any case, that

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(*f*) *Smith* v. *Cunningham* (1823), 1 Add., at p. 455.

(*g*) *Burtenshaw* v. *Gilbert* (1774), 1 Cowp., at p. 52; *Thynne* v. *Stanhope* (1822), 1 Add., at p. 53; *Giles* v. *Warren* (1872), 2 P. & D., at p. 402; *Perrott* v. *Perrott* (1811), 14 East, at p. 439.

(*h*) *Thynne* v. *Stanhope* (1822), 1 Add., at p. 54; *Lewis* (1858), 27 L. J. P. 31.

(*i*) (1774), 1 Cowp., at p. 52.

(*k*) See *Onions* v. *Tyrer* (1716), 1 P. Wms. 343; 2 Vern. 741; *Perrott* v. *Perrott* (1811), 14 East, at p. 439; *Thynne* v. *Stanhope* (1822), 1 Add., at p. 53; *Giles* v. *Warren* (1872), 2 P. & D., at p. 402. If the whole or any part of the will is destroyed or rendered illegible by natural causes, as by fire, fading of ink, and the like, there can be no doubt that its contents may be proved by extrinsic evidence; thus, in the case cited by Toller, p. 70, where a will was found gnawed by rats and in part illegible, on proof of the substance of the will by joining the pieces, and by the memory of the witnesses, probate was granted: see *Wright* (1908), 44 Ir. L. T. 137. The practice in such a case, where satisfactory oral evidence is before the Court showing what the missing words were, is not to insert such words in the probate, but to allow a document showing the words as proved, to be annexed to the probate: *Gill* v. *Gill*, [1909] P. 157. See also *Adams* v. *Southerden*, [1925] P. 177, C. A. (a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, so that the revocation is contingent on the fact being true); cf. *Re Faris, Goddard* v. *Overend*, [1911] 1 Ir. R. 469, 472.

If the destruction of a will is referable to a mistake, whether of fact or of law, the will is not revoked.

the destruction were solely referable to a mistake, then, whether the mistake were one of fact or of law (*l*), whether it be a mistake as to the legal validity of the document destroyed or as to the legal effect of its destruction, the document destroyed under an erroneous belief is not revoked.

The doctrine of "dependent relative revocation."

Cases have also arisen in which the act of destruction was referable wholly and solely to the intention of setting up some other testamentary paper in the place of the one destroyed. The result of these decisions has been to establish the doctrine of "dependent relative revocation," according to which an act of destruction, wholly and solely referable to the intention of setting up some other testamentary paper, is or is not a revocation, according as the relative act is efficacious or invalid (*m*).

"The doctrine of dependent relative revocation," said Sir J. P. Wilde in *Powell* v. *Powell* (*n*), "is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi* it is no revocation. What then if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted. The act is referable, not to an abstract intention to revoke, but to an intention to validate the other paper; and if the sole condition upon which revocation was intended is not fulfilled, the *animus revocandi* is not present. In the above observations it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. Cases may and probably will arise in which the intention is either mixed or ambiguous, and such are for future consideration" (*o*).

(*l*) *Perrott* v. *Perrott* (1811), 14 East, at pp. 439, 440.

(*m*) See Wms. on Exors. (11th ed.), p. 107.

(*n*) (1866), 1 P. & D., at p. 212.

(*o*) So in *Ilchester* (1803), 7 Ves., at p. 372, Lord Alvanley said: "It has been held that where a disposition is made, so as to have legal effect, and afterwards another, by which the former would be revoked but the other substituted, and it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition; though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition,

It is proposed to consider the application of these principles to the varying circumstances of the cases in which they have been applied.

(1) A will destroyed in the erroneous belief that it is invalid is not revoked.

And first, as to cases in which the act of destruction is referable to a mistake as to the validity of the instrument which is destroyed.

If a testator destroys his will in the erroneous belief that it is not a valid testamentary disposition, such destruction will not amount to a revocation (*p*).

In *Giles* v. *Warren* (*q*) Lord Penzance said : " There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it " (*r*).

(2) Will destroyed under an erroneous belief as to the legal consequences which will result.

Secondly, as to cases where the testator destroys the instrument under an erroneous belief as to the legal consequences which will result from his act.

In *James* v. *Shrimpton* (*s*) a testator, having duly executed his will, subsequently married, whereby his will was revoked. On the day of his marriage, after the ceremony, he executed a codicil, in which he made provision for his wife; the codicil contained a clause to this effect : " in all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed,

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if the instrument cannot have that effect, it shall not be a revocation." See also *per* the Master of the Rolls, *ibid.*, at p. 379. In *Winsor* v. *Pratt* (1821), 2 Brod. & Bing., at p. 655, Dallas, C.J., said : " I take the rule to be that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. And again, the effect of cancelling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the cancelling of the first being dependent thereon, ought to be looked upon as null and inoperative." See also, generally, upon the subject of dependent relative revocation, the note to *Duppa* v. *Mayo* (1670), 1 Wms. Saund. 278; *Dancer* v. *Crabb* (1873), 3 P. & D., at p. 104; *Cossey* v. *Cossey* (1900), 82 L. T. 203.

(*p*) *Giles* v. *Warren* (1872), 2 P. & D. 401; *Thornton* (1889), 14 P. D. 82.

(*q*) (1872), 2 P. & D., at p. 402.

(*r*) See also the remarks of Sir C. Cresswell in *Clarkson* v. *Clarkson* (1862), 2 S. & T. 497. In *Thynne* v. *Stanhope* (1822), 1 Add. 52, an allegation that a testatrix destroyed her will *sine animo revocandi*, under an erroneous impression that the law did not permit her, as a minor, to dispose of her property by will, was rejected on the ground that the allegation, if proved, furnished no proof that the paper ever existed as a finished will, nor that it was cancelled *sine animo revocandi*.

(*s*) (1876), 1 P. D. 431; as to the effect of the destruction of a codicil by which a revoked will has been revived, *vide post*, p. 201, note (*s*).

and probably the testator then destroyed it. Sir J. Hannen said: "I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. . . . I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the Court should give no more effect to the act than it would do if the testator had destroyed the paper under a misapprehension as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil."

In *Stamford* v. *White* (*t*) a testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled in the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of his first marriage. Sir F. H. Jeune said: "The will of 1895 does not in terms revoke the will of 1882, and the cutting off the signature was done under an erroneous belief. If the testator thought that the settlement would, by its own force, give the property to the children of the first marriage, and that, therefore, the will of 1882 was useless, under those circumstances would the revocation of 1895 have been absolute? It would have been made under the erroneous impression of the effect of the settlement, and therefore, under an erroneous impression as to the document of 1882." The will of 1882 was admitted to probate (*u*).

(3) Where the destruction is referable to the intention of setting up some other testamentary paper: *e.g.* a later will.

Thirdly, as to cases in which the act of destruction was referable wholly and solely to the intention of setting up some other testamentary paper.

1. Where the testamentary paper intended to be set up by the destruction of the will in question is a later will already in existence at the time when the earlier will is destroyed.

A will destroyed in the belief that a later will has been duly executed and supersedes it, is not revoked

If a testator destroys an earlier will in the belief that he has validly executed a later will which supersedes it, and that the earlier will is therefore useless, and the later will, owing to some defect in its execution, subsequently turns out to be inoperative, the act of destruction cannot operate to revoke the instrument destroyed in that erroneous belief.

(*t*) [1901] P. 46

(*u*) Cf. *Beardsley* v. *Lacey* (1898), 78 L. T. 25; *Adams* v. *Southerden*, [1925] P. 177, C. A. (where a testator, under the mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property, burned his will).

if in fact the later instrument is invalid.

In *Hyde* v. *Hyde* (*x*) a man, having made and duly executed a will of his real and personal estate, had a mind to change a trustee and make some little alterations. "Whereupon," the report proceeds, "he sends for a scrivener, and gives directions to prepare a draft of instructions for another will, which the scrivener does accordingly, which the testator reads over and approves very well, and sets his hand to it; and being at a tavern, thinking he has now made a new will, he pulls out of his pocket the first will, and tears off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing. 'Why,' says he, 'I am cancelling my first will.' 'Pray,' says the scrivener, 'hold your hand, the other will is not perfected, it will not pass your real estate for want of being executed pursuant to the Statute of Frauds and Perjuries.' 'I am sorry for that,' says he, and immediately desisted from tearing off any more of the seals, and in some short time after dies, without having done anything further to perfect the second will, or cancelling the first."

The Lord Chancellor held that the subsequent will could be no revocation as to the real estate, not being executed according to the Statute of Frauds; and that as to the tearing off the seals from the first eight sheets, that not being done *animo cancellandi* unless the second will was good (*y*), was no revocation.

In *Onions* v. *Tyrer* (*z*) the testator, having made a will, which was properly attested as by law was then required for passing freehold lands, and having afterwards made a second will containing a fresh devise of his lands, but so attested as to be ineffectual for passing them, by this latter will purported to revoke all former wills. It was contended that the second will was sufficiently attested for the purpose of working a revocation of the former although it was not sufficiently attested to pass the lands. There was also some evidence that the first will was torn in the presence of the testator by his order, after the execution of the later will.

The Lord Chancellor said: "If the first will had been cancelled by the testator's directions upon a presumption that the second devisee was to take the premises by the second will, such a cancelling should not have profited the heir, because it would have been a cancelling proceeding from a mistake: it is no more than if the testator, being sick, and having his two wills under his pillow, should, by mistake, give his last will to

(*x*) (1700), 1 Eq. Cas. Abr. 409.
(*y*) See *Limbery* v. *Mason* (1710), 2 Comyns, at p. 455.
(*z*) (1716), 1 P. Wms. 343; 2 Vern. 742.

be cancelled, or order one to cancel his first, who by mistake cancels his last.

" Though the first will was ordered by the testator to be cancelled, and the same was cancelled accordingly, yet all this being upon a presumption that the latter will was good, and duly executed, it is properly relievable under the head of accident.

" It is plain that the testator did not mean to revoke his former will by cancelling but by substituting another perfect will in lieu thereof, and not otherwise, and therefore the cancelling thereof (if any) was but a circumstance showing that he thought he had made a good disposition by the second will, and in confidence thereof it was done with no other intent but that the second will should thereby most surely take place. . . . If the testator did order [the former will] to be cancelled, the effect of such cancelling depended on the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling the first will, depending thereon, ought to be looked upon as null also, and therefore the first will as to the said lands is still subsisting and unrevoked " (*a*).

These cases were followed in *Scott* v. *Scott* (*b*), *Clarkson* v. *Clarkson* (*c*), in *In the Goods of Middleton* (*d*), and in *Durber* v. *Bunn* (*e*), in each of which cases the testator, having executed a later will, destroyed an earlier will on the assumption that the later will had been validly substituted for it. On it appearing that the later will was in fact not duly executed, the earlier will was held to be unrevoked and was admitted to probate.

In *Dancer* v. *Crabb* (*f*) the testatrix, having dictated to a friend some alterations which she wished to make in her will, tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum was never duly executed, but on proof that the testatrix believed that this paper, together with the remainder of her will, constituted a new and valid testamentary disposition, the Court held that no part of the original will had been revoked. Sir James Hannen said : " If a testator's act can be interpreted thus : ' Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked; but if his meaning is ' As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in

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(*a*) 1 P. Wms., at p. 346, n. 2.
(*b*) (1859), 1 S. & T. 258.
(*c*) (1862), 2 S. & T. 497.
(*d*) (1864), 3 S. & T. 583.
(*e*) (1926), 134 L. T. 669.
(*f*) (1873), 3 P. & D. 98.

fact made. I think that the latter form of words correctly expresses the state of the testatrix's mind at the time when she tore her will " (*g*).

The principle does not apply where the second will is in fact duly executed, but some matter *dehors* the will renders its provisions ineffectual.

Where, however, the second will is duly executed, and valid as a testamentary instrument, but the disability of some of the legatees to take, or some matter *dehors* or subsequent to the will renders its provisions to some extent ineffectual, then the destruction of an earlier will, although dependent upon the validity of the later instrument, will, it seems, operate as a revocation. It is very difficult to make a satisfactory distinction between such cases as *Onions* v. *Tyrer* (*h*) and cases in which a gift fails for want of capacity in the legatee to take, but the distinction has been drawn in cases of revocation by a subsequent will, and would, it should seem, apply to cases of revocation by destruction also (*i*).

Where the paper intended to be set up is an earlier will.

2. Where the testamentary paper intended to be set up by the destruction of the will in question is an earlier will, already in existence, but revoked by the instrument which is destroyed.

A will destroyed under the erroneous impression that an earlier revoked will is thereby revived, is not revoked.

If a testator, having executed a later will by which a will of earlier date was revoked, destroys the later will under the erroneous belief that the earlier will is thereby revived, the act of destruction will not operate to revoke the later will.

In *Powell* v. *Powell* (*k*) a testator, having executed a will in 1864 revoking all former wills, in 1865 destroyed that will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand. It was held that the will of 1864 was not revoked.

Sir J. P. Wilde said: " What does it matter whether a testator were to say ' I tear this will because I have this day executed another designed to replace it ' or ' I tear this will because I desire and expect that the effect of my so doing will be to set up my old will '? In either case the revocatory act is based on a condition which the testator imagines is fulfilled. In both cases the act is referable not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present " (*l*).

(*g*) See *Irvin* (1908), 25 T. L. R. 41.

(*h*) *Vide ante*, p. 167.

(*i*) *French's Case*, Rolle's Abridgment, Devise O. 4; *Ilchester* (1803), 7 Ves., at p. 373; *Tupper* v. *Tupper* (1855), 1 K. & J. 665; *Quinn* v. *Butler* (1868), L. R. 6 Eq. 225.

(*k*) (1866), 1 P. & D. 209

(*l*) This case was followed in *Cossey* v. *Cossey* (1900), 82 L. T. 203; and cf. *Adams* v. *Southerden*, [1925] P. 177, C. A. See, however, *Gentry* (1873),

A will destroyed with the intention that it shall be revoked conditionally on the execution of a fresh will, is not revoked if the fresh will is in fact never executed, or is invalidly executed.

3. Where the testamentary paper intended to be substituted for the document destroyed is a will which the testator intends to make in the future, and is not in existence at the time of the destruction.

If the testator destroys his will with the intention that the will should be revoked conditionally on his executing a fresh will, then, if the fresh will is in fact never executed, or is invalidly executed, the will destroyed by the testator is not revoked.

In *Dixon* v. *The Solicitor to the Treasury* (*m*) the testator, a few days before his death, gave instructions to a solicitor for a new will, and, after sending for his existing will, there and then cut off his signature, stating that he meant to cancel the will as he was going to make a new one. He was alleged to have said that he understood that the cutting out of the signature from the old will was a necessary preliminary to making a new will. The testator died without having executed a fresh will. Sir Gorell Barnes said: "If the testator cut out his signature because he thought he had to cut it out before he could start operations on the fresh will, then he was doing that act as part of the operation of bringing a new will into force: and, if this were so, it follows that he would not have cut out his signature if he had thought that it would have the effect of making him die intestate." The jury found as a fact that the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will, and the will was accordingly pronounced for (*n*).

Application of the principle of dependent relative revocation to obliterations of bequests in a will.

The doctrine of dependent relative revocation is applicable to cases in which a bequest or appointment in the will is obliterated by the testator, with the intention of substituting another bequest or appointment in its place. If the substituted bequest or appointment is not effectually made, the original bequest or appointment remains unrevoked (*o*).

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3 P. & D. 80, where a revocation of a will was held to be absolute, and not dependent on the incorporation of certain documents in the papers admitted to probate.

The case of *Dickinson* v. *Swatman* (1860), 4 S. & T. 205, in so far as it conflicts with the principles laid down in *Powell* v. *Powell* (1866), 1 P. & D. 209, must be regarded as overruled.

(*m*) [1905] P. 42.

(*n*) See *Appelbee* (1828), 1 Hagg. 143; *Cockayne* (1856), Dea. & Sw. 177, where the doctrine of dependent relative revocation was extended to a case of an intention to execute a fresh document: *Eeles* (1862), 2 S. & T. 600; *De Bode* (1847), 5 N. C. 189; *Mitcheson* (1863), 32 L. J. P. 202.

(*o*) See *Short* v. *Smith* (1803), 4 East, at p. 429; *Winsor* v. *Pratt* (1821), 2 Brod. & Bing., at p. 657; *Kirke* v. *Kirke* (1828), 4 Russ. 435; *Locke* v. *James* (1843), 11 M. & W. 901; and *post*, p. 175, where this matter is more fully dealt with.

Where the only evidence to establish a case of dependent relative revocation was given by a witness who was interested in setting up the earlier will, whose conduct threw doubts upon his credibility, the Court refused to act upon his evidence, though uncontradicted (*p*).

The evidence establishing a case of dependent relative revocation must not be doubtful or vague.

Section 5.

OBLITERATIONS, INTERLINEATIONS AND ALTERATIONS IN A WILL.

Section 21 of the Wills Act, 1837, provides that "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will" (*q*).

Provisions of the Wills Act, s. 21.

Where unattested alterations (*r*) occur in a will, the presumption of law is that such alterations were made after the execution of the will, and in the absence of evidence rebutting the presumption, probate will be granted of the will in its original state, omitting the alterations (*s*). The rule is somewhat differently expressed by Wood, V.-C., in *Williams* v. *Ashton* (*t*). He said: "I do not think it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or at another. The correct view is that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence

Unattested alterations presumed to have been made *after* the execution of the will.

(*p*) *Eckersley* v. *Platt* (1866), 1 P. & D. 281; *Weston* (1869), 1 P. & D. 633.

(*q*) As to partial revocation by cancellation or obliteration before the Wills Act came into operation, see *Swinton* v. *Bailey* (1878), L. R. 4 A. C. 70.

(*r*) A will altered without the testator's concurrence may be pronounced for in its unaltered state: *Parker* v. *Hickmott* (1828), 1 Hagg. 211.

(*s*) *Cooper* v. *Bockett* (1844—6), 4 Moo. P. C. 419; *Gann* v. *Gregory* (1854), 3 De G. M. & G., at p. 780; *Simmons* v. *Rudall* (1851), 1 Sim. (N.S.), at p. 137; *Greville* v. *Tylee* (1851), 7 Moo. P. C., at p. 328; *James* (1858), 1 S. & T., at p. 238; *Sykes* (1873), 3 P. & D., at p. 27; *Adamson* (1875), 3 P. & D., at p. 255. Alterations appearing in a will, which was signed by the testator whilst as a soldier he was employed in actual military service, will, in the absence of any evidence as to their date, be presumed to have been made during the continuance of the military service: *Tweedale* (1874), 3 P. & D. 204.

(*t*) (1860), 1 J. & H. 115, at p. 118.

from which a jury may infer that the alteration was made before the will was executed " (*u*).

The presumption may be rebutted:

Stated, however, as the rule generally is, that there is a presumption that unattested alterations on the face of a will were made after its execution, this presumption may be rebutted by proof or internal evidence to the contrary (*x*).

by proof or internal evidence to the contrary;

The Court may come to the conclusion that the alterations were in the will at the time of its execution upon any reasonable evidence, without insisting upon the oath of the attesting witnesses, or any other particular species of evidence (*y*).

by inferences drawn from the condition of the will;

The evidence of an expert in handwriting is entitled to some consideration (*z*), so are the facts that the testator was a person who well knew the formalities required for making a will, and that the alterations appear to have been written with the same pen and ink as the rest of the will (*a*). The inspection of the document itself and the character of the alterations may suffice to satisfy the Court that they were made before execution (*b*). But the mere fact that dates prior to that of the will have been placed against the alterations by the testator will not in itself justify their inclusion in the probate (*c*).

and by evidence of declarations made by the testator *before* the execution of the will; *secus*, declarations made after.

The presumption may be rebutted by evidence of declarations made by the testator before the execution of the will, showing an intention on his part which appears to have been carried into effect by the will as altered, and not as it originally stood. But evidence of declarations made by the testator after the execution of the will is not, it should seem, admissible for the purpose

(*u*) See *Doe* v. *Palmer* (1851), 16 Q. B. 747, at p. 755; *Sykes* (1873), 3 P. & D., at p. 27. The mere circumstance that the amount of a legacy or the name of a legatee is inserted in a different handwriting and in different ink will not constitute an obliteration, interlineation or other alteration. Blanks may be supplied, and in a different ink, because the will may very probably be brought with blanks to the testator, and then filled up; no presumption could arise in such a case against the will having been executed as it appears: *Greville* v. *Tylee* (1851), 7 Moo. P. C., at p. 327. The mere fact that words which interrupt the grammatical structure of a paragraph occur in a will, is not, it should seem, sufficient to raise a presumption that they have been introduced after its execution. It is no part of the duty of the Court to raise obstacles, and make the Wills Act more difficult of compliance than it is: *Swindin* (1850), 2 Rob. 192. There is a marked distinction between interlineations and alterations. Interlineations are generally used merely to complete an imperfect sentence, whilst an alteration is a change in the original disposition. So where a will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged, the Court held that it was not bound to presume that they were made after execution, and included them in the probate: *Cadge* (1868), 1 P. & D. 543; and see *Birch* v. *Birch* (1848), 1 Rob. 675.

(*x*) *Adamson* (1875), 3 P. & D., at p. 255.

(*y*) *Hindmarch* (1866), 1 P. & D., at p. 308; *Greville* v. *Tylee* (1851), 7 Moo. P. C., at p. 329.

(*z*) *Hindmarch* (1866), 1 P. & D., at p. 308.

(*a*) *Ibid.*

(*b*) *Birch* v. *Birch* (1848), 1 Rob. 675; *Swindin* (1850), 2 Rob. 192; *Cadge* (1868), 1 P. & D. 543; *Tonge* (1892), 66 L. T. 60

(*c*) *Adamson* (1875), 3 P. & D. 253.

of proving that alterations were made before the will was executed (*d*).

Unattested alterations made after the execution, are rejected.

Unattested alterations made in a will after its execution are rejected, and the will in its original and unaltered state admitted to probate. For the section enacts that such alterations shall be ineffectual so far as the words or effect of the will before alteration shall be "apparent." The section, however, contains an exception in cases where the words or effect of the will before

Where words originally in the will are

(*d*) In *Doe* v. *Palmer* (1851), 16 Q. B. 747, at p. 756, Lord Campbell, C.J., said: "If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed, the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ . . . from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? . . . Declarations of the testator *after* the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires; and *for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible.* But the previous declarations of the testator as to his testamentary intentions do not seem to be liable to the same objections. They demonstrate that the alteration is not an afterthought; they cannot have been uttered with any view of evading the law respecting the execution of wills; and they still leave upon the devisee the burthen of proving by reasonable evidence that this law has been complied with." This principle that the presumption may be rebutted by evidence of declarations made before, but not after, the execution was recognised in the following cases: *Williams* v. *Ashton* (1860), 1 J. & H. 115; *Sykes* (1873), 3 P. & D. 26; *Adamson* (1875), 3 P. & D., at p. 256.

In *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154, it was held that declarations made by a testator both before and after the execution of the will, are admissible as evidence of its contents when the execution is not in question. But this case, it is submitted, left the authority of *Doe* v. *Palmer* unimpaired. Cockburn, C.J., referring to that case, said: "Lord Campbell said, 'Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested . . .' a proposition in which . . . I fully concur. He then goes on to say: 'And for the same reason a declaration by the testator after the will was executed, that the alteration had been made previously would be inadmissible.' This may be more doubtful. . . . The question in *Doe* v. *Palmer* turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid, but if made before they were inserted, would be inoperative to cover them. What it comes to is, that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it": *Sugden* v. *Lord St. Leonards*, at pp. 228, 229. Earlier in his judgment (at p. 225), Cockburn, C.J., recognised the principle that declarations of a deceased testator made *before* the execution of a will are admissible to rebut the presumption arising from alterations appearing on the face of it.

In *Dench* v. *Dench* (1877), 2 P. D. 60, declarations made by the testator subsequent to the execution of the will were tendered as evidence that an alteration appearing on the face of it was made before execution. *Sugden* v. *Lord St. Leonards* (*ubi supra*) was cited, but the Court decided that it would not act upon that evidence. Evidence of declarations made before the execution by the testator was, on the authority of *Doe* v. *Palmer*, admitted and acted upon. See accord. *Jessop*, [1924] P. 221. But see *Gould* v. *Lakes* (1880), 6 P. D. 1.

A mere general statement by the testator that he has made some alterations in his will is not sufficient to give validity to any alterations found in the instrument after his death: *Williams* v. *Ashton* (1860), 1 J. & H. 115.

completely obliterated, so as to be no longer "apparent," they are omitted from the probate.

alteration shall not be "apparent." If therefore the words are completely obliterated, so that it cannot be made out what they originally were, the obliteration is effectual, and probate must then be granted as if there were blanks in the will.

Several cases have been decided, which, dealing with erasures and alterations made of or over words in a testamentary document, show in what cases words so obscured are considered to be "apparent" and by what means they may be made so "apparent." The result of these authorities appears to be that the words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the section, if experts, using magnifying glasses when necessary, can decipher them and satisfy the Court that they have done so; but that it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it (*f*).

Obliterated words are "apparent" if decipherable by experts, using magnifying glasses if necessary.

But no physical interference with the document is permissible.

(*f*) *Per* Sir F. H. Jeune in *Ffinch* v. *Combe*, [1894] P., at p. 201. In *Ibbetson* (1839), 2 Curt. 337, Sir H. J. Fust said: "The obliterations and erasures should be carefully examined by persons accustomed to inspect writings, in order to ascertain how the will originally stood. Possibly with the use of glasses that may be discovered; but I am quite unable to make it out." In that case, as it turned out, it could not be discovered what the parts obscured originally were.

In *Beaven* (1840), 2 Curt. 370, a word had been altered, but in such a way that the original word remained, beyond question, apparent. In that case probate was granted with the original word: see also *Greenwood*, [1892] P. 7.

In *Lushington* v. *Onslow* (1848), 6 N. C. 183, erased words were allowed to form part of the probate, although nothing but the assistance of a very skilful expert using a powerful magnifying glass could possibly have discovered what the original words were (see the remarks of Sir F. H. Jeune on this case in *Ffinch* v. *Combe*, [1894] P., at p. 200).

In *James* (1858), 1 S. & T. 238, probate was granted of the will with the parts erased in blank, the original words not being discernible on the face of the paper.

In *Brasier*, [1899] P. 36, words beneath alterations were admitted to probate upon proof that they could be deciphered by an expert in writing using a magnifying glass.

The Court will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out, but will refer such a matter to proof, and pronounce its judgment according to the evidence which may be offered: *Townley* v. *Watson* (1844), 3 Curt. 761.

In *McCabe* (1873), 3 P. & D., at p. 96, Sir J. Hannen said: "It is stated by [expert witnesses] that they can, with the assistance of magnifying glasses, read the words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, but am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts." In *Ffinch* v. *Combe*, [1894] P., at p. 200, Sir F. H. Jeune, referring to this case, said: "I think Sir J. Hannen did not intend to say that the aid of experts and magnifying glasses might not be resorted to in order to determine if words were apparent, but only that in that particular case he was not satisfied with the opinion of the experts that the words could in fact be read by any means." What methods may be resorted to in deciphering the words altered or erased, may be gathered from the directions to the expert in handwriting in *Ffinch* v. *Combe*, [1894] P., at pp. 192—194. Magnifying glasses may be used: *Ibbetson* (1839), 2 Curt. 338; *Horsford* (1874), 3 P. & D., at p. 215; *Ffinch* v. *Combe*, [1894] P., at p. 201; *Brasier*, [1899] P. 36.

Chemical agents must not be used on the document, or the document

When words in a will are so completely effaced or obliterated as not to be apparent on the face of the instrument itself, no extrinsic evidence can be admitted to show what they originally were.

When words are obliterated so as to be no longer "apparent," extrinsic evidence is inadmissible to prove their purport.

Sir H. Jenner Fust in *Townley* v. *Watson* (*g*) said: "What then is the interpretation to be put upon this section when either words in a will or the effect of words are so completely effaced or obliterated as not to be apparent? Now, I think, the *prima facie* construction must be '*apparent on the face of the instrument itself*' and not that suggested in argument, namely, '*capable of being made apparent by extrinsic evidence.*' What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned, 'unless the words shall be capable of being made apparent'? . . . I think it is impossible to read the words and not say it was the intention of the Legislature that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament" (*h*).

The doctrine of dependent relative revocation applied to cases where the testator completely erases a bequest,

An important corollary has been engrafted upon this doctrine that a complete obliteration by the testator of words in his will constitutes a valid revocation of the words so obliterated.

It is clear from the words of section 20 of the Wills Act, which applies to the revocation of a will or codicil, or any part thereof, that an intention to revoke is absolutely necessary to effect a

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itself affected in any way: *Horsford* (1874), 3 P. & D., at p. 215; *Ffinch* v. *Combe*, [1894] P., at p. 193.

The effacement of the original writing by the testator by pasting a piece of paper over it, is an obliteration within the meaning of the section, and the Court will not order the paper so pasted upon the will to be removed for the purpose of ascertaining what is written underneath: *Horsford* (1874), 3 P. & D. 211; *Ffinch* v. *Combe*, [1894] P. 191.

But if the words written beneath the superimposed paper can be read by an expert in handwriting, on placing a piece of brown paper around them, and holding the document against a window-pane, the words are "apparent" within the meaning of the section: *Ffinch* v. *Combe*, [1894] P. 191.

Where words had been written upon the back of a codicil, and a piece of blank paper pasted over them, the Court ordered the paper to be removed in order to ascertain whether the words so written amounted to a revocation of the codicil: *Gilbert*, [1893] P. 183.

(*g*) (1844), 3 Curt., at p. 768.

(*h*) See *Stephens* v. *Taprell* (1840), 2 Curt., at p. 467; and see *McCabe* (1873), 3 P. & D., at p. 96; *Horsford* (1874), 3 P. & D., at p. 216; *Ffinch* v. *Combe*, [1894] P., at p. 198.

with the intention of revoking it only if he has effectually substituted another bequest in its place.

revocation by burning, tearing, or otherwise destroying (*i*). And it has been held on the construction of section 21, that an obliteration, in order to constitute a revocation of the words obliterated, must in like manner be made by the testator with an intention to revoke (*k*).

Where, therefore, a testator entirely erases or obliterates the original words, with the intention of revoking that portion of the will *only in the event of his having effectually substituted another bequest in its place*, the doctrine of dependent relative revocation (*l*) becomes applicable (*m*); and if the substituted bequest is not effectually given, the original bequest is not revoked. In such cases extrinsic evidence is admissible to show what the original words were (*n*). But the testator's intention is a question of fact to be ascertained from his declarations and the surrounding circumstances, and where that intention would be defeated by restoring the original words, the Court is not bound to apply the doctrine of dependent relative revocation, and may hold that the original words were revoked although the other words were ineffectually substituted (*o*).

In such cases extrinsic evidence is admissible to show what the original words were.

(*i*) *Brooke* v. *Kent* (1840), 3 Moo. P. C., at p. 348.

(*k*) *Brooke* v. *Kent* (1840), 3 Moo. P. C., at p. 349; *Townley* v. *Watson* (1844), 3 Curt., at p. 769.

(*l*) See *ante*, pp. 164 *et seq.*

(*m*) *Horsford* (1874), 3 P. & D., at p. 216.

(*n*) *Vide ante*, p. 170. In the following cases where a legacy was given, the amount afterwards obliterated by the testator, and another sum written by him over the obliteration by way of substitution, but without the attestation required by the Act, the Court acting upon this doctrine admitted extrinsic evidence as to the words obliterated, and included them in the probate although they were not "apparent" upon the face of the will: *Brooke* v. *Kent* (1840), 3 Moo. P. C. 334; *Soar* v. *Dolman* (1842), 3 Curt. 121; *Horsford* (1874), 3 P. & D. 211.

The principle applies in a case where the name of an executor has been erased and another name substituted by the testator, such obliteration and substitution being unattested. The Court will direct the original name to be restored in the probate if satisfied by evidence *aliunde* what the original name was: *Harris* (1860), 1 S. & T. 536; *Parr* (1859), 29 L. J. P. 70; *Greenwood*, [1892] P. 7.

The principle also applies to a case where the testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The Court will receive evidence to show what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee: *McCabe* (1873), 3 P. & D. 94.

Cases have occurred where the name of an attesting witness has been erased by the testator; were this done with the intention of revoking the will, a question might arise whether that would be a sufficient "destruction" within the meaning of the statute: see *Margary* v. *Robinson* (1886), 12 P. D., at p. 12; *Hobbs* v. *Knight* (1838), 1 Curt. 768, 781; *Morton* (1887), 12 P. D. 141; *vide ante*, p. 151. In the cases referred to the name so erased was restored in the probate, as the Court was satisfied that the testator did not intend to revoke the will; and see *Playne* v. *Scriven* (1849), 7 N. C. 122; *Coleman* (1861), 2 S. & T. 314; *Greenwood*, [1892] P. 7; *Godfrey* (1893), 69 L. T. 22.

(*o*) *Zimmer* (1924), 40 T. L. R. 502 (where a testatrix by her will left her property to her three children. One child died, leaving issue, and thereupon the testatrix completely erased the word "three" and wrote the word

Attestation of alterations.

Alterations made in a will after its execution are to be executed in the same manner as a will (*p*), but the signature of the testator and the subscription of the witnesses may be made in the margin (*q*) or on some other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration (*r*), and written at the end or some other part of the will (*s*).

Unattested alterations made in a will after its execution but before the execution of a codicil.

A codicil duly executed will give effect and operation to unattested alterations in a will (*t*), and that, it should seem, whether the codicil be or be not expressly confirmatory of the will to which it refers (*u*). For a codicil is a republication of a will (*x*) and validates the dispositions of the will as they stand at the time of the execution of the codicil (*y*).

Unattested alterations in will presumed to have been made *after* execution of codicil.

It will generally be presumed, in the absence of evidence to the contrary, that alterations appearing on the face of the will were made not only after the execution of the will, but also after the execution of the codicil (*z*).

How the presumption may be rebutted.

Declarations by a testator made before the execution of a codicil which republishes the will, may be admitted to show that the alterations in the will were made before the execution of the codicil (*a*).

A testator, after the execution of his will, made various alterations in it. Among the interlineations, which were unattested, was a legacy of "£1,000 to each of my executors."

"two" over the erasure. Her declared intention was that her two surviving children should share the estate between them. The alteration was unattested. The Court while omitting the word "two" from the probate, refused to restore the word "three," because it was not satisfied that the testatrix would have desired that word to stand if she had been told that the word "two," written as she had written it, would have no effect).

(*p*) The initials of the testatrix and the attesting witnesses in the margin opposite alterations are sufficient: *Blewitt* (1880), 5 P. D. 116; but not the initials of the witnesses alone if the testator merely traced over his signature at the end of the will with a dry pen: *Cunningham* (1860), 4 S. & T. 194.

(*q*) See *Wilkinson* (1881), 6 P. D. 100.

(*r*) See *Treeby* (1875), 3 P. & D. 242.

(*s*) Wills Act, 1837, s. 21.

(*t*) *Skinner* v. *Ogle* (1845), 4 N. C., at p. 79; *Neate* v. *Pickard* (1843), 2 N. C. 406; *Wyatt* (1862), 2 S. & T. 494.

(*u*) This was the rule of law before the Wills Act came into operation; section 22 of the Wills Act is confined to wills, etc., "which shall be in any manner revoked"; it would therefore seem that a duly executed codicil will still amount to a republication of the will, as under the old law, unless it appears on the face of the codicil that it was not the intention of the testator to republish the will; or unless the will has been in any manner revoked, in which case the statute further requires that the codicil should show an intention to revive the will: see *post*, p. 197.

(*x*) *Sykes* (1873), 3 P. & D., at p. 27.

(*y*) *Hall* (1871), 2 P. & D., at p. 257; *Tyler* v. *Merchant Taylor's Co.* (1890), 15 P. D. 216.

(*z*) *Lushington* v. *Onslow* (1848), 6 N. C. 183; *Sykes* (1873), 3 P. & D., at p. 27; *Bradley* (1847), 5 N. C. 186; *Christmas* v. *Whinyates* (1863), 3 S. & T., at p. 89.

(*a*) *Sykes* (1873), 3 P. & D., at p. 28.

In the body of the will he gave a legacy of £10,000 to one of his executors. In a codicil the testator recited that he had given a legacy of £11,000 to this executor. It was held that this reference showed that the interlineation had been made prior to the execution of the codicil, and that it was therefore incorporated by it (*b*).

Deliberative alterations in a will,

Before the Wills Act came into operation it formed a frequent subject of discussion whether, as regards certain words or figures in a testamentary paper, the testator intended the bequest therein contained to be final or merely deliberative. If, under all the circumstances, the Court considered that such words had not been written as a fixed testamentary disposition, but merely deliberatively, in order that the testator, on further consideration, should determine whether or not they should ultimately be carried out, it rejected the words as forming no part of the will (*c*).

Analogous principles have been applied in considering alterations made in a will before the execution of a codicil.

Thus where a testator, after the execution of his will, struck through with a pencil several paragraphs thereof, placed a query opposite other paragraphs, and subsequently executed a codicil which confirmed in so far as it did not alter his will, it was held that the alterations so made were deliberative and not final, and not included in the confirmation by the codicil; they were therefore omitted from the probate (*d*).

not included in the confirmation by the codicil.

A sheet interpolated in the will after its execution.

Where a will consists of several sheets, and one of the sheets is proved to have been interpolated amongst the others after the execution of the will, the contents of the paper so interpolated will not be admitted to probate unless it has been executed in accordance with the provisions of the Act (*e*).

Prima facie presumption where a will consists of several sheets.

Where, however, several sheets of paper, constituting a connected disposal of the property, are found together after the death of the testator, the last sheet being duly executed, the

(*b*) *Heath*, [1892] P. 253.

(*c*) *Hall* (1871), 2 P. & D., at p. 258. In *Adams* (1872), 2 P. & D. 367, the testatrix executed a printed form of a will. The blanks were filled up by the deceased in her own handwriting, partly in ink and partly in pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter were rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will. It was held that the words in pencil were deliberative only, and probate was granted without them. See also *Hawkes* v *Hawkes* (1828), 1 Hagg. 321, where it was laid down that the general presumption and probability is that where alterations are made in pencil only, they are deliberative; where in ink, they are final and absolute; and that when they are of both sorts, the presumption as to each is stronger. See also *Calamy* v. *Hyde* (1731), 1 Lee, 423 n.

(*d*) *Hall* (1871), 2 P. & D. 256; *Wyatt* (1862), 2 S. & T. 494. See *Kerr* v. *Stinnear*, [1904] 1 Ch. 317.

(*e*) *Treloar* v. *Lean* (1889), 14 P. D. 49.

presumption, in the absence of direct proof, is that they all formed part of the will of the deceased at the time of its execution (*f*).

This presumption, it should seem, is not rebutted by the mere circumstance that the several sheets do not constitute in all points a consistent disposal of the property (*g*). For, if direct proof is wanting, and any theory consistent with the validity of the will can be suggested, which appears to the Court to be as probable as the theory on which the argument for its invalidity is based, the will as found must be maintained (*h*).

Declarations by the testator admissible to show what were the constituent parts.

In considering the question whether several sheets of paper did or did not constitute the will at the time of its execution, statements of the testator, whether made before or after the execution of the will, are admissible in evidence to show what were the constituent parts of the will at that time (*i*).

Words written beneath signature regarded as interlineations.

In certain cases, words written below the signature of the testator before the execution of the will, and referred to in the body of the will, have been regarded as interlineations and admitted to probate (*k*).

Probate in *facsimile*.

In a case where the construction of the will may be affected by the appearance of the original paper, the Court will order the probate to pass in *facsimile* (*l*).

(*f*) *Gregory* v. *The Queen's Proctor* (1846), 4 N. C. 620; *Marsh* v. *Marsh* (1860), 1 S. & T. 528; *Rees* v. *Rees* (1873), 3 P. & D. 84.
(*g*) *Marsh* v. *Marsh* (1860), 1 S. & T. 528, 531.
(*h*) *Rees* v. *Rees* (1873), 3 P. & D., at p. 86.
(*i*) *Gould* v. *Lakes* (1880), 6 P. D. 1; *Hutchinson* (1902), 18 T. L. R. 706.
(*k*) *Birt* (1871), 2 P. & D. 214; *Greenwood*, [1892] P. 7; *ante*, p. 103.
(*l*) *Raine* (1865), 34 L. J. P. 125; *Smith* (1854), 3 S. & T. 589.

CHAPTER V.

INCORPORATION OF DOCUMENTS BY REFERENCE.

Unattested papers may in certain circumstances be regarded as incorporated in a will.

NOTWITHSTANDING the provision of section 9 of the Wills Act that no will shall be valid unless executed with the formalities required by that section, a written paper, though unattested, may under certain circumstances be admitted to probate as forming part of the will of the deceased. For a paper imperfect in itself may be so referred to and identified in an instrument validly executed, that it may be considered part of it in the same manner as if repeated *totidem verbis* in the will itself (*a*). In such a case the paper is said to be incorporated by reference in the will of the deceased (*b*).

The principle of incorporation by reference was applied to wills executed in accordance with the provisions of the Statute of Frauds.

The principle of incorporation by reference, which received judicial recognition at a period long anterior to the passing of the Wills Act, was based upon and justified by the following considerations.

By the Statute of Frauds, devises of lands were to be in writing, signed and attested; this was the security which that law provided for the authenticity of such instruments. Any attempt to devise lands with less security was considered, *pro tanto*, a defeasance of the statute; but it was permitted to a testator to render operative as part of his will duly attested, a written paper already in existence; and for this reason—because the paper being clearly identified by a will duly attested, the security intended by the statute would not be diminished (*c*).

The law on this subject unaffected by the Wills Act.

The Wills Act, 1837, left untouched the law upon this subject. The ceremonies necessary to authenticate a testamentary instrument were altered, but no alteration was made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the Wills Act, 1837; and that the principles as to incorporation by reference laid down in cases anterior to the Wills Act must still be regarded as applicable to wills executed since that Act (*d*).

(*a*) *Ferraris* v. *Lord Hertford* (1843), 3 Curt., at pp. 492, 493; *S. C. nom. Croker* v. *Lord Hertford* (1844), 4 Moo. P. C., at p. 365.

(*b*) *Croker* v. *Lord Hertford* (1844), 4 Moo. P. C., at p. 365.

(*c*) *Ibid.*

(*d*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 455. The cases decided under the Statute of Frauds are summarised and commented upon in *Ferraris* v. *Lord Hertford* (1843), 3 Curt., at pp. 492 *et seq.*; *S. C. nom. Croker* v.

The principle of incorporation by reference may be stated thus :—

The principle of incorporation by reference.

Where a testator in a duly executed will or codicil refers to an unattested written paper (whether of a testamentary form or character or not), as a written paper then in existence in such terms that it may be ascertained, the paper so referred to becomes part of his will, in other words, is incorporated therein; provided always that the paper referred to is actually in existence at the time of the execution of the will or codicil (*e*).

Three conditions must be satisfied.

It will be seen from the statement of the principle in this form that three conditions must be satisfied before an unexecuted document can be regarded as incorporated in a duly executed testamentary instrument.

First.—The unexecuted document must be in existence at the time of the execution of the testamentary instrument into which it is to be incorporated.

Secondly.—There must be a reference in the duly executed testamentary instrument to the informal document as an existing and not as a future document.

Thirdly.—The unexecuted document must be so described as to leave no doubt in the mind of the Judge, in the circumstances as they actually existed and are proved before him, that the document referred to is the document propounded.

Burden of proof.

The burden of proving the existence of these three conditions is upon the person who contends for the incorporation of the particular document (*f*).

Admissibility of extrinsic evidence to identify the document referred to in the will.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written (*g*), or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities clearly establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for that purpose (*h*).

When a question arises as to the incorporation of unattested

Lord Hertford (1844), 4 Moo. P. C., at pp. 365 *et seq.*; *Allen* v. *Maddock* (1858), 11 Moo. P. C., at pp. 444—453.

(*e*) This statement of the general principle is collected from the following cases : *Ferraris* v. *Hertford* (1843), 3 Curt., at p. 492; *Allen* v. *Maddock* (1858), 11 Moo. P. C. 427; *Watkins* (1865), 1 P. & D., at p. 20; *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C. 404; *Kehoe* (1884), 13 L. R. Ir. 13; *Smart*, [1902] P., at p. 240; *University College* v. *Taylor*, [1907] P., at p. 236 (the Court of Appeal did not disagree with the statement of principles laid down in the last cited case : see [1908] P. 140, 145).

(*f*) *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C. 404.

(*g*) See *University College* v. *Taylor*, [1908] P. 140, 144, 145, C. A.

(*h*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 454.

documents by reference in a will, the Court of Probate becomes, to a certain extent, a Court of construction; it has to determine what is the meaning of the reference made by the testator in his will, and whether any, and if any, what document found at his death is thereby referred to. This question is one of fact which obviously must be explained, and can only be explained by parol evidence. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testator's death any such document as is referred to in the will. For this purpose inquiry must be made and evidence must be offered to show what documents there were at the date of the will which could answer the description contained in it; and the Court, having by these means placed itself in the situation of the testator, and acquired as far as possible all the knowledge which the testator possessed, must say, upon a consideration of those extrinsic circumstances, whether the particular document is identified or not (*i*).

Extrinsic evidence of this character is admissible on the ground that every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare (*k*).

Direct evidence of the testator's intention is inadmissible;

A distinction exists between evidence of surrounding circumstances and direct evidence of intention, such as declarations of the testator by word or in writing and other testimony of a similar character. As a general rule, no such evidence can be received in order to explain the expressions which he has used (*l*).

unless two or more documents equally fulfil the description in the will.

"There is but one case," said Lord Abinger in *Doe* v. *Hiscocks* (*m*), "in which this sort of evidence of intention can properly be admitted, and that is . . . where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of two or more persons (each answering the words in the will), the testator intended to express."

Accordingly, it has been held that direct evidence of intention is admissible to explain a reference in the will to an unexecuted paper only in cases where two or more papers equally fulfil the description found in the will (*n*).

(*i*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at pp. 441, 442.

(*k*) Wigram on Evidence, Prop. V., par. 96, quoted in *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 441.

(*l*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 440.

(*m*) (1839), 5 M. & W. 368.

(*n*) *Paton* v. *Ormerod*, [1892] P., at p. 252. Further as to the admissibility

1. The unexecuted document must be in existence at the time of the execution of the testamentary instrument into which it is to be incorporated.

(1) The unexecuted document must be in existence at the time of the execution of the will or codicil.

Section 9 of the Wills Act provides that no will or codicil shall be valid unless it shall be executed in the manner prescribed by that section; that provision was made not for the benefit of individuals, but for the greater protection and security of the public, and that security the testator cannot dispense with at his option. It is therefore not competent to a testator to reserve to himself a power of disposing of his property by any paper executed in any other manner than is required by this section of the Act (*o*). It has accordingly been decided, and there is no doubt that an unexecuted paper made afterwards can never be part of a will (*p*). Where, therefore, an unexecuted document is put forward as incorporated by reference in a will, the *onus* is clearly thrown on those who contend for the incorporation of the particular document to prove, by parol extrinsic evidence, that it was in existence at the date of the will (*q*).

2. There must be a reference in the duly executed testamentary instrument to the informal document as an existing and not as a future document.

(2) The unexecuted document must be described as an existing and not as a future document.

Thus, in *In the Goods of Sunderland* (*r*), a testatrix by her will bequeathed the residue of her property, save and except such furniture, etc., " as shall be ticketed or described in a paper in my own handwriting." It appeared that at the time when the will was executed two lists answering the description in the will had already been written by the testatrix and were in existence. Sir J. P. Wilde stated that there was abundant parol evidence to satisfy the Court that the testatrix did intend those lists to form part of her will, but held that the Court was not at liberty to enter into that question, or to receive that evidence. He said : " The Court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen* v. *Maddock* (*s*). That limit seems to be fixed by one sentence in the judgment : ' A reference in a will may

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of extrinsic evidence, see *Greves* (1858), 1 S. & T. 250; *Almosnino* (1859), 1 S. & T., at p. 510; *Paton* v. *Ormerod*, [1892] P., at p. 250.

(*o*) *Ferraris* v. *Hertford* (1843), 3 Curt., at p. 498, see also at pp. 499—511, and cases there cited; *S. C. nom. Cooper* v. *Lord Hertford* (1844), 4 Moo. P. C., at p. 365; *Briggs* v. *Penny* (1849), 3 De G. & S., at p. 547; *Johnson* v. *Ball* (1851), 5 De G. & S. 85, 91; *Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

(*p*) *Wilkinson* v. *Adam* (1812), 1 V. & B., at p. 445.

(*q*) *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C., at p. 414; see *Habergham* v. *Vincent* (1793), 2 Ves. 204; *Smart* v. *Prujean* (1801), 6 Ves., at p. 565 (and see this case commented upon, 3 Curt., at p. 504; 11 Moo. P. C., at p. 444); *Ferraris* v. *Cooper* (1843), 3 Curt. 468, at pp. 492—511; *Kehoe* (1884), 13 L. R. Ir. 13; and cases cited, *supra*, note (*o*).

(*r*) (1866) 1 P. & D. 198.

(*s*) (1858), 11 Moo. P. C., at p. 454.

be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document *described as then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it.' There must be a reference to a written document described as then existing. . . . I think that these papers are not so described, and I therefore grant probate of the will and codicils alone " (*t*).

(3) The unexecuted document must be identified with certainty.

3. The unexecuted document must be so described as to leave no doubt in the mind of the Judge, in the circumstances as they actually existed and are proved before him, that the document referred to is the document propounded (*u*).

No doubt must exist as to the identity of document to be incorporated.

" Certainty and identification," said Dr. Lushington in *Croker* v. *Lord Hertford* (*x*), " is the very essence of incorporation. If any doubt can exist as to the instrument to be incorporated, then the principle of incorporation by relation would fail." Again, in *Smart* v. *Prujean* (*y*), Lord Eldon said : " An instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way that the Court can be under no mistake " (*z*).

As to the certainty of the reference required by the law in the incorporating instrument, it is necessary, and it is sufficient, that the description should be such as to enable the Court,

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(*t*) See *Van Straubenzee* v. *Monck* (1862), 3 S. & T. 6; *Reid* (1868), 38 L. J. P. 1; *Truro* (1866), 1 P. & D. 201; *Smart*, [1902] P., at p. 241. In *University College* v. *Taylor*, [1907] P. 228, where the words of reference were to " such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me," it was held by Sir Gorell Barnes, that this reference incorporated a memorandum in existence at the time when the will was executed, although the words " are contained " might be construed in a future sense if the facts rendered it necessary so to do. But the Court of Appeal ([1908] P. 140) treating the matter as one of construction of the particular will, held that by the words the testator was intending to reserve to himself the right to declare from time to time the rules and regulations and the trusts which he desired to apply to his gift, and reversed the decision in the Court below, holding that as the will might be construed as referring to an existing or future document, parol evidence was inadmissible. See, further, *Stewart* (1863), 3 S. & T. 192. It seems that the will need not state *in express terms* that the document sought to be incorporated was then already in existence, so long as the reference is not of a kind that can only be applied to a future document : *Smart*, [1902] P. 238; *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C., at p. 414; but see *University College* v. *Taylor*, [1908] P. 140 (C. A.), *supra*.

(*u*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 444.

(*x*) (1844), 4 Moo. P. C., at p. 366

(*y*) (1801), 6 Ves., at p. 565.

(*z*) See also *Habergham* v. *Vincent* (1793), 2 Ves., at p. 228; *Ferraris* v. *Hertford* (1843), 3 Curt., at p 499.

when the evidence is produced, to say what is the document intended (*a*).

The words of reference may be so vague as to be incapable of being applied to any document in particular, and in such a case, it seems, parol evidence is inadmissible to show that the testator intended a particular document to be incorporated in his will (*b*). But the authorities seem clearly to establish that where there is a reference to any written document described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose (*c*). When the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the document, it is no objection to it that, by possibility, circumstances might have existed in which the document referred to might not have been identified (*d*).

In illustration of these propositions, reference may be made, on the one hand, to cases where the document propounded as incorporated has been held to be sufficiently identified by the reference in the will, and, on the other hand, to cases where the identification has been held to be insufficient.

Cases in which the document referred to has been held to be sufficiently identified.

A testatrix produced a sealed envelope on which was written "I confirm the contents written in the enclosed document in the presence of," etc. This was signed by her and attested by two witnesses. On her death, two days afterwards, the envelope, still sealed with the same seal, was found on her table; on being opened it was found to contain a testamentary disposition in the form of a letter. Sir Cresswell Cresswell said: "Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum. . . . The parol evidence shows that the envelope was sealed in a particular manner, and that it was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and only one was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed" (*e*).

(*a*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 452.
(*b*) *Ibid.*, at p. 454, and cases there cited.
(*c*) *Ibid.*, at p. 454; *vide ante*, pp. 181 *et seq.*
(*d*) *Ibid.*, at p. 461.
(*e*) *Almosnino* (1859), 1 S. & T. 508; contrast *Van Straubenzee* v. *Monck* (1862), 3 S. & T. 6; and cf. *Re Nicholls, Hunter* v. *Nicholls*, [1921] 2 Ch. 11. The following are some of the principal cases where the proof of identity was held to be sufficient: *Smith* (1841), 2 Curt. 796; *Claringbull* (1844), 3 N. C. 1; *Ingoldby* v. *Ingoldby* (1846), 4 N. C. 493; *Allen* v. *Maddock* (1858), 11 Moo. P. C. 427; *Daniell* (1882), 8 P. D. 14; *Heathcote* (1881), 6 P. D. 30.

Cases in which the document referred to has been held insufficiently identified.

On the other hand, in *Van Straubenzee* v. *Monck* (*f*) a testatrix executed a paper with these words on it : " It is my wish for my dear husband to administer the moneys; the smaller bequests L will be so kind as to attend to." She then, in the presence of the attesting witnesses, enclosed in it two papers which she had written, and folded and sealed the first paper. At her death, within the envelope were found two unexecuted sheets of paper containing bequests. When found, the envelope appeared to have been opened and resealed; there was no evidence that the papers found in it were those originally enclosed, or that they were in existence when the envelope was executed. Sir C. Cresswell said : " Identity may be ascertained by the aid of evidence of the surrounding facts; . . . such evidence, however, can only be used to aid the construction of what a testator has written. . . . The reference in A (the envelope) is not distinctly to any paper then existing. One may conjecture that the deceased was referring to something written or to be written, but it is mere conjecture; and certainly there is no such reference to any instrument as will enable the Court to ascertain it. . . . Nor is there any legal evidence to satisfy the Court when the papers were written." On these grounds the learned Judge refused probate of all three papers propounded (*g*).

In *In the Goods of Garnett* (*h*) a testator duly executed a document in the following terms : " The enclosed papers No. 1, 2, 3, 4, 5, 6 were signed by the testator in the joint presence of us," etc. The witnesses who attested this document saw no papers except the one they signed, but the testator said to them, " I have made certain alterations in my will; the will is in that drawer." At his death the executed paper, together with six others of a testamentary character, all signed by the testator, and numbered respectively 1, 2, 3, 4, 5, 6, were found in a closed envelope, on which was written " My last will." All six documents bore dates anterior to that of the executed paper. Some other papers of a testamentary character were found among the deceased's effects. Sir Gorell Barnes said : " I have come to the conclusion that the six papers are not shown to be incorporated, so as to exclude the possibility of mistake, and are not shown to be clearly identified with the description given of them in the [executed] paper."

In *In the Goods of Pascall* (*i*) a testator in his will desired

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(*f*) (1862), 3 S. & T. 6.
(*g*) Contrast the case of *Almosnino* (1859), 1 S. & T. 508; *ante*, p. 185.
(*h*) [1894] P. 90.
(*i*) (1868), 1 P. & D. 606. The following are some of the principal cases in which the proof of identity was held to be insufficient : *Smart* v. *Prujean*

that instructions previously given by him to an attorney's clerk should be carried out. The instructions were verbal, but the clerk had at the time made short notes of them in the presence of the testator. It was held that there was not a reference to an existing document in terms which distinctly identified it.

Effect on an unexecuted testamentary paper of the execution of a document expressed to be a "codicil to my last will."

When a testamentary paper, intended to operate as a will or codicil, has never been validly executed, very important questions frequently arise as to the effect of the execution of a testamentary instrument, expressed to be "a codicil to my last will."

Distinction between republication and incorporation by reference.

It is important in this connection to distinguish between republication and incorporation. Before the passing of the Wills Act, 1837, it was common to republish a will or a codicil for the purpose of rendering it operative from the date of republication (*k*). It was held that a codicil would operate as a republication of a will, and that the republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil (*kk*).

It will be remembered that before the Wills Act, 1837, came into operation no formalities of any kind were necessary in the execution of a will or codicil as to personal estate, but that a devise of lands must be attested by three witnesses. When, therefore, an informally executed will purported to deal with real estate, and was followed by a codicil attested by three witnesses, it was an important question whether the will was rendered operative to pass real estate by reason of the execution of the codicil. It was held that it was, provided the codicil expressly referred to the will. This was not, properly speaking, a republication, which, as the term imports, implies a previous valid execution of the paper sought to be republished, but an incorporation by reference of an unexecuted paper. Accordingly, in all cases of incorporation under the Statute of Frauds

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(1801), 6 Ves. 560 (see this case commented upon 3 Curt. 504—507; 11 Moo. P. C. 444); *Sotheron* (1841), 2 Curt. 831; *Ferraris* v. *Cooper* (1843), 3 Curt. 468; 4 Moo. P. C. 339; *Phelps* (1849), 6 N. C. 695; *Haynes* v. *Hill* (1849), 7 N. C. 256; *Greves* (1858), 1 S. & T. 250; *Drummond* (1860), 2 S. & T. 8; *Van Straubenzee* v. *Monck* (1862), 3 S. & T. 6; *Allnutt* (1863), 3 S. & T. 167; *Brewis* (1864), 3 S. & T. 473; *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C. 404; *Watkins* (1865), 1 P. & D. 19; *Dallow* (1866), 1 P. & D. 189; *Gill* (1869), 2 P. & D. 6; *Paton* v. *Ormerod*, [1892] P. 247; *Garnett*, [1894] P. 90; *Eyre* v. *Eyre*, [1903] P. 131; *University College* v. *Taylor*, [1908] P. 140, C. A., reversing the decision of Sir Gorell Barnes, [1907] P. 228.

(*k*) *Croker* v. *Lord Hertford* (1844), 4 Moo. P. C., at p. 365. A will of personalty might be republished by parol declarations: see *post*, p. 195.

(*kk*) *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 452.

there was an express reference to a paper in writing described with certainty (*l*).

A testamentary instrument, not duly executed, may be rendered operative by a subsequent codicil.

Where a testamentary instrument, intended to operate as a will, is not executed according to the requirements of a statute, a subsequent codicil, duly executed and expressed to be "a codicil to my last will and testament," may incorporate and thus render operative the unduly executed instrument (*m*).

But a duly executed codicil will not incorporate and validate an unexecuted testamentary instrument, whether will or codicil, unless it expressly refer to the latter (*n*).

A reference in the duly executed codicil to the will, will not incorporate an intermediate informal codicil.

Thus in *In the Goods of Phelps* (*o*) the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir Herbert Jenner Fust held that the first "codicil" was not established by the second, for the instrument in question was not a codicil, and therefore the confirmation of the will did not amount to a confirmation of the codicil (*p*).

(*l*) *Croker* v. *Lord Hertford* (1844), 4 Moo. P. C., at pp. 365, 366. It is important to remember this distinction between cases on incorporation before the Wills Act, 1837, and subsequent cases: that before the statute a testamentary paper not executed so as to affect real estate was valid as to personalty, was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the Wills Act came into operation no paper not duly executed and attested can, in strictness, properly be described as a will or codicil: *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 440.

(*m*) Thus in *Allen* v. *Maddock* (1858), 11 Moo. P. C. 427, a testatrix in 1851 made a testamentary instrument which she intended to operate as her will, but which was not attested according to the requirements of the Wills Act. In 1856 she duly executed a codicil, which was headed "This is a codicil to my last will and testament." This codicil contained no reference to the paper of 1851, which was, however, found at the testatrix's death in an envelope indorsed "Mrs. Anne Foote's [the testatrix's] will." No other will or testamentary paper was found. Held:

First, that as there was a distinct reference in the codicil to a "last will and testament," and no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the "last will" referred to by the codicil of 1856.

Secondly, that, though informally executed, the paper of 1851 was incorporated with and made valid by the duly executed codicil of 1856. See *Heathcote* (1881), 6 P. D. 30.

(*n*) *Doe* v. *Evans* (1832), 1 Cr. & M. 42; *Utterton* v. *Robins* (1834), 1 A. & E. 423; *Smith* (1890), 45 Ch. D. 632. As to the effect of a codicil which confirms a will without reference to intermediate duly executed codicils, *vide infra*, pp. 202, 203.

(*o*) (1849), 6 N. C. 695.

(*p*) See *Haynes* v. *Hill* (1849), 7 N. C. 256, where a testator made a will and several codicils, the last only of which was attested. The last codicil confirmed the will, but said nothing of the codicils. Sir H. J. Fust went very fully into the doctrine and held that the unattested codicils were not incorporated, there being no reference to anything but the will, and the unattested codicils not being part of it.

In *Ferraris* v. *Hertford* (1843), 3 Curt. 468, the testator made a will and twenty-nine codicils. Some of the codicils were made before the Wills Act, 1837, and required no attestation; others were made after the Act, some of

But in *In the Goods of Smith* (*q*) a testator in 1838 made a codicil to his will, signed but not attested. In 1840 he made a further codicil, signed and duly attested. This was written upon the second side of the paper on which the former codicil was written, and was expressed to be "a *second codicil* to my last will." Sir H. J. Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also" (*r*).

Where the duly executed codicil is expressed to be a "*second* codicil to my will."

The mere fact that a duly attested codicil is written on the same sheet of paper as an informal instrument of earlier date will not effect an incorporation, unless the codicil contains a reference to the other instrument (*s*).

Unexecuted and executed papers written on the same paper.

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which were attested and others not. One codicil made in 1838 was unattested. The testator made a further codicil in 1839, duly executed and attested, and thereby declared that he *ratified and confirmed his will and codicils*. The question was whether the 1838 codicil was thereby incorporated and established, and it was decided by Sir H. J. Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the Court could not, therefore, extend the words of reference to an instrument not answering the description. Affirmed *sub nom. Croker* v. *Lord Hertford* (1844), 4 Moo. P. C. 339. A duly executed codicil, expressed to be "a codicil to my will," was held not to incorporate unattested additions made to the will prior to the execution of the codicil: *Haynes* v. *Hill* (1849), 1 Rob. 795; even though the will, the unattested additions, and the codicil, were all written consecutively upon the same paper: *Willmott* (1858), 1 S. & T. 36. And see *Reynolds* (1873), 3 P. & D. 35; *Burton* v. *Newbery* (1875), 1 Ch. D., at p. 238.

(*q*) (1841), 2 Curt. 796.

(*r*) See *Ingoldby* v. *Ingoldby* (1846), 4 N. C. 493, where a testator made an unattested codicil to his will; and afterwards made a second, properly attested, with the words "This is *another codicil* to my will." On his death these two codicils only were found, and Sir H. J. Fust admitted them to probate. He said: "There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it was not duly executed; but it is clear that the testator intended it to be a codicil. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So, here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." The learned Judge then adverted to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverted to it as a not immaterial circumstance, but did not make it a *ratio decidendi*. See *Burton* v. *Newbery* (1875), 1 Ch. D. 234. But see *Stockil* v. *Punshon* (1880), 6 P. D. 9, where an unattested document containing the words "This is a third codicil to my will" was held not to be incorporated in a codicil of a subsequent date by the words "This is a fourth codicil to my will." But in *Heathcote* (1881), 6 P. D. 30, the same learned Judge (Sir J. Hannen) said: "In *Stockil* v. *Punshon* it was of no importance which way the Court decided. I therefore did not consider the question of what extraneous evidence would be sufficient to connect the one document with the other, but I acted on the impression that the bare fact of enumeration was not sufficient to incorporate the second paper." See also *Allnutt* (1863), 3 S. & T. 167, where the previous document was referred to as a codicil by mistake.

(*s*) *Drummond* (1860), 2 S. & T. 8; *Tovey* (1878), 39 L. T. 235; *Doe* v. *Evans* (1832), 1 Cr. & M. 42; *Aaron* v. *Aaron* (1849), 3 De G. & Sm. 475; see *Allen* v. *Maddock* (1858), 11 Moo. P. C., at p. 448; *Brewis* (1864), 3 S. & T. 473; *Heathcote* (1881), 6 P. D. 30; *Burton* v. *Newbery* (1875), 1 Ch. D., at p. 238.

Incorporation of words written beneath the testator's signature.

The question of incorporation has sometimes arisen in respect of words written on the same sheet of paper as a duly executed will, but beneath and following the operative signature of the testator (*t*). But such a question can only arise if the Court is of opinion that such words are not parcel of the will so as to invalidate the execution as not complying with the Wills Act Amendment Act, 1852 (*u*).

Probate of executed document with directions to administer the estate in conformity with the trusts of a previous unexecuted document.

Where the terms of the will show that the testator has given instructions that his property shall be disposed of in the manner set out in a previous unexecuted paper, and the terms of reference are not such as to justify the Court in regarding the unexecuted paper as incorporated in the will, the Court may grant probate of the will with directions to the executor to administer the estate in accordance with the trusts of the unexecuted paper (*x*).

Where a will refers to a non-existing document, that document afterwards comes into existence, and after that again there is a codicil republishing the will.

The principle—hereafter more fully discussed—that the execution of a codicil republishes the will to which it is a codicil, has a very important result when applied to cases of incorporation by reference. For it has been held that the Court cannot, according to the authorities, give greater or less effect to a codicil than this : to treat its execution as if the testator had at the same time sat down and re-executed his will (*y*). Accordingly, when a will contains a reference to a document not existing at the date of the will, but comes into existence afterwards, and then, after that again, there is a codicil, the following rule has been laid down :—

(*t*) See *Watkins* (1865), 1 P. & D. 19 : A will signed and attested at the foot of the first page of a foolscap sheet contained the following words :—"I do hereby bequeath the following sums to my sons and daughters hereunder named." On pages 2 and 3 the testatrix had written, before execution, a list of bequests to her sons and daughters. It was held that the will did not refer with such distinctness to a paper then in existence as to entitle pages 2 and 3 to probate. And see *Dallow* (1866), 1 P. & D. 189.

(*u*) *Dallow* (1866), 1 P. & D., at p. 191; and *vide ante*, p. 103.

(*x*) *Marchant*, [1893] P. 254. The circumstances under which the Court of Chancery will give effect to a trust not disclosed, or not fully disclosed, in a will, and the evidence which is admissible to prove the terms of the trust, are scarcely within the scope of this book, but reference may be made to the case of *Fleetwood* (1880), 15 Ch. D. 594, where the cases are reviewed. If the trust is expressed on the face of the will, but the trusts are not fully declared, no trust *afterwards* declared by a paper not executed as a will can be binding : *Johnson* v. *Ball* (1851), 5 De G. & Sm. 85; *Briggs* v. *Penny* (1851), 8 Mac. & G. 546; *Singleton* v. *Tomlinson* (1878), L. R. 3 A. C. 404; and the legatee will be treated as trustee for the next-of-kin; *Re Boyes* (1884), 26 Ch. D., at p. 535. But where the Court is satisfied that there has been a communication by the testator and acceptance by the legatee, it will enforce a trust even where no trust appears on the face of the will : *Re Boyes* (*ubi supra*); and it would appear that a trust by communication with the legatee may be created by a communication subsequent to the will : *Moss* v. *Cooper* (1860), 1 J. & H. 352; provided that the trust be communicated in the lifetime of the testator : *Re Boyes* (*ubi supra*); *Re Gardner*, [1920] 2 Ch. 523, C. A. See further, on this subject, *Stead*, [1900] 1 Ch. 237; *McCormick* v. *Grogan* (1869), L. R. 4 H. L. 82, 88; *French* v. *French*, [1902] 1 Ir. R. 172, 230; and Wms. on Exors. (11th ed.), p. 303, note (*l*), and pp. 1222 *et seq.*

(*y*) *Truro* (1866), 1 P. & D., at p. 205; *vide post*, p. 202.

Where the will, *if treated as executed on the date of the codicil, and read as speaking at that date*, contains language which, within the principles already laid down, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date (*z*).

The rule was thus stated by Sir Gorell Barnes in *In the Goods of Smart* (*a*) : " If the document is not existing at the time of the will, but comes into existence afterwards, and then after that again, there is a codicil confirming the will, . . . the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil; and if the informal document is existing then, *and is referred to in the will as existing*, so as to identify it, there will be incorporation : but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which show it to be referring to a future document, then it appears to me there is no incorporation."

The two cases of *In the Goods of Truro* (*b*) and *In the Goods of Smart* (*c*), when contrasted, illustrate the operation of this rule.

If the reference in the will, read as speaking from the date of the codicil, is to the document *as existing*, there will be an incorporation.

In *In the Goods of Truro* (*b*) the testatrix, on September 15, 1865, executed a will which contained a bequest of all such articles of silver plate " *as are contained in the inventory signed by me and deposited herewith.*" A list in the handwriting of the testatrix and headed " List of plate and plated articles left by my will dated the 15th of September, 1865," was on September 21, 1865, deposited by the testatrix at her bankers, enclosed in the same envelope as her will. The list was signed by the testatrix, and bore the date September 21, 1865. On October 10, 1865, the testatrix executed a codicil to her will. Sir J. P. Wilde held that the inventory was incorporated in the will, because, treating the will as having been re-executed on the date of the codicil, and construing the words of reference by the light of the events that had then happened, they

(*z*) *Truro* (1866), 1 P. & D., at p. 205, *per* Sir J. P. Wilde. The case of *Mathias* (1863), 3 S. & T. 100, in so far as it lays down a general proposition in conflict with this rule, cannot be supported : *ibid.*, at p. 204.

(*a*) [1902] P., at p. 241.

(*b*) (1866), 1 P. & D. 201.

(*c*) [1902] P. 238.

appeared with sufficient distinctness to refer to a document then existing; for the inventory referred to had then been signed by the testatrix and deposited at the bankers (*d*).

Secus if the will, read as if executed on the date of the codicil, still speaks in terms which show it to be referring to a future document.

In *In the Goods of Smart* (*e*) a will made in 1895 contained the following words: "I direct my trustees to give to such of my friends *as I may designate in a book or memorandum that will be found with this will* the different articles specified for such friends in such book or memorandum." At the time when the will was made there was no such book as that mentioned in the will in existence, but a book which in some respects answered the description was written by the testatrix prior to the execution by her in 1900 of a codicil which confirmed the will of 1895. Sir Gorell Barnes said: "The reference made at the date of the will was, I think, clearly made as to a future document. A document next comes into existence and a codicil is afterwards made; but if you treat the will according to the cases, as speaking at the date of the codicil, the reference is still in terms to a document which, even then, is future, and therefore does not comply with one of the necessary conditions, namely, that it must refer to a document as existing at the date when the will was re-executed. For these reasons, I think there ought to be no incorporation of the book" (*f*).

Distinction between *title* to incorporation and the *necessity* of taking probate of a paper as incorporated.

It is important to distinguish between the title or right of a paper to be regarded as incorporated, and the necessity of taking probate of a paper referred to in the will. The title to probate depends upon the clearness and sufficiency of the words of incorporation; the necessity of taking probate depends upon the validity or invalidity of the instrument to be incorporated. For instance, if a man, by will or codicil, simply

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(*d*) See *Hunt* (1853), 2 Rob. 622 (but see the remarks of Sir Gorell Barnes on this case in *Smart*, [1902] P., at p. 241); *Stewart* (1863), 3 S. & T. 192; 4 S. & T. 211, where the words of reference were "I direct my executors to distribute all pictures, etc., *according to any list or lists signed by me.*" A list written after the will, but before the execution of the codicil, was held to be incorporated: *Rendle* (1899), 68 L. J. P. 125; see *Smart*, [1902] P., at p. 242.

(*e*) [1902] P. 238.

(*f*) See *Mathias* (1863), 3 S. & T. 100, where the words of reference were "I request my trinkets may be divided *as I shall direct by a small memorandum.*" Held, no incorporation. Sir C. Cresswell said: "How can the execution of a codicil . . . make that to be a part of a will which was no part of the will before; and the codicil contains no reference to the memorandum?" If these words were intended to lay down a general rule at variance with *Truro* (1866), 1 P. & D. 201, they can no longer be supported: see *ante*, p. 191, note (*z*).

Reid (1868), 38 L. J. P. 1, where the words of reference were "to pay . . . some small sums . . . *to be named in a letter addressed to my two nieces.*" Held, no incorporation.

Durham v. *Northen*, [1895] P. 66, where the words of reference were "to set apart funds or investments which the trustees *will find noted by me.*" Held, no incorporation.

ratifies a deed valid *per se*, no one would be compelled to take probate of that deed, but the title to probate remains the same: if he ratifies an instrument inoperative and invalid *per se*, then the title and necessity co-exist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a title to probate, and—except in cases hereafter mentioned—there is also necessity (*g*); for those interested under the will are interested in having set out in the probate, under the sanction of the Court, any document referred to in the will in such a way as to be incorporated in it, and further, it is convenient that the whole of the testator's will should be on record in the registry of the Court (*h*).

As a rule, all documents incorporated by reference in a will must form part of the probate.

But though in theory an incorporated document should always be included in the probate, in practice difficulties frequently arise in carrying out this rule (*i*). The document referred to may be one in which third persons alone are interested, and it has been held that when this is the case, and the persons who have the custody refuse to allow the document to be copied and inserted in the probate, the probate may go without it (*k*). Again, the document incorporated may be of great length, so that the expense of engrossing it in the probate would be very large. In a proper case, the Court will on that ground relax the rule requiring the incorporated document to be set out at length in the probate (*l*). And where part only of the incorporated document is material, the Court will not insist on including the whole in the probate (*m*).

But the rule may be relaxed.

If two independent wills are made, one disposing of the testator's property in England, and the other disposing of his property abroad, the former alone will be admitted to probate in the Probate Division (*n*). But the English will, if last, may

Two wills, one disposing of property in England, the other of property abroad.

(*g*) *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 89. In *Bizzey* v. *Flight* (1876), 3 Ch. D. 269, an incomplete settlement was held to be perfected by a confirmation contained in a will; but see *Hubbard* (1865), 1 P. & D. 53. For cases in which clauses in a previously revoked will have been referred to in a later will, see *Sinclair* (1843), 3 Curt. 746; *Ouchterlony* (1863), 3 S. & T. 175; *Gill* (1869), 2 P. & D. 6; *Bangham* (1876), 1 P. D. 429.

(*h*) *Sibthorp* (1866), 1 P. & D., at p. 108; *Jones* (1920), 36 T. L. R. 294. It has been suggested that unless a document referred to in the will is admitted to probate, a Court of construction might hold that such document were not part of the will: *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 89; *Sibthorp* (cited *supra*), at p. 108. But see *Bizzey* v. *Flight* (1876), 3 Ch. D., at p. 273.

(*i*) *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 86; *Battersbee* (1852), 2 Rob. 439.

(*k*) *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 87; *Battersbee* (1852), 2 Rob. 439; *Sibthorp* (1866), 1 P. & D. 106. An affidavit should be filed to that effect: see *Astor* (1876), 1 P. D. 150.

(*l*) *Sheldon* v. *Sheldon* (1844), 1 Rob., at p. 86; *Lansdowne* (1863), 3 S. & T. 194; *Dundas* (1863), 32 L. J. P. 165; *Balme*, [1897] P. 261; see *Astor* (1876), 1 P D., at p. 153.

(*m*) *Limerick* (1850), 2 Rob. 313.

(*n*) See *ante*, p. 11.

If one refers to the other in such a way as to incorporate it, both must be included in the probate.

contain a reference to the foreign will, so as to incorporate it; or the foreign will, if last, may incorporate the English will, and then the probate should include both documents, as they virtually become one document (*o*).

(*o*) See *ante*, pp. 11, 12.

CHAPTER VI.

THE REPUBLICATION OF WILLS.

SECTION 1.

HOW A WILL MAY BE REPUBLISHED OR REVIVED.

The law as to the republication of wills prior to the Wills Act, 1837.

IN his work on Executors (*a*), Sir Edward Vaughan Williams gives the following summary of the law as to the republication of wills prior to the Wills Act, 1837 :—

"By the law as it stood before the passing of the Wills Act, by reason of section 5 of the Statute of Frauds, no will of lands could be republished except by re-execution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. But as that section did not apply to wills of personalty, such a will might be republished not only by an unattested codicil or other writing, but by the mere parol acts or declarations of the testator (*b*). . . . Satisfactory proof of recognition, *animo republicandi*, by the testator, was sufficient republication even of a cancelled or obliterated will if it continued legible (*c*).

Republication of a cancelled or obliterated will.

"As to republication by codicil, the cases on wills, made before the Wills Act, show that a codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; and as such furnishes conclusive evidence of the testator's considering his will as then existing (*d*). But although

Republication by a codicil: in case of wills made before the Wills Act.

(*a*) Wms. on Exors (11th ed.), pp. 136 *et seq.*; and see further, as to the law before the Act, the judgment of Sir J. P. Wilde in *Steele* (1868), 1 P. & D. 575, at pp. 577, 578.

(*b*) *Ibid.*, citing Wentw. Off. Ex., Chap. I, p. 60 (14th ed.).

(*c*) *Ibid.*, citing Wentw. Off. Ex., Chap. I, p. 65 (14th ed.).

(*d*) *Ibid.*, citing *Acherley* v. *Vernon* (1720), 3 Bro. P. C. 107; *Potter* v. *Potter* (1750), 1 Ves. Sen. 437; *Jackson* v. *Hurlock* (1764), Ambl. 487; *Gibson* v. *Lord Montford* (1750), 1 Ves. Sen. 485; *Serocold* v. *Hemming* (1758), 2 Lee, 490; *Barnes* v. *Crowe* (1792), 1 Ves. 486 (overruling *Att.-Gen.* v. *Downing* (1769), Ambl. 573); *Doe* v. *Davy* (1774), Cowp. 158; *Pigott* v. *Waller* (1802), 7 Ves. 98; *Goodtitle* v. *Meredith* (1813), 2 M. & S. 5; *Hulme* v. *Heygate* (1816), 1 Mer. 285; *Rowley* v. *Eyton* (1817), 2 Mer. 128; *Duffield* v. *Elwes* (1825), 3 B. & C. 705; *Guest* v. *Willasey* (1825), 2 Bing. 429; 3 Bing. 614; *Crosley* (1828), 2 Hagg. 80; 1 Saund. 278 (*b*), *et seq.*, note to *Duppa* v. *Mayo*; *Williams* v. *Goodtitle* (1830), 10 B. & C. 895; *Doe* v. *Walker* (1844), 12 M. & W. 591; *Skinner* v. *Ogle* (1845), 1 Rob. 363; *Doe* v. *Marchant* (1843), 6 M. &

the effect of a codicil, as to republication, is by no means dependent on its being annexed to the will, yet if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that it was intended as a codicil to the will to which it is annexed, and to no other . . . (*e*).

A codicil did not republish a will if a contrary intention appeared on the face of it.

"But although the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is whether the particular case is or is not within the general rule (*f*): for if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted" (*g*).

Provisions of the Wills Act, s. 22.

Section 22 of the Wills Act, 1837, provides: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same: and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

G. 813, 825; *Dickinson* v. *Stidolph* (1861), 11 C. B. (N.S.) 341; *Re Earle's Trust* (1858), 4 K. & J. 673; *Re Champion*, [1893] 1 Ch. 101; *Re Wilcock*, [1898] 1 Ch. 95; *Re Rayer*, [1903] 1 Ch. 685. So a will or codicil containing a devise of real estate, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the will or codicil (*vide ante*, pp. 188 *et seq.*). But it has been held that the duly executed codicil must distinctly refer to the informal instrument: see *Doe* v. *Evans* (1832), 1 Cr. & M. 42; *Utterton* v. *Robins* (1834), 1 A. & E. 423. So in *Re Smith* (1890), 45 Ch. D. 632, Stirling, J., after quoting the passage in the text, said: "The learned author is there, as I read his language, speaking of a codicil which refers to the will. While the long list of cases given in the note to the passage just cited forms an ample justification of the proposition of law which I understand to be there laid down, in every one of those cases, with one apparent exception . . . there appears to have been some sort of reference in the codicil to the preceding will. . . . Consequently none of the cases . . . support the proposition that a reference to the will is unnecessary."

(*e*) *Ibid.*, citing *Rogers* v. *Pittis* (1822), 1 Add., at p. 41; *Barnes* v. *Crowe* (1792), 1 Ves., at p. 490.

(*f*) *Ibid.*, citing *Bowes* v. *Bowes* (1801), 2 B. & P., at p. 506, *per* Lord Eldon, C.

(*g*) *Ibid.*, citing *Strathmore* v. *Bowes* (1798), 7 T. R. 482; *S. C. sub nom. Bowes* v. *Bowes*, 2 B. & P. 500; *Heylin* v. *Heylin* (1775), Cowp. 132, Lord Mansfield's judgment; *Parker* v. *Biscoe* (1819), 3 J. B. Moore, 24; *Smith* v. *Dearmer* (1829), 3 Y. & J. 278; *Ashley* v. *Waugh*, cited in *Doe* v. *Walker* (1844), 12 M. & W. 598, 601; *Moneypenny* v. *Bristow* (1832), 2 Russ. & M. 117; *Hughes* v. *Turner* (1835), 3 My. & K. 666; *Doe* v. *Hole* (1850), 15 Q. B. 848; *Hughes* v. *Hosking* (1856), 11 Moo. P. C. 1; *Re Moore*, [1907] 1 Ir. R. 315.

The provisions of the section only apply to wills and codicils which have been *in any manner revoked.*

It will be observed that the provisions of the first part of the section apply only to the wills and codicils which have been in any manner revoked. It is said that although no will, since the Wills Act, 1837, came into operation, can be republished by any parol act or declaration of the testator, or by any codicil not duly executed in accordance with the provisions of the Act, yet a codicil, duly executed, will still amount to a republication of the will, according to the old law, unless it appears on the face of the codicil that it was not the intention of the testator to republish; or unless the will has been in some manner revoked, in which case the statute further requires that the codicil shall show an intention to revive (*h*).

Revival by implication abolished by the statute.

A will or codicil which has been in any manner revoked can, since the statute, be revived only by re-execution, or by a codicil duly executed, showing an intention to revive the same. The statute is designed to do away with the revival of wills by mere implication (*i*); a will can no longer be revived by any oral declaration (*k*). Nor, if a will has been revoked, wholly or in part, can destruction of the revoking instrument revive the will, or the part thereof which has been revoked (*l*).

Nor can destruction of the revoking instrument revive the will.

Methods of revival.

The methods of revival prescribed by the statute are two in number : (1) by re-execution (*m*), and (2) by a duly executed codicil " showing an intention to revive."

The intention to revive must appear upon the face of the codicil.

With reference to the second mode of revival, it has been held that the intention to revive must appear upon the face of the codicil (*n*). Unless there is a latent ambiguity in the codicil, extrinsic evidence of the testator's intention to revive any, and what, instrument is inadmissible (*o*), but the Court will always receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will better enable it to read the true sense of the words he has used (*p*).

Admissibility of extrinsic evidence.

In what way the intention to revive may be expressed.

The intention to revive must appear on the face of the codicil, either by express words referring to the will as revoked and importing an intention to revive the same, or by a

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(*h*) Wms. on Exors. (11th ed.), pp. 140, 141. See *Grealey* v. *Sampson*, [1917] 1 Ir. R. 286.

(*i*) *Steele* (1868), 1 P. & D., at p. 578; *Marsh* v. *Marsh* (1860), 1 S. & T., at p. 533.

(*k*) *Hale* v. *Tokelove* (1850), 2 Rob., at p. 325.

(*l*) *Major* v. *Williams* (1843), 3 Curt. 432; *Brown* (1858), 1 S. & T. 32; *Hodgkinson*, [1893] P. 339; *vide ante*, p. 145.

(*m*) As to what amounts to a re-execution, see *Dunn* v. *Dunn* (1866), 1 P. & D. 277; and as to the effect of the re-execution of a will on an existing codicil thereto, see *Wade* v. *Nazer* (1847), 1 Rob. 627, and *post*, p. 203.

(*n*) *Steele* (1868), 1 P. & D., at p. 578.

(*o*) *Walpole* v. *Cholmondeley* (1797), 7 T. R. 138; *Goodenough* (1861), 2 S. & T. 141; *Steele* (1868), 1 P. & D., at p. 576; *Chapman* (1844), 1 Rob. 1.

(*p*) *Steele* (1868), 1 P. & D., at p. 576.

disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question (*q*).

It is not necessary to specify the date of the will.

A revoked will may be revived by a codicil which refers to it in such a way as to show an intention to revive, even though the reference in the codicil does not specify the date of the will (*r*), or gives an incomplete or inaccurate date (*s*) or description (*t*). A codicil which merely refers to the testator's " will " may revive a will which has been revoked, if it appears that there was not more than one will of the testator in existence (*u*); but where a testator refers in a codicil to a last will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will, and not to a revoked will (*x*).

Physical annexation of a codicil to a will.

The mere physical annexation—*e.g.*, by a piece of tape—of a duly executed codicil of later date to testamentary papers which have been revoked, is not in itself a ground for inferring the " intention to revive " required by the statute (*y*).

Memorandum at foot of will.

Where a testator, whose will leaving the residue of his property to his first wife (Sarah Terrible) had been revoked by his marriage to his second wife (Martha Terrible), executed a memorandum written at the foot of the will in the following terms : " I give and bequeath to my wife Martha Terrible, my wife Sarah Terrible being void by death," it was held that the will was revived (*z*).

Effect of reference in a codicil to a revoked will by its date alone.

Cases of difficulty arise in considering the effect of a reference, in a codicil, to a revoked will by its date alone, without any further expression of an intention to revive. In the earlier cases it was undoubtedly held that if a codicil referred to a revoked will by its date, that was sufficient to effect a revival of the instrument referred to, even in cases where parol evidence, if admissible, would have established beyond all doubt that the reference in question was nothing but a blunder—an error having arisen from some obvious cause, and the date of a revoked instrument having been inserted by

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(*q*) *Steele* (1868), 1 P. & D., at p. 578.
(*r*) *McCabe* (1862), 2 S. & T. 474.
(*s*) *Jansen* v. *Jansen* (1797), quoted in *Rogers* v. *Pittis*, 1 Add., at p. 38; *Houblon* (1865), 11 Jur. (N.S.) 549; *Green* (1899), 79 L. T. 738.
(*t*) *Thomson* v. *Hempenstall* (1849), 1 Rob. 783.
(*u*) *Neate* v. *Pickard* (1843), 2 N. C. 406; *Marsh* v. *Marsh* (1860), 1 S. & T., at p. 533.
(*x*) *Hale* v. *Tokelove* (1850), 2 Rob., at p. 326; *Marsh* v. *Marsh* (1860), 1 S. & T., at p. 533; *Steele* (1868), 1 P. & D., at p. 579.
(*y*) *Marsh* v. *Marsh* (1860), 1 S. & T. 528.
(*z*) *Terrible* (1858), 1 S. & T. 140.

mistake for that of another will which the testator intended to confirm (*a*).

The question was, however, exhaustively considered by Sir J. P. Wilde in *In the Goods of Steele* (*b*). After stating that he doubted whether any testator who bore in mind that he had revoked his will, and had substituted another for it, ever sat down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by making a codicil simply referring by date to his first will, the learned Judge said : " The Court ought to be slow to conclude that a testator has manifested in this indirect way a desire to revoke his last will, and it should scrutinise narrowly the language of a codicil which is said to show such an intention, lest in the desire to follow the testator's wishes too blindly it should set them at nought altogether." Accordingly, in *In the Goods of May* (*c*), where a testator had first made a will on January 11, 1860, then a second will on August 18, 1860, in terms revoking the first, and finally a codicil which was in fact intended—as parol evidence, if admissible, clearly showed—to be a codicil to the second will, but by mistake was expressed to be a codicil to the testator's " last will and testament bearing date the 11th day of January, 1860," the learned Judge held that the mere reference in the codicil to the revoked will by its date was insufficient to revive the revoked will, and consequently to revoke the intermediate will, there being no other evidence on the face of the codicil of an intention to revive the will referred to. This decision has been followed in a number of subsequent cases, in which mistaken references to revoked wills by their dates have occurred in codicils (*d*).

If by mistake a codicil not only refers to a revoked will by its date

Although where a mistake has been made merely as to the date of the will to which it was intended to append the codicil, the reference to a revoked will by its date alone is held not to

(*a*) *Walpole* v. *Cholmondeley* (1797), 7 T. R. 138; *Goodenough* (1861), 2 S. & T. 141; *Chapman* (1844), 1 Rob. 1; *Payne* v. *Trappes* (1847), 1 Rob. 583. In *Reynolds* (1873), 3 P. & D. 35, where there was no question of any mistake, Sir J. Hannen appears to have held that a reference in a codicil to a revoked will by its date alone, was sufficient to revive the revoked will, though not to revive a codicil to that will. This case was decided after the judgment of Sir J. P. Wilde in *Steele, May* and *Wilson* (1868), 1 P. & D. 575, and *May* (*ubi supra*) was referred to in argument. It seems to be inconsistent with these cases. A reference in a codicil to a revoked will by its date will, of course, not revive that will if—quite apart from any question of mistake—there are words in the codicil showing a contrary intention : *Dennis*, [1891] P. 326.

(*b*) (1868), 1 P. & D. 575, at p. 579.

(*c*) (1868), 1 P. & D. 581.

(*d*) *Steele* (1868), 1 P. & D. 575, 580; *Wilson* (1868), 1 P. & D. 582; *Ince* (1877), 2 P. D. 777; *Gordon*, [1892] P. 228; and see *Whatman* (1864), 34 L. J. P. 17. In *Gordon* (*ubi supra*), the mistaken date was omitted from the probate.

but also refers to the terms and provisions of that will,

revive that instrument, the case is very different if the mistake goes further still, and the codicil refers not only to the date, but also to the terms and provisions of the revoked will. For where the mind of the draftsman, whether the testator himself or someone employed by him, has been really applied to the words of the particular instrument, it is impossible for the Court to say that it was by mistake that this instrument was referred to instead of another, and that a codicil which purports to be a codicil to a particular will and which refers to and modifies its provisions, does not revive that will (*e*). Thus in *In the Goods of Stedham* (*f*) a testator made two wills, one in 1877 and the other in 1878; both were kept by his solicitor in his safe. In 1880 the solicitor was desired by the testator to prepare a codicil to his will, and taking out the wrong will by mistake, he prepared a codicil, expressed to be a codicil to the will of 1877, in which the terms and language of that will were employed and its provisions referred to. It was held that the codicil revived the will of 1877 (*g*).

the revoked will must be held to be revived.

If a codicil refers to a will which has been entirely destroyed.

But if a codicil refers to a will with the intention of reviving it and it turns out that such will has been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival (*h*). Nor can the draft of the will, if in existence, be admitted to probate (*i*). But it seems that where one part of a will in duplicate has been destroyed by the testator on the execution of a subsequent will in terms revoking the former, but the other part is in existence, the will may be revived by a codicil, subsequently executed, expressing an intention to revive it (*k*).

It was at one time held that although the destroyed will was not revived, any intermediate will was revoked (*l*); but this view has since been discredited (*m*).

The reason for this rule is stated to be that a will which has been revoked and actually destroyed exists no longer in law or in fact: it does not exist as a will, since it has been revoked; nor as a written instrument, as a paper writing, for

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(*e*) *Dyke* (1881), 6 P. D. 207, at p. 208.
(*f*) (1881), 6 P. D. 205.
(*g*) See *Dyke* (1881), 6 P. D. 207; *Chilcott*, [1897] P. 223; *Carleton*, [1915] 2 Ir. R. 9; and *vide infra*, p. 202.
(*h*) *Hale* v. *Tokelove* (1850), 2 Rob. 318, 328; *Newton* v. *Newton* (1861), 5 L. T. (N.S.) 218; *Rogers* v. *Goodenough* (1862), 2 S. & T. 342; *Steele* (1868), 1 P. & D. 575, 576; *Reade*, [1902] P. 75.
(*i*) *Hale* v. *Tokelove* (1850), 2 Rob., at p. 331.
(*k*) *Payne* v. *Trappes* (1847), 1 Rob. 583.
(*l*) *Hale* v. *Tokelove* (1850), 2 Rob., at p. 329; *Newton* v. *Newton* (1861), 5 L. T. (N.S.) 218; but see *Lord St. Helens* v. *Lady Exeter* (1789), 3 Phill. 461, n.
(*m*) *Newton* v. *Newton* (1861), 12 Ir. Ch. Rep. 118, C. A.; *Rogers* v. *Goodenough* (1862), 2 S. & T. 342.

it has been destroyed. Not being either a will or a writing, how then can it again become a will? It can never be revived in its original condition as a written instrument, and thus the very first thing required of a valid will by the Wills Act, 1837, namely, that it should be in writing, cannot be satisfied (*n*).

Whether the rule applies to a will which has been accidentally lost, or destroyed *sine animo revocandi*, is still an open question (*o*), though the reason cited above certainly seems to apply to this case also. The case, however, could scarcely arise in practice (*p*).

Revival by a conditional codicil.

Conditional revival.

A codicil expressed to take effect only upon an event which does not happen, republishes a will to which it refers by date, and is on that account entitled to probate (*q*). And when a codicil revives a revoked will subject to the happening of a contingency which is in suspense at the death of the testator, the revoked will is entitled to probate immediately upon his death (*r*).

Effect of destruction of a codicil by which a revoked will has been revived.

Where a revoked will had been revived by a codicil, and that codicil was subsequently destroyed by the testator, the question arose whether the destruction of the instrument upon which the will depended had left the will inoperative. It was held that the testator could not have intended the destruction of the codicil to have that effect, and that as he had destroyed it under a misconception of the effect of his act, the destruction was not *animo revocandi*, and probate was granted of the will and of the codicil as contained in a draft (*s*).

Section 2.

CONSEQUENCES OF REPUBLICATION.

The will republished is to be deemed to have been made at the time of its republication.

Section 34 of the Wills Act, 1837, provides: "Every will re-executed or republished, or revived by any codicil shall, for the purposes of this Act, be deemed to have been made at the

(*n*) *Rogers* v. *Goodenough* (1862), 2 S. & T., at p. 350.

(*o*) *Hale* v. *Tokelove* (1850), 2 Rob., at p. 330; *Rogers* v. *Goodenough* (1862), 2 S. & T., at p. 351.

(*p*) The will would have first to be accidentally destroyed, then revoked by marriage or by a later will, and then attempted to be revived by a subsequent codicil.

(*q*) *Da Silva* (1861), 2 S. & T. 315; cf. *Hugo* (1877), 2 P. D. 73.

(*r*) *Bangham* (1876), 1 P. D. 429.

(*s*) *James* v. *Shrimpton* (1876), 1 P. D. 431. This case does not expressly decide that a revoked will, which has been revived by a codicil, can be rendered inoperative by subsequent destruction of the codicil by the testator with the intention not only of revoking the codicil, but also of revoking the will. This question must therefore be regarded as unsettled, but, since the statute was designed to abolish not only revival by implication, but also revocation by implication, would perhaps be decided in the negative: *vide ante*, p. 156; and see *Marsh* v. *Marsh* (1860), 1 S. & T., at p. 533.

time at which the same shall be so re-executed, republished, or revived."

Whether republication revokes any other will of a date prior to the republication.

The republication of a will is tantamount to the making of that will *de novo;* it brings down the will to the date of the republication, and makes it speak, as it were, at that time. In short, the will so republished is, to all intents and purposes, a new will. Consequently, upon the ordinary and universal principle that of any number of wills the last and newest is that in force, it may revoke any will of a date prior to that of the republication (*t*).

The republication of a will which itself contains a clause revoking former testamentary instruments must therefore, it would seem, revoke any intermediate wills executed between the dates of its original execution and its republication. In the opinion of Sir Edward Vaughan Williams (*u*), the result is the same even though the republished will contains no clause of revocation, and its provisions are not wholly inconsistent with those of the intermediate wills. But the practice of the Court in such cases is to hold that the intermediate wills are not necessarily revoked, and to admit all the documents to probate in order that the Court of construction may determine their effect when interpreted together (*x*).

Effect of the republication of a will on the codicils thereto,

Difficult questions arise in determining the effect of the republication of a will upon codicils thereto. Where the instrument which effects the republication expressly refers to the codicils, no difficulty can arise, for the testator may always by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil, or on the other hand to confirm and republish his will together with the codicils (*y*).

where there is first a will, then a first codicil modifying the will, then a second

But assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second

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(*t*) See *per* Sir John Nicholl in *Rogers* v. *Pittis* (1822), 1 Add., at p. 38. See *Truro* (1866), 1 P. & D. 201, 203.

(*u*) Wms. on Exors. (11th ed.), p. 142, note (*r*).

(*x*) *Stedham* (1881), 6 P. D. 205; *Dyke* (1881), 6 P. D. 207; *Chilcott*, [1897] P. 223; *Green* (1899), 79 L. T. 738; *Deakin* v. *Garvie* (1919), 36 T. L. R. 122, C. A.; *Carleton*, [1915] 2 Ir. R. 9. In the last-mentioned case, the testator made a will, then a second will revoking all prior wills, and lastly a codicil which, by mistake, was indorsed on and referred to the earlier will. Applying *Stedham* (1881), 6 P. D. 205, it was held that the earlier will was revived, yet all three documents were admitted to probate, and that although the earlier will contained a clause of revocation. Such a course can, it is submitted, only be justified, if at all, on the principle that a clause of revocation in a testamentary paper is not absolutely conclusive of an intention to revoke a prior bequest, *vide ante*, pp. 135, 136.

(*y*) See *Green* v. *Tribe* (1878), 9 Ch. D., at p. 234.

codicil? Does it republish the will as it originally stood, or does it confirm the will as modified by the first codicil?

codicil confirming the will, but not mentioning the first codicil.

1. Where the first codicil has been duly executed, and neither it nor the will has been revoked.

In this case *prima facie* the will as modified by the first codicil is confirmed, and the first codicil is not revoked; for if a man confirms and ratifies his last will he ratifies and confirms it with every codicil that has been added to it. And the ratification of a will, expressly described by its date without any reference to its codicils, is a ratification of the will as modified by the codicils, and does not therefore revoke the codicils which were made between the date of the will and the confirming codicil (*z*).

But in every case it is a question of the intention of the testator, and although a reference simply to the date of the will is not sufficient in itself to restrict the confirmation to that particular document, yet if other words and surrounding circumstances convey that intention with reasonable certainty, the first codicil will be treated as revoked, and the will together with the second codicil only admitted to probate (*a*).

2. Where the first codicil was duly executed, but the will and first codicil have been revoked.

In this case a reference in the reviving codicil to the will alone will not, it seems, be a sufficient expression of an intention to revive the first codicil (*b*).

3. Where the first codicil was never duly executed, and can have force and effect, if at all, only if incorporated in and set up by the later codicil.

This class of cases has been discussed in an earlier chapter (*c*). It seems that merely confirming, in the second codicil, the will by its date, will not operate upon the earlier codicil so as to give it force and effect (*d*), but if the later codicil is described as a *second* codicil to the will, that may suffice to do so (*e*).

Where a will is first partly revoked and then wholly revoked.

Section 22 of the Wills Act provides: "When any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so

(*z*) *Crosbie* v. *MacDoual* (1799), 4 Ves. 610; *Smith* v. *Cunningham* (1823), 1 Add. 448; *Wade* v. *Nazer* (1847), 1 Rob. 627 (a case of re-execution); *Saussaye* (1873), 3 P. & D. 42; *Green* v. *Tribe* (1878), 9 Ch. D. 231; *Follett* v. *Pettman* (1883), 23 Ch. D. 337.

(*a*) *Greenough* v. *Martin* (1824), 2 Add. 239; *Upfill* v. *Marshall* (1843), 3 Curt. 636; *McLeod* v. *McNab*, [1891] A. C. 471.

(*b*) *Reynolds* (1873), 3 P. & D. 35; *vide ante*, p. 188, note (*p*).

(*c*) *Ante*, pp. 188 *et seq.*

(*d*) *Burton* v. *Newbery* (1875), 1 Ch. D. 234, dissenting from *Gordon* v. *Reay* (1832), 5 Sim. 274; *Aaron* v. *Aaron* (1849), 3 De G. & Sm. 475; *vide ante*, p. 188, note (*p*).

(*e*) *Smith* (1841), 2 Curt. 796, *ante*, p. 189, and other cases there cited.

much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown " (*f*).

Further consequences of republication.

The execution of a codicil which republishes a will has further important consequences. It may give effect to unattested alterations in a will (*g*), or render the will effective to incorporate documents which have come into existence subsequent to its execution (*h*), or render valid an unexecuted will or other paper (*i*). These consequences have been discussed at length in earlier chapters. It may also extend the operation of the will to persons and property to whom or to which the description is applicable at the date of republication, but that subject is not within the scope of this book.

Effect of republication by a person formerly of unsound mind, who has recovered his understanding.

Finally, if a testator make a will while of unsound mind, and afterwards recover his understanding, and republish it, it would doubtless become a valid will; though the mere fact of his recovery, without more, cannot give it any force or strength (*k*).

(*f*) See *Neate* v. *Pickard* (1843), 2 N. C. 406; *Hodgkinson*, [1893] P. 339.
(*g*) *Ante*, p. 177.
(*h*) *Ante*, pp. 190 *et seq.*
(*i*) *Ante*, pp. 188 *et seq.*
(*k*) Wms. on Exors. (11th ed.), p. 150; Swinb., Part II, s. 3, pl. 3: so an infant, on attaining majority, may republish and ratify a will made during infancy; Swinb., Part II, s. 2, pl. 8; Godolph., Part I, ch. 8, pl. 1.

CHAPTER VII.

APPOINTMENT OF EXECUTORS.

Meaning of the term "executor."

An executor is he to whom another man commits by will the execution of that his last will and testament (*a*). "To name or to appoint an executor," says Swinburne (*b*), "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts and the performance of his will."

The bare nomination of an executor is sufficient to entitle a will to probate.

The bare naming of an executor, without giving any legacy or appointing anything to be done by an executor, is sufficient to make it a will, and as a will it is to be proved (*c*).

Section 1.

WHO IS CAPABLE OF BEING AN EXECUTOR.

Who may be an executor.

All persons are capable of being executors that are capable of making wills, and some others besides (*d*).

The King.

The King may be appointed executor, in which case he nominates such persons as he shall think proper to officiate the execution of the will (*e*).

Corporations aggregate.

A corporation aggregate may be appointed executor, and in such a case the Court formerly granted administration with the will annexed to its syndic, that is, the person duly appointed by the corporation to take the grant (*f*).

(*a*) 2 Black. Comm. 503; Wentw., Off. Ex. c. I.

(*b*) Part IV, s. 2, pl. 2.

(*c*) Wms. on Exors. (11th ed.), p. 151; Godolph., Part II, c. 5, s. 1; see *Brownrigg* v. *Pike* (1882), 7 P. D., at p. 64; *Lancaster* (1859), 1 S. & T. 464. The appointment of an executor entitled a will dealing only with realty to probate, even before the Land Transfer Act, 1897: *Jordan* (1868), 1 P. & D. 555; *secus*, before the Married Women's Property Act, 1882, and the Land Transfer Act, 1897, the will of a married woman made in exercise of a power which related only to real estate: see *O'Dwyer* v. *Geare* (1859), 1 S. & T. 465; *Barden* (1867) 1 P. & D. 325; *Tomlinson* (1881), 6 P. D. 209; *Cubbon* (1886), 11 P. D. 169; *Hornbuckle* (1890), 15 P. D. 149.

(*d*) 2 Black. Comm. 503.

(*e*) Bacon's Abr. Exors., A 1; Godolph., Part II, c. 1, s. 2.

(*f*) *Darke* (1859), 1 S. & T. 516; *Hunt*, [1896] P. 288; *Martin* (1904), 90 L. T. 264; see *Law Guarantee Society* v. *Bank of England* (1890), 24 Q. B. D. 406; *Re Thompson's Settlement*, [1905] 1 Ch. 229. As section 161 of the Judicature (Consolidation) Act, 1925 (*infra*, p. 206), only applies to trust corporations, corporations other than trust corporations may still apply by a syndic, but they must swear that they are not trust corporations.

Trust corporations: Judicature (Consolidation) Act, 1925, s. 161.

But now, by section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*g*), it is enacted:

(1) The High Court may—

(a) where a trust corporation (*h*) is named in a will as executor, whether alone or jointly with another person, grant probate to the corporation either solely or jointly with another person, as the case may require; and

(b) grant administration to a trust corporation, either solely or jointly with another person,

and the corporation may act accordingly as executor or administrator, as the case may be.

(2) Probate or administration shall not be granted to a syndic or nominee on behalf of a trust corporation.

(3) Any officer authorised for the purpose by a trust corporation or the directors or governing body thereof may, on behalf of the corporation, swear affidavits, give security and do any other act or thing which the Court may require with a view to the grant to the corporation of probate or administration, and

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(*g*) This section now replaces section 14 of the Administration of Estates Act, 1925, which replaced section 17 of the Administration of Justice Act, 1920.

(*h*) By section 175, sub-section 1, of the Judicature (Consolidation) Act, 1925, "trust corporation" means the public trustee or a corporation either appointed by the Court in any particular case to be a trustee or authorised by rules made under the Public Trustee Act, 1906, s. 4, sub-s. 3, to act as custodian trustee. By the Public Trustee (Custodian Trustee) Rules, 1926, dated August 3, 1926, which came into immediate operation as provisional rules, it is provided: (1) Any corporation constituted under the law of the United Kingdom or of any part thereof and having a place of business there and empowered by its constitution to undertake trust business, and being either (a) a company incorporated by special Act or Royal Charter, or (b) a company registered (whether with or without limited liability) under the Companies (Consolidation) Act, 1908, having a capital (in stock or shares) for the time being issued of not less than £250,000, of which not less than £100,000 shall have been paid up in cash, or (c) a company registered without limited liability under the Companies (Consolidation) Act, 1908, whereof one of the members is a company within any of the classes hereinbefore defined, shall be entitled to act as a custodian trustee. (2) Any corporation constituted under the law of the United Kingdom, or of any part thereof, and having its place of business there, and being either—(a) a company established for the purpose of undertaking trust business for the benefit of His Majesty's Navy, Army, Air Force or Civil Service, or of any unit, department, member or association of members of any one or more of those services, and having among its directors or members any persons appointed or nominated by the Board of Admiralty, the Army Council, the Air Council, or any Department of State, or any one or more of those Departments, or (b) a company authorised by the Lord Chancellor to act in relation to any charitable, ecclesiastical or public trusts as a trust corporation, shall be entitled to act in relation to such business or trusts as a custodian trustee. (3) In this rule the "United Kingdom" means Great Britain and Northern Ireland; "trust business" means the business of acting as trustee under wills and settlements and as executor and administrator; "share capital" includes stock. To the corporations included in this definition are added, by section 3 of the Law of Property (Amendment) Act, 1926, the Treasury Solicitor (including the solicitor for the affairs of the Duchy of Lancaster), the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor; see *post*, p. 804.

the acts of an officer so authorised shall be binding on the corporation.

(4) Where, at the commencement of this Act, any interest in any estate is vested in a syndic on behalf of a trust corporation acting as the personal representatives of a deceased person, the said interest shall, by virtue of this Act, vest in the corporation, and the syndic shall be kept indemnified by the corporation in respect of the said interest.

This sub-section shall not apply to securities registered or inscribed in the name of a syndic or to land or a charge registered under the Land Registration Act, 1925, in the name of a syndic, but any such securities, land or charge, shall be transferred by the syndic to the corporation or as the corporation may direct.

(5) This section shall have effect whether the intestate (*i*) died before or after the commencement of this Act, and no such vesting or transfer as aforesaid shall operate as a breach of a covenant or condition against alienation or give rise to a forfeiture.

A corporation sole may be nominated executor, and may take probate in the same way as an individual (*k*). Corporations sole.

The appointment of a partnership firm as executors, is the appointment of the individuals composing the firm (*l*). Partnership firm.

An alien may be appointed executor, and may take probate as such (*m*). Aliens.

(*i*) In the course of transference from section 14 of the Administration of Estates Act, 1925, to section 161 of the Judicature (Consolidation) Act, 1925, the words "testator or" seem to have dropped out of the section accidentally.

(*k*) *Haynes* (1842), 3 Curt. 75. By section 180, sub-section 1 of the Law of Property Act, 1925, where either before or after the commencement of the Act, any property or any interest therein is or has been vested in a corporation sole (including the Crown), the same shall, unless and until otherwise disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to and vested in the successors from time to time of such corporation (and see the Administration of Estates Act, 1925, s. 3, sub-s. 5). Section 180, sub-section 2 deals with the effect of a corporation sole or corporation aggregate acquiring any interest in or charge on property when there is a vacancy in the office of the corporation sole, or in the office of the head of the corporation aggregate, which affects the status or powers of the corporation; and section 180, sub-section 3 provides, *inter alia*, that any appointment of a corporation sole as a personal representative at a time (either before or after the commencement of the Act) when there was a vacancy in the office, shall, on the vacancy being filled, take effect and be deemed to have taken effect as if the vacancy had been filled before the appointment, and on the appointment of a successor shall be capable of being accepted, disclaimed, or renounced by him.

(*l*) *Fernie* (1849), 6 N. C. 657.

(*m*) See British Nationality and Status of Aliens Act, 1914, s. 17, which now replaces section 2 of the Naturalization Act, 1870. As to the position during the late war of alien enemies and their executors and administrators, see *ante*, p. 38.

Infants.

An infant may be appointed executor; nay, even an infant *en ventre sa mère* may be made executor (*n*).

But no infant can act as executor during his minority (*o*); accordingly where an infant is sole executor of a will, administration with the will annexed is granted to his guardian, or to such other person as the Court thinks fit, for the use and benefit of the infant until the infant attains the age of twenty-one years, and on his attaining that age, and not before, probate of the will may be granted to him (*p*). The appointment of an infant as executor does not operate to transfer any interest in the property of the deceased to the infant or to constitute him a personal representative for any purpose unless and until probate is granted to him (*q*). And where there are several executors, and one of them is under age, no administration *durante minore ætate* need be granted, for those of full age may execute the will (*r*).

Married women.

A married woman may be appointed executrix, and, since January 1, 1883 (the date when the Married Women's Property Act, 1882, came into operation), may act in that office as if she were a *feme sole*, without any consent on the part of her husband (*s*).

Formerly a married woman could not accept the office of executrix or administratrix without her husband's consent (*t*).

Felons.

A convicted felon or outlaw may be appointed executor (*u*), and an executor who has obtained probate, notwithstanding a conviction of felony, and notwithstanding outlawry or attainder, may continue to act as executor, and, if his testator were himself an executor, to represent him in that capacity (*x*). The Court cannot refuse to grant probate to a person appointed

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(*n*) 2 Black. Comm. 503; Swinb., Part V, s. 1, pl. 6; Godolph., Part II, c. 9, s. 1; Bac. Abr. Exors., A. 7.

(*o*) *Stewart* (1875), 3 P. & D. 244.

(*p*) Judicature (Consolidation) Act, 1925, s. 165, sub-s. 1, which replaces section 20, sub-section 1 of the Administration of Estates Act, 1925, which in turn replaced the Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6, see *post*, p. 363. Before the last-mentioned Act was passed, an infant could act as executor on attaining the age of seventeen: 2 Black. Comm. 503.

(*q*) Judicature (Consolidation) Act, 1925, s. 165, sub-s. 2, which replaces section 20, sub-section 2 of the Administration of Estates Act, 1925.

(*r*) *Foxwist* v. *Tremain* (1670), 1 Mod. 47; *Pigot and Gascoigne's Case* (1572), cited Brownl. 46; see *post*, p. 363.

(*s*) Married Women's Property Act, 1882, s. 1, sub-s. 2, ss. 18, 24; as to acquisition and disposition by married women of interests in property as personal representatives, see section 170 of the Law of Property Act, 1925, which replaces section 1 of the Married Women's Property Act, 1907.

(*t*) See Wms. on Exors. (11th ed.), p. 154.

(*u*) Bac. Abr. Exors., A 3; but a person who is guilty of feloniously killing another cannot take any benefit under that other person's will, and this applies equally to a case of manslaughter as to one of murder: *Hall* v. *Knight*, [1914] P. 1; cf. *Crippen*, [1911] P. 108.

(*x*) *Smethurst* v. *Tomlin* (1861), 2 S. & T., at p. 146.

executor, on the ground that, after the death of the testator, he was convicted of felony (*y*).

Persons of unsound mind are incapable of acting as executors or administrators, for their disability renders them incapable not only of executing the trust reposed in them, but also of determining whether they will or will not take upon themselves the execution of it (*z*). Wherefore, if one of unsound mind is appointed executor, or if an executor becomes insane, the Court may commit the administration to another (*a*).

Persons of unsound mind.

If the sole executor is or becomes lunatic, it is the practice to make a grant of administration with the will annexed, for the use and benefit of the executor during his lunacy (*b*).

By the Public Trustee Act, 1906, s. 5, sub-s. 1, the "Public Trustee" (an office created by that Act, the holder of which office is constituted a corporation sole) may by that name, or any other sufficient description, be appointed executor, either alone or jointly with any other person or persons (*c*).

Public Trustee.

Where a will has been made, and an executor appointed, the Court cannot exercise any discretion as to granting or refusing probate. If probate is refused, it must be on the ground of some legal disability, recognised and allowed by the common law (*d*). For an executor is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualification; nobody can add qualifications to him other than those which the testator has imposed, but he shall be who, and in what manner, the testator shall judge proper (*e*).

Save as aforesaid the Court has no discretion, but must grant probate to the person appointed executor.

Accordingly, it has been held that the Court cannot pass over an executor by reason of his bad character (*f*), or on account of his poverty or insolvency (*g*).

The Court cannot pass over an executor by reason of his bad character, poverty, or insolvency.

(*y*) *Smethurst* v. *Tomlin* (1861), 2 S. & T. 143. But see *Drawmer* (1913), 108 L. T. 732, where an executor undergoing imprisonment for conspiracy was passed over under section 73 of the Court of Probate Act, 1857, although he refused to renounce; and see *post*, pp. 402, 403. By section 65 of the Trustee Act, 1925, which replaces section 48 of the Trustee Act, 1893, property vested in any person on any trust ("trust" extends to the duties incident on the office of a personal representative: section 68, sub-section 17), shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee, or pass to his co-trustee in right of survivorship, or devolve on his personal representative as if he had not become a convict; but this is not to affect the title to the property so far as relates to any beneficial interest therein of the convict.

(*z*) Bac. Abr. Exors., A. 5; Godolph., Part II, c. 6, s. 2.

(*a*) Bac. Abr. Exors., A. 5; *Hills* v. *Mills* (1686), 1 Salk. 36; *Evans* v. *Tyler* (1849), 2 Rob., at pp. 133, 134. (*b*) *Vide post*, pp. 370 *et seq.*

(*c*) It is considered that the Public Trustee, when he accepts office as executor, continues the chain of executorship. *Vide post*, App. IV., p. 896.

(*d*) *Smethurst* v. *Tomlin* (1861), 2 S. & T., at p. 146.

(*e*) *Rex* v. *Raines* (1699), 1 Lord Raym., at p. 364; Bac. Abr. Exors., A. 6.

(*f*) *Samson* (1873), 3 P. & D. 48.

(*g*) Bac. Abr. Exors., A. 6; *Rex* v. *Raines* (1699),1 Lord Raym. 361; see

Jurisdiction of the Court of Chancery to restrain an insolvent executor, and to appoint a receiver.

There are, however, cases in which the Court of Chancery will control an insolvent or bankrupt executor, by the appointment of a receiver; and it has been suggested that the Probate Division might be justified, since the Judicature Act, in refusing to grant probate to an executor in any case where Equity would restrain the executor, if probate were granted to him, and would appoint a receiver (*h*).

Former power of the Court under s. 73 of the Court of Probate Act.

Section 73 of the Court of Probate Act, 1857, empowered the Court, where an executor was resident out of this country, to refuse to grant probate to him, if satisfied that by reason of his position abroad, or his bad character, he was unfitted to act (*i*). This section is repealed by the Administration of Estates Act, 1925, as to deaths occurring after the commencement of that Act (*k*), and section 162 of the Judicature (Consolidation) Act, 1925, which now replaces it in the case of persons dying after the commencement of the Act, contains no equivalent provision (*l*).

Section 2.

HOW AN EXECUTOR MAY BE APPOINTED.

The appointment of an executor may be express or constructive.

"An executor," says Sir Edward Vaughan Williams (*m*), "can derive his office from a testamentary appointment only. His appointment may either be express, or constructive, in which case he is usually called executor *according to the tenor;*

Hathornthwaite v. *Russell* (1740), 2 Atk. 126; see also 3 P. Wms, 336, n.; *Hills* v. *Mills* (1686), 1 Salk. 36.

(*h*) Wms. on Exors. (11th ed.), p. 157, note (*g*); as to the jurisdiction of the Court of Chancery to restrain an insolvent or bankrupt executor and to appoint a receiver, see *Rex* v. *Simpson* (1758), 1 W. Black., at p. 458; *Utterson* v. *Mair* (1793), 2 Ves. 95; *Scott* v. *Becher* (1817), 4 Price, 346; *Bowen* v. *Phillips*, [1897] 1 Ch. 174. Section 41 of the Trustee Act, 1925, which replaces section 25 of the Trustee Act, 1893, and gives a general power to the Court to appoint a new trustee or new trustees whenever expedient, does not empower the Court to appoint an executor or administrator: Trustee Act, 1925, s. 41, sub-s. 4. But under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1, sub-s. 2, the Court can, in a proper case remove the executor and appoint a judicial trustee in his place; see *Ratcliff*, [1898] 2 Ch. 352; and now, by the Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2, sub-s. 1 (*d*), the Public Trustee can accept a judicial trusteeship, if duly appointed by the Court under the Judicial Trustees Act, 1896. The Courts of Equity will not, on the ground of his insolvency, control, by the appointment of a receiver, a person appointed executor and known by the testator to be a bankrupt or insolvent: *Gladdon* v. *Stoneman* (1808), reported 1 Madd. 143, n.; *Langley* v. *Hawke* (1820), 5 Madd. 46; *Stainton* v. *Carron Co.* (1853), 18 Beav. 146, at p. 161; nor upon the single ground that the executor is in mean circumstances: *Hathornthwaite* v. *Russell* (1740), 2 Atk. 126; *Anon.* (1806), 12 Ves. 4; *Howard* v. *Papera* (1815), 1 Madd. 142; and see Wms. on Exors. (11th ed.), pp. 1595 *et seq.*

(*i*) *Vide post*, pp. 402, 404.

(*k*) Administration of Estates Act, 1925, s. 56, and Second Schedule.

(*l*) *Vide post*, pp. 412—415.

(*m*) Wms. on Exors. (11th ed.), p. 159; see *Fraser* (1870), 2 P. & D., at p. 186.

Executor according to the tenor.

for, although no executor be expressly nominated in the will by the word 'executor,' yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors" (*n*).

By what words a person may be constituted executor according to the tenor.

In order to constitute one an executor according to the tenor of a will, it must appear, on a reasonable construction thereof, that the testator intended that such person should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in the will (*o*); in other words, that the testator intended to cast upon him the duties of an executor (*p*).

Direction to pay debts may suffice.

A simple direction to a certain person to pay the debts of the testator, without any bequest to him, and without specifically appointing him as trustee, may suffice to constitute him executor according to the tenor (*q*). But a direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not suffice; for in that case the direction to pay debts is treated as a charge on the specific legacy (*r*).

Secus a direction to pay debts out of a particular fund.

Universal legatee or mere trustee is not, as such, entitled to probate as executor according to the tenor.

A universal legatee or devisee is not, as such, entitled to a grant of probate as executor according to the tenor (*s*). And unless the Court can gather from the words of the will that a person named "trustee" therein is required to pay the debts

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(*n*) Godolph., Part II, c. 5, s. 2; Wentw. Off. Ex. 20 (14th ed.); see Swinb., Part IV, s. 4, pl. 3; and see *Manly* (1862), 3 S. & T. 56, where a testamentary paper in the form of a letter was addressed to "my dear Eliza," and contained full information as to the amount of the testatrix's property, and directions as to its disposition; it concluded "I know of nothing else, my dear Eliza, to trouble you with." The person so designated was held to be executrix according to the tenor: Cf. *Almosnino* (1859), 1 S. & T. 508.

In *Bradley* (1883), 8 P. D. 215, a testator said in his will "I appoint A B and C D," but did not state in what capacity he appointed them; he however proceeded to bequeath legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to its disposition. It was held that A B and C D were executors according to the tenor.

So in *Allam* (1892), 66 L. T. 382, a person appointed by the testator to "carry out my wishes," and in *Way*, [1901] P. 345, a person directed "to hold and administer all my estate," were held to be executors according to the tenor; see also *Russell*, [1892] P. 380; *Laird*, *ibid.*

(*o*) *Adamson* (1875), 3 P. & D. 253.

(*p*) *Earl of Leven and Melville* (1889), 15 P. D. 23. The following directions have been held to constitute the persons designated executors according to the tenor:—A direction to "pay all and take all": *Brightman* v. *Keighley* (1585), Cro. Eliz. 43; "to pay debts, funeral expenses, and the expenses of proving the will": *Fry* (1827), 1 Hagg. 80; "to pay debts and legacies": *Bell* (1878), 4 P. D. 85; "I appoint A B my residuary legatee to discharge all lawful demands": *Grant* v. *Leslie* (1819), 3 Phill. 116; "to receive and pay the contents" of the will: *Pickering* v. *Towers* (1757), 2 Lee, 401.

(*q*) *Cook*, [1902] P. 114.

(*r*) *Toomy* (1864), 3 S. & T. 562; see *Cook*, [1902] P., at p. 115.

(*s*) *Oliphant* (1860), 1 S. & T. 525. Nor has the rule been altered by the Land Transfer Act, 1897: *Pryse*, [1904] P. 301.

of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor (*t*).

Executor may be appointed by necessary implication.

An executor may be appointed by necessary implication (*u*). Thus, where a testator said in his will, "Should Mary be not living, I do constitute Eleanor my executrix," it was held that Mary was executrix by implication, according to the tenor of the will (*x*). And where a testator said, "I appoint my sister A my executrix, only requesting that my nephews B and C will kindly act for and with this dear sister," it was held that B and C were executors according to the tenor (*y*).

But where a testatrix left "the sum of one sovereign each to the executor and witness of my will for their trouble," but did not name any executor, it was held that she had not clearly said that the witnesses to her will were to be her executors, and probate was refused to them, although, beneath the signature of the testatrix, and opposite to their names, the words "witnesses and executors" were written (*z*).

Executor by implication of law.

Under section 22 of the Administration of Estates Act, 1925, an executor can be appointed by implication of law, for that

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(*t*) *Punchard* (1872), 2 P. & D. 369. In the following cases persons described in the will as "trustees" were held to be constituted executors according to the tenor:—Where the trustees were directed: "to dispose of the testator's property, and convert it into money, and to deposit the same for certain purposes": *Chappell* (1868), 37 L. J. P. 32; *Baylis* (1865), 1 P. & D. 21; "to get in the testator's estate, and distribute it after payment of funeral and other expenses": *Lush* (1887), 13 P. D. 20; "to receive sums due to the residue" (the will contained directions to "my executors," and it appeared that the testator had used the terms "executors" and "trustees" indifferently as referring to the same persons): *Earl of Leven and Melville* (1889), 15 P. D. 22, and see *Kirby*, [1902] P. 188; "to carry out this will" and "for the due execution of my will": *Russell*, [1892] P. 380; *Laird*, *ibid.*; see also *Montgomery* (1846), 5 N. C. 99; *Collett* (1857), Dea. & Sw. 274; *MacKenzie*, [1909] P. 305; *Brown* (1910), 54 Sol. Jo. 478.

On the other hand, persons described in the will as "trustees" were held *not* to be constituted executors according to the tenor in the following cases:—Where the property was left to the trustee on trust for a specific purpose, or for the benefit of particular persons: *Boddicott* v. *Dalzeel* (1756), 2 Lee, 294; *Jones* (1861), 2 S. & T. 155; *Stewart* (1875), 3 P. & D. 244; *Maley* (1887), 12 P. D. 134. Where a person was appointed "trustee" without more: *Punchard* (1872), 2 P. & D. 369; *Lowry* (1874), 3 P. & D. 157. Where the will was that of a married woman made in exercise of a power of appointment: *Fraser* (1870), 2 P. & D. 183.

As to the distinction between the duties of a trustee and an executor, see *Fawkener* v. *Jordan* (1756), 2 Lee, 327; *Moss* v. *Bardswell* (1860), 3 S. & T. 187.

(*u*) Wms. on Exors. (11th ed.), p. 163, citing Godolph., Part II, c. 5, s. 3; Swinb., Part IV, s. 4, pl. 6.

(*x*) *Naylor* v. *Stainsby* (1754), 2 Lee, 54. See also *Brightman* v. *Keighley* (1585), Cro. Eliz. 43, cit. *supra*, p. 211, note (*p*). In *Aird* (1828), 1 Hagg. 336, a person appointed limited executor in a will was held to be appointed general executor in a codicil by implication and without express words.

(*y*) *Brown* (1877), 2 P. D. 110. See *Grant* v. *Leslie* (1819), 3 Phill. 116; *Powell* v. *Stafford* (1803), cit. 3 Phill., at p. 118; *Stevenson* (1852), 16 Jur. 714. Where a person is requested to assist an executor, the question may arise whether he is thereby appointed co-executor or merely coadjutor or overseer. As to the distinction between these offices, see Wentworth Off. Ex. 21 (14th ed.); Bro. Exors., pl. 73; Godolph., Part II, c. 2, s. 4; Wms. on Exors. (11th ed.), p. 163.

(*z*) *Woods* (1868), 1 P. & D. 556.

section provides that in default of express appointment, a testator who dies after the commencement of the Act, shall be deemed to have appointed as his special executors in regard to settled land the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land (*a*).

Executor according to tenor of foreign will.

Where the will is of a testator domiciled abroad, the question whether persons are therein appointed executors according to the tenor of the will is to be determined by the English law, and not in accordance with the decision of the Court of the testator's domicil (*b*).

An executor according to the tenor entitled to probate jointly with the executor expressly nominated.

An executor according to the tenor may be entitled to be joined in the probate with an executor expressly nominated. Thus, where a testator made a will and four codicils, by the last of which he appointed his nephew residuary legatee "to discharge all lawful demands against my will and codicils," and the will contained an express appointment of executors, it was held that the nephew was executor according to the tenor, and was entitled to be joined in the probate with the executors expressly appointed (*c*). But where there is an express appointment of an executor, it is, of course, less probable that there should be an indirect appointment to the same office (*d*).

Authorisation of some third person to nominate the executor.

A testator may, by his will, authorise some third person to nominate his executor, and probate will be granted in such a case to the executor nominated by him to whom the testator has delegated his power of selection (*e*).

Thus, a testatrix appointed A and B executors of her will, and in case of the death of either of them, empowered the survivor to appoint another, so that there should continue to be two executors. Upon the death of A, B appointed C executor to act with him, but C did not take out probate during the

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(*a*) See *post*, Part I, Chapter VIII, pp. 232 *et seq.*, where the section is discussed and explained.

(*b*) *Cosnahan* (1866), 1 P. & D. 183; *Earl* (1867), 1 P. & D. 450, and *vide ante*, p. 23, note (*p*). The executor according to the tenor of a foreign will cannot demand probate as of right; the Court may in its discretion grant him administration with the will annexed: *Grewe* (1922), 38 T. L. R. 440.

(*c*) *Grant* v. *Leslie* (1819), 3 Phill. 116. See *Collard* v. *Smith* (1799); and *Powell* v. *Stratford* (1803), quoted 3 Phill., at pp. 117, 118; *Brown* (1877), 2 P. D. 110; *Wright* (1908), 25 T. L. R. 15. In *Lynch* v. *Bellew* (1820), 3 Phill. 424, a person was held to be executor according to the tenor for limited purposes, although another had been expressly nominated executor for general purposes. (*d*) *Grant* v. *Leslie* (1819), 3 Phill., at p. 117.

(*e*) *Cringan* (1828), 1 Hagg. 548, where the testator directed that the legatees should appoint two executors; *Jackson* v. *Paulet* (1851), 2 Rob. 344, where A and B were appointed executors with directions, conjointly with the testator's wife, to appoint a third person as trustee and executor. In *Ryder* (1861), 2 S. & T. 127, a testator requested A B "to appoint some one to see this my will executed." Probate was granted to A B on his appointment of himself being filed in the registry. See *Re Sampson*, [1906] 1 Ch. 435.

lifetime of B. On B's death it was held that probate might be granted to C, and that he might appoint another executor to act with him (*f*).

Several executors in several degrees.

Instituted executor.

Substituted executor.

Substituted executor cannot propound the will, unless the instituted executor has been cited.

A testator may appoint one person to be his executor, and another to be his executor in case the first cannot or will not act. For example, the appointment may take the following form : " I appoint A my executor, but if A will not or cannot act, then I appoint B my executor, and if B will not or cannot act, I appoint C," and so on. In such a case A is called the instituted executor in the first degree, B is said to be substituted in the second degree, C to be substituted in the third degree, and so on (*g*). In such cases the substituted executor cannot propound the will unless the instituted executor is incapable of acting, or renounces, or has been cited to accept or refuse the office (*h*).

Whether, if the instituted executor takes probate, and dies intestate, the substituted executor shall be regarded as excluded.

Where there is an instituted and a substituted executor, the question sometimes arises whether the substitution is to take place only in the event of the instituted executor not acting at all, or whether it is to take place in the event of the instituted executor's death after having taken probate. This is a question of intention to be decided on the construction of the words of the will, and it has been said that the Court will not construe the words in a technical spirit, but will endeavour to carry out the real object of the testator (*i*).

Thus, if the second executor is substituted if the first " will not or cannot be executor," it is said that if the instituted executor once accepts office and afterwards dies intestate the substitutes are all excluded, for the condition is fulfilled once and for all by the acceptance of the instituted executor (*k*).

(*f*) *Deichman* (1842), 3 Curt. 123.

(*g*) See Swinb., Part IV, s. 19, pl. 1; Godolph., Part II, c. 4, s. 1; Wms. on Exors. (11th ed.), pp. 165, 166.

(*h*) *Smith* v. *Crofts* (1758), 2 Lee, 557. In *Lane* (1864), 33 L. J. P. 185, A was appointed executor, but in the event of his going abroad or being or remaining abroad for upwards of two months, B was appointed executor. After the death of the testator, A went abroad without taking probate. Probate was granted to B, with power reserved to A to come in and prove the will.

In *Wilmot* (1852), 2 Rob. 579, A was appointed executor, and the will proceeded : " In case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, I appoint B executor, to act only during such time as A shall be resident abroad, or otherwise be incapable of acting." A died in the lifetime of the testator. Probate was granted to B as executor.

In *Langford* (1867), 1 P. & D. 458, A was appointed executor, and " in case of his absence on foreign duty " B was appointed executrix. A was in England at the testator's death, but was absent on foreign service when the application for probate was made. Probate was granted to B. See also *Betts* (1861), 30 L. J. P. 167.

(*i*) *Foster* (1871), 2 P. & D. 304.

(*k*) Swinb., Part IV, s. 19, pl. 10; Godolph., Part II, c. 4, s. 2; Wms. on Exors. (11th ed.), p. 166.

But where a testator appoints an executor and provides that "in case of his death" (*l*) or "in his default" (*m*) another is to be substituted, on the death of the instituted executor even after he has proved the will, the substituted executor may be admitted to the office, if it appear that the testator intended the substitution to take place on the death of the instituted executor, whether happening in the testator's lifetime or afterwards (*n*).

The person appointed executor must be identified with certainty.

Whether an executor is appointed by express terms or by implication, there must be no uncertainty as to the identity of the person intended (*nn*). Thus, where a testator appointed "A as my executor, with any two of my sons," the Court held the appointment of "any two" of his sons to be void for uncertainty (*o*). Again, a testator by his will appointed "one of my sisters my sole executrix"; he had three sisters living at that time, but two died in his lifetime. It was held that the appointment was void for uncertainty (*p*).

Where the description of the executor in the will is imperfect or ambiguous.

Parol evidence, however strong, cannot be admitted to supply a complete blank.

Where the description of the executor in the will is imperfect or ambiguous, the question frequently arises whether parol evidence is admissible to any and, if to any, to what extent, in order to assist the Court to ascertain the meaning of the testator as expressed in his will. In this connection it has been held that, in considering whether a particular person has been sufficiently designated by a testator, there must be a description in the will to which the required meaning can be attached. A complete blank cannot be filled up by parol testimony, however strong (*q*).

But where there are any words to which a reasonable meaning can be attached,

But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is (*r*). So where a person is described by an initial, as "Mrs. C," evidence is admissible to show that the testator was accustomed to speak of a particular person

(*l*) *Lighton* (1828), 1 Hagg. 235; *Johnson* (1858), 1 S. & T. 17.

(*m*) *Foster* (1871), 2 P. & D. 304.

(*n*) *Lighton* (1828), 1 Hagg. 235; *Bourke* (1826), 1 Hagg. 237, n.

(*nn*) Where the holder of an office has been appointed executor, a question may arise whether the person entitled to probate is the holder of that office at the time when the will was executed or at the date of the testator's death. On this point, see *Jones* (1927), 43 T. L. R. 324; and as to the appointment of a corporation sole at a time when there is a vacancy in the office, see *ante*, p. 207, note (*k*).

(*o*) *Baylis* (1862), 2 S. & T. 613. See *Altham's Case* (1610), 8 Co. Rep. 155 a; *Strode* v. *Russel* (1708), 2 Vern., at p. 624.

(*p*) *Blackwell* (1876), 2 P. D. 72. But in *Hubbuck*, [1905] P. 129, where a testator appointed his "granddaughter ——" his executrix, and there were three granddaughters, probate was granted to the one whom the Court found, from the extrinsic evidence, to be the person intended.

(*q*) *De Rosaz* (1877), 2 P. D., at p. 69. Thus a legacy to "Mr. ——" cannot have effect given to it: *Baylis* v. *Att.-Gen.* (1741), 2 Atk. 239; nor a legacy to "Lady ——": *Hunt* v. *Hort* (1791), 3 Bro. C. C. 311.

(*r*) *De Rosaz* (1877), 2 P. D., at p. 69.

parol evidence is admissible to identify the person intended.

by the initial of her name (*s*). And where a blank was left for the Christian name, parol evidence was admitted to show who was intended (*t*). The principle upon which the Court acts is that laid down by Sir John Wigram : " For the purpose of determining the object of the testator's bounty, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator." So where the deceased by his will appointed as his executor " Percival ——, of Brighton, the father," the Court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein (*u*).

Parol evidence is admissible to the same extent where the description of the executor is true in part but not in every particular.

So where the description of the executor is true in part, but not true in every particular—as where the Christian or surname is mistaken—parol evidence is admissible to show who was intended to take, provided there is sufficient indication of intention on the face of the will to justify the application of the evidence (*x*). In such cases, which include cases where the description is applicable partly to one person and partly to another (*y*), the extrinsic evidence is confined to evidence of surrounding circumstances (*z*), and direct evidence of intention, *e.g.*, statements of the testator as to which person was intended, is inadmissible (*a*).

Direct evidence of the testator's intention is admissible only when the description is equally applicable in all its parts to two or more persons.

The only case in which parol evidence of statements of the testator as to whom he intended to benefit or supposed he had benefited by his will, can be received, is where the description is equally applicable in all its parts to two persons (*b*). In *Grant* v. *Grant* (*c*) a testator appointed as his executor his " nephew, Joseph Grant." There were in fact two persons named Joseph Grant, one the son of the testator's brother and

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(*s*) *Abbot* v. *Massie* (1796), 3 Ves. 148; *Clayton* v. *Lord Nugent* (1844), 13 M. & W., at p. 207. (*t*) *Price* v. *Page* (1799), 4 Ves. 680.

(*u*) *De Rosaz* (1877), 2 P. D. 66. And see *Hubbuck*, [1905] P. 129.

(*x*) *Miller* v. *Travers* (1832), 8 Bing., at p. 248. So where a testator appointed " William McCormack " his executor, and the only two persons at all answering the description were Thomas McCormack and William Abraham McCormack, parol evidence was admitted to prove which person was intended by the testator, and probate was granted to Thomas McCormack : *Brake* (1881), 6 P. D. 217. See also *Charter* v. *Charter* (1871), 2 P. & D. 315, L. R. 7 H. L. 364; *Chappell*, [1894] P. 98. (*y*) *Vide supra*, note (*x*).

(*z*) *Charter* v. *Charter* (1874), L. R. 7 H. L. 364, at p. 377; *Brake* (1881), 6 P. D. 217.

(*a*) *Charter* v. *Charter* (1874), L. R. 7 H. L., at pp. 376, 377; *Doe* v. *Hiscocks* (1839), 5 M. & W. 363; *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 227.

(*b*) *Charter* v. *Charter* (1874), L. R. 7 H. L., at pp. 376, 377; *De Rosaz* (1877), 2 P. D., at p. 70. (*c*) (1869), 2 P. & D. 8.

the other the nephew of the testator's wife. In that case it was held that where a word is used in a will as part of the description of a person specified by name, and is applicable to the persons so specified both in an ordinary and popular sense and in a strict and primary sense, an ambiguity is raised, and the Court may receive evidence of the circumstances of the testator and of the sense in which he was accustomed to use the word, in order to ascertain the person indicated (*d*).

Where there is no ambiguity, evidence is not admissible to show that the testator intended to appoint a person other than the person described.

But where there is no ambiguity in the description of the executor, evidence cannot be admitted to prove that the testator intended to appoint a person other than the person described in the will. Thus, where a testator appointed "Francis Courtenay Thorpe, of Hampton, gentleman," his executor, and there was living a youth, twelve years of age, to whom the name and description applied, the Court refused to admit evidence to show that the testator intended the father of the youth, whose name was Francis Corbet Thorpe (*e*).

Probate granted to all the executors named in several testamentary papers.

When probate is granted of two or more testamentary papers as together constituting the will of the deceased, it is the practice of the Court to make the grant to all the executors named in the several papers (*f*).

Section 3.

IN WHAT WAYS THE APPOINTMENT OF AN EXECUTOR MAY BE QUALIFIED (*g*).

Appointment of executor may be absolute or qualified.

The appointment of an executor may be either absolute or qualified. It may be qualified either (1) as to time, or (2) as to place, or (3) as to purpose or subject-matter; and (4) the appointment of an executor may be conditional or contingent.

Appointments limited as to time.

Where a time is limited when the person appointed executor is to begin, or when he shall cease to be executor, and the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the Court may grant administration with the will annexed until there be

(*d*) See also *Ashton*, [1892] P. 83. (*e*) *Peel* (1870), 2 P. & D. 46.

(*f*) *Leese* (1862), 2 S. & T. 442; *Budd* (1862), 3 S. & T. 196; *Geaves* v. *Price* (1862), 3 S. & T. 71; *Nickalls* (1865), 4 S. & T. 40; *Morgan* (1867), 1 P. & D. 323; *Strahan*, [1907] 2 Ir. R. 484. *Secus*, where it appears to be the intention of the testator to revoke the appointment of executors contained in the first paper, and to substitute for them the executors named in the second paper: *Lowe* (1864), 3 S. & T. 478; *Baily* (1869), 1 P. & D. 628. And see *Henfrey* v. *Henfrey* (1842), 4 Moo. P. C. 29; *Howard* (1869), 1 P. & D. 636; *Cottrell* v. *Cottrell* (1872), 2 P. & D. 397; *Griffith* (1872), 2 P. & D. 457; *vide ante*, p. 142.

(*g*) See further on this subject Swinb., Part IV, ss. 5—16; Godolph., Part I, cc. 13, 14, Part II, c. 2; Wms. on Exors. (11th ed.), pp. 169 *et seq.*

an executor, or a cessate administration after the executorship is ended (*h*).

Appointments limited as to place.

A testator may appoint different persons for the representation and distribution of his property in different places (*i*). Thus, where a testator appointed certain persons "executors in Portugal," and others, "executors in England," it was held that the persons appointed executors "in Portugal" (*i.e.*, for Portugal) were not entitled to probate in England (*k*).

Appointments limited as to purpose or subject-matter.

A testator may appoint an executor for a particular purpose: *e.g.*, for the purpose of administering the estate of another person, whose sole surviving executor the testator himself was; or for the purpose of carrying into effect the provisions of a particular codicil; and in such a case probate limited for such purpose is granted to him.

Again, the power of the executor may be limited as to the subject-matter upon which it is to be exercised, as where a person is made executor for a particular part of the testator's property alone; and in such a case probate limited to that part of the estate will be granted to him (*l*).

In *In the Goods of Wakeham* (*m*), a testator by his will gave certain specific legacies, but did not dispose of the residue of his personal estate. He appointed his daughter executrix for all property "not named in the will." The Court refused to grant probate of the will to the daughter as executrix, since she was precluded from dealing with the property which passed under the will.

The same will may contain the appointment of one executor for general, and of another for limited purposes (*n*). In such a case the general executor is entitled to probate in respect of all the estate, save and except the property which vests in the limited executor; while the limited executor is granted probate limited to the purposes prescribed by the will (*o*).

Special executors as respects settled land.

A testator may appoint, and in default of express appointment, is deemed to have appointed, as his special executors in regard to settled land, the persons who at the time of his death are the trustees of the settlement, and probate may be granted to such trustees limited to the settled land. He may appoint

(*h*) Swinb., Part IV, s. 17, pl. 2; Wms. on Exors. (11th ed.), pp. 169, 170. See *Lighton* (1828), 1 Hagg. 235; *Johnson* (1858), 1 S. & T. 17, *ante*, p. 215; *Bond* v. *Faikney* (1757), 2 Lee, 371. *Vide post*, p. 244.

(*i*) *Spratt* v. *Harris* (1833), 4 Hagg., at p. 408.

(*k*) *Velho* v. *Leite* (1864), 3 S. & T. 456; *Wallich* (1864), 3 S. & T. 423. See *Pulman* (1863), 3 S. & T. 269; and the cases cited *ante*, p. 11, note (*p*).

(*l*) *Davies* v. *The Queen's Proctor* (1851), 2 Rob. 413; but see *Rose* v. *Bartlett* (1635), Cro. Car. 293, where an executrix "of all my cattle, corn, and movable goods," was held to be executrix for the whole estate. See Wms. on Exors. (11th ed.), p. 171, citing Dyer, 4 a; Wentw. Off. Ex. 29 (14th ed.); Godolph., Part II, c. 3, ss. 2, 3.

(*m*) (1872), 2 P. & D. 395.

(*n*) *Lynch* v. *Bellew* (1820), 3 Phill. 424.

(*o*) *Vide post*, p. 242.

other persons, either with or without such trustees, to be his general executors in regard to his other property and assets (*p*).

The appointment of an executor may be subject to a condition precedent, as where a testator appoints A to be his executor if he give security to perform the will (*q*), or if he prove the will within three calendar months after the testator's death (*r*), or repay to the testator's estate a debt owed by him to the testator (*s*). And probate will not be granted to the executor unless and until the condition precedent is fulfilled (*s*).

The appointment of an executor may be conditional: condition precedent,

But where the condition is not a condition precedent, but a condition subsequent intended to abridge the power of the executor if he perform it not, the person named executor is executor presently (*t*), though the executorship may be determined by a breach of the condition (*u*).

condition subsequent.

Section 4.

HOW MANY MAY BE APPOINTED EXECUTORS.

One person may be appointed sole executor, or divers may be appointed executors together, as many, says Swinburne (*x*) as the testator lists to appoint, so that the number be not infinite. But though the testator may appoint as many executors as he pleases, probate will not be granted to more than four persons in respect of the same property (*y*).

One or many may be appointed; but probate is not granted to more than four.

While there is nothing to prevent probate from being granted to a sole executor, it is provided by section 160, sub-section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*z*), that where there is only one personal representative (*zz*) (not

Probate by sole executor.

(*p*) Administration of Estates Act, 1925, s. 22. See *post*, Part I, Chapter VIII ("Special Personal Representatives in Respect of Settled Land").

(*q*) Godolph., Part II, c. 2, s. 1; Wentw. Off. Ex. 28 (14th ed.); Wms. on Exors. (11th ed.), p. 172.

(*r*) *Wilmot* (1834), 1 Curt. 1; and see *Day* (1850), 7 N. C. 553; *Lane* (1864), 33 L. & P. 185.

(*s*) *Stapleton* v. *Truelock* (1553), 3 Leon. 2.

(*t*) *Alice Francis' Case* (1550), 1 Dyer 4 a, pl. 8 *in margine;* Wentw. Off. Ex. 28 (14th ed.); *Jennings* v. *Gowers* (1589), 1 Leon. 229.

(*u*) Wentw. Off. Ex. 23 (14th ed.); Godolph., Part II, c. 2, s. 1.

(*x*) Swinb., Part IV, s. 20, pl. 1.

(*y*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1, which replaces section 12 of the Administration of Estates Act, 1925, and applies to grants made after the commencement of the Act, *i.e.*, January 1, 1926, whether the testator died before or after that date. Where there are more than four executors who have not renounced and are competent to take probate, power is reserved to the other executors to apply on vacancies occurring: Rule 114, N. C. B. As to the procedure where of several executors, one alone proves the will, see *post*, pp. 243, 244 (double probate).

(*z*) The sub-section replaces section 12, sub-section 2 of the Administration of Estates Act, 1925, and applies to grants made after the commencement of the Act, whether the testator died before or after that date.

(*zz*) "Personal representative" is not defined in the Judicature (Consolida-

being a trust corporation (*a*)), then, during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, the Court may, on the application of any person interested or of the guardian, committee or receiver of any such person, appoint one or more personal representatives in addition to the original personal representative in accordance with probate rules and orders (*b*).

Appointment of additional personal representatives by the Court.

Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being as effectually as if all the persons named as executors had concurred therein (*c*).

Right of proving executors to exercise powers.

Section 5.

IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT HIS APPOINTMENT.

An executor cannot assign his office, for it is a personal trust (*d*). Nevertheless, the interest vested in the executor by the will of the deceased may under certain circumstances be continued and kept alive by the will of the same executor (*e*).

Transmissibility of the office of executor.

Section 7 of the Administration of Estates Act, 1925, which replaces the statute 25 Edw. 3, st. 5, c. 5 (*f*) as modified by section 16 of the Court of Probate Act, 1858 (*g*), and applies only to deaths occurring after the commencement of the Act (*h*), provides as follows :—

Executor of executor represents original testator.

(1) An executor of a sole or last surviving executor of a testator is the executor of that testator.

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tion) Act, 1925, but in the Administration of Estates Act, 1925, from which the sub-section is taken, the expression means the executor, original or by representation, or administrator for the time being of a deceased person (section 55, sub-section 1 (xi)). It seems, therefore, that the power of the Court to appoint an additional representative extends to a case where probate has been granted to a sole executor, though a grant of probate and administration with the will annexed in respect of the same property would be a great departure from the practice hitherto.

(*a*) For the definition of a "trust corporation," *vide ante*, p. 206.

(*b*) See Rule 115, N. C. B.

(*c*) Administration of Estates Act, 1925, s. 8. The section applies whether the testator died before or after the commencement of the Act : *ibid.*, sub-s. 2. As to the necessity for all the proving executors to join in a conveyance of real estate, see section 2, sub-section 2 of the Act, and *vide ante*, p. 16.

(*d*) Vaugh. 182.

(*e*) 2 Black. Comm. 506.

(*f*) "Executors of executors shall have the same rights and duties as the first executors" : now repealed by the Administration of Estates Act, 1925, Second Schedule, so far as it applies to deaths occurring after the commencement of the Act : section 56.

(*g*) Similarly repealed : Administration of Estates Act, 1925, s. 56, and Second Schedule.

(*h*) *Ibid.*, s. 54.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by—

(a) an intestacy; or

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator—

(a) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor.

These provisions are in great part merely declaratory of the law existing at the commencement of the Act, and as this will still apply in the case of deaths occurring before the commencement of the Act, and may be useful in construing the provisions of the statute, the following statement of the law then existing, which must be read subject to the provisions of the Act, where they apply, is here retained.

The executor of a sole, or sole surviving executor, represents the first testator,

1. If a sole executor, or the survivor of several executors, having proved the will, dies without having completely administered the estate, his executor, by the mere act of proving his will, becomes the legal personal representative of the original testator (*i*).

The executor of a sole executor is to all intents and purposes the executor and representative of the original testator. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence (*k*). Unless an executor has proved

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(*i*) 2 Black. Comm. 506; stat. 25 Edw. 3, st. 5, c. 5, now repealed, and replaced by section 7 of the Administration of Estates Act, 1925, *vide supra*, p. 220. See Wms. on Exors. (11th ed.), p. 174, citing Com. Dig. Admin. G, B 6; Touchstone, 464; Wentw. Off. Exor. 461 (14th ed.).

(*k*) 2 Black. Comm. 506; *Wankford* v. *Wankford* (1700), 3 Salk. 164.

provided the first executor has proved the will of the original testator.

the will (*l*), he cannot transmit the executorship. Therefore, if the first executor dies in the lifetime of the testator, or without having proved the will, his executorship is wholly determined, and administration with the will annexed must be granted (*m*).

His title, how evidenced.

Whether he can take administration with the will annexed.

An executor, upon taking out probate of the will of an executor, becomes *ipso facto* the executor of the will of the first testator (*n*); his title as such is evidenced by the existence and production of each independent probate; he cannot be compelled, and it is doubtful whether he can be allowed, to take an administration *de bonis non* of the first testator (*o*).

Transmission of executorship through *feme covert* executrix, provided probate of her will is not limited.

A married woman, who is executrix, may continue the claim of representation by appointing her own executor. The rule is that a *limited* probate taken out of the will of a *feme covert*, will not continue the claim of representation under the general probate of the will of the original testator (*p*). But the practice of granting limited probate of the wills of married women has, since the Married Women's Property Act, 1882, been altered, and probate in the general form is now granted (*q*).

If there are several executors, no interest is transmissible except through the survivor of the proving executors.

Where there are more executors than one, the executorship can be transmitted through *the survivor of the acting executors* alone.

Thus if A and B are executors, and both actually prove the will, on the death of A no interest in the executorship is transmissible to his executor, but the whole representation survives to B. On the death of B—the survivor of the acting executors—the executorship is transmitted to B's executor (*r*).

(*l*) The will must be proved in England: see *Gaynor* (1869), 1 P. & D. 723, and cases cited.

(*m*) *Day* v. *Chatfield* (1683), 1 Vern. 200; *Wankford* v. *Wankford* (1700), 1 Salk. 303; *S. C.*, 3 Salk. 164. And see *Anon.*, 3 Salk. 21; *Pullen* v. *Sarjeant* (1684), 2 Ch. Rep. 300.

(*n*) *Perry* (1840), 2 Curt. 655. He is not permitted to renounce probate of the first will and take probate of the second: *ibid.*; and *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25; *vide post*, p. 226.

(*o*) Tristram & Coote (16th ed.), p. 72, n., citing *Dawkins* v. *Eyton*, Dr. Cottrell's M.S. cases. And see *Noddings* (1860), 2 S. & T. 15; *Tucker* (1860), 2 S. & T. 123; *Richards* (1866), 1 P. & D., at p. 158.

(*p*) *Bayne* (1858), 1 S. & T. 132. The office is transmitted when the *original* probate was limited: see *Beer* (1851), 2 Rob. 349. The chain is broken if an executor is appointed for life only, or if an executrix is appointed during widowhood and remarries: see *Bond* v. *Faikney* (1757), 2 Lee, 371.

(*q*) *Price* (1887), 12 P. D. 137. *Vide ante*, p. 80. Under the old practice the will of a married woman, made under a power, and appointing executors, did not continue the chain of representation from a former will, of which the married woman was executrix; but a *feme covert* might make a will for the express purpose of transmitting the executorship: see *Hughes* (1860), 4 S. & T. 209; *Bayne* (1858), 1 S. & T. 132; *Martin* (1862), 3 S. & T. 1; *Richards* (1866), 1 P. & D. 156; *Bridger* (1878), 4 P. D. 77; *Tugman* v. *Hopkins* (1842), 4 M. & G., at p. 400; but see *Birkett* v. *Vandercom* (1831), 3 Hagg. 750; *Barr* v. *Carter* (1797), 2 Cox, 429.

(*r*) If B dies intestate, the executor of A shall not be executor of the

Effect of renunciation by some of several executors.

Before 1858.

The law was formerly the same where there were several executors and one alone proved the will, and the rest renounced. In such a case, upon the death of him who proved the will, no interest was transmitted to his executor, if any of those who had renounced were surviving (*s*).

After 1858.

But the law in this respect was altered by the Court of Probate Act, 1857, s. 79, and by the Court of Probate Act, 1858, s. 16 (*t*), replaced, in cases where the death occurred after January 1, 1926, by the Administration of Estates Act, 1925, ss. 5 and 7; and now where an executor who has renounced probate survives his acting co-executor, the representation will devolve as if his name had never appeared in the will, and the executor, if any, of the acting executor will represent the original testator. The law is the same in cases where an executor to whom power has been reserved survives his acting co-executor, and does not appear to a citation to accept or refuse probate (*u*); and where a non-acting executor who has never renounced probate survives an acting executor but dies without having taken probate of the will (*x*).

Where non-proving executors renounce, or survive proving executor and fail to appear to citation, or die without taking a grant.

Administrator of executor.

2. The administrator (*y*) of an executor cannot represent the original testator (*z*).

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original testator, for the executorship wholly and solely vested in B by the survivorship; and so administration *de bonis non* must be granted: *Smith* (1842), 3 Curt. 31. See Wms. on Exors. (11th ed.), p. 176, citing Wentw. Off. Exors. 215 (14th ed.).

(*s*) Wms. on Exors. (11th ed.), p. 176.

(*t*) *Vide post*, p. 229.

(*u*) *Noddings* (1860), 2 S. & T. 15; and see Errata et Corrigenda, 2 S. & T., facing p. 1; *Reid*, [1896] P. 129. See Court of Probate Act, 1858, s. 16, and Administration of Estates Act, 1925, s. 5, *post*, p. 229.

(*x*) *Lorimer* (1862), 2 S. & T. 471. See Court of Probate Act, 1858, s. 16, and Administration of Estates Act, 1925, s. 5, *post*, p. 229.

(*y*) *I.e.*, an administrator appointed on intestacy or with the will annexed. It was formerly held that the administrator *durante minore ætate* of the executor of an executor is the representative of the first testator, for such an administrator is *loco executoris*: Wms. on Exors. (11th ed.), p. 175, note (*e*), citing *Anon.* (1675), 1 Freem. 288; *contra*, *Limner* v. *Every* (1595), Cro. Eliz. 211, cit. Bac. Abr. Exors., B. 1; but see Mr. Smirke's note in his edition of Freeman (1 Freem. 288). But by section 165 of the Judicature (Consolidation) Act, 1925, it is provided that the appointment of an infant as executor shall not operate to constitute him a personal representative for any purpose unless and until probate is granted to him under the section, *i.e.*, on his attaining twenty-one. It is clear that the infant executor of an executor will represent the original testator if and when, on attaining twenty-one, he proves the will of his immediate testator, for by section 7 of the Administration of Estates Act, 1925, the chain of representation is not broken by a temporary grant of administration if probate is subsequently granted, but having regard to the provisions of section 165 of the Judicature (Consolidation) Act, 1925, it would seem that during his minority, his guardian, who obtains a grant of administration, will not represent the original testator. It was also held that if an administration *cum testamento annexo* was granted to the *attorney* of an executor, for his use and benefit, it was the same thing as if the executor had actually proved the will himself, and that

(*z*) See note (*z*), p. 223.

The administrator of an executor does not represent the original testator.

For the administrator of an executor has clearly no privity or relation to the original testator, being only commissioned to administer the effects of the executor and not of the original testator (*a*).

Office transmitted through several successive executors,

An executorship may be transmitted through several successive executors, each in turn, upon proving the will of his own immediate testator, becoming the representative of every preceding testator (*b*).

so long as the course of representation is not broken by any one administration.

But whenever the course of representation from executor to executor is interrupted by any one administration (*c*), it is necessary for the Court to commit administration afresh, and to appoint an administrator of the goods of the original testator not administered by the former executor (*d*).

SECTION 6.

THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

SUB-SECTION 1.—*When and how an Executor can Renounce.*

An executor, at any time after the death of the testator, may renounce probate and execution of the will.

An executor, being a private officer of trust named by the testator, and not by the law, may refuse his office. He cannot be compelled to accept the executorship, but he may at any

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therefore a grant to the attorney of an executor did not break the chain of representation: *Bayard* (1849), 1 Rob. 768; *Murguia* (1884), 9 P. D. 236. And in *Frengley*, [1915] 2 Ir. R. 1, it was held that a grant for the use and benefit of an executor during his incapacity is equivalent to a grant of probate to him, and that, should such executor survive his co-executor, the executor of the latter would not represent the original testator. But section 7 of the Administration of Estates Act, 1925, provides that the chain of representation is broken, *inter alia*, by the failure to obtain probate of a will, and though the section contains the proviso that the chain of representation is not broken by a temporary administration, this is qualified by the words "if probate is subsequently granted." It would seem that in cases to which the section applies, a grant of temporary administration for the use and benefit of the executor will break the chain of representation, unless probate of the will is subsequently granted.

(*z*) The executor of A's administrator is not the representative of A, for the administrator of A is merely the officer of the Court of Probate, prescribed to him by Act of Parliament or by the practice of the Court, in whom the deceased has reposed no trust at all; and therefore upon the death of that officer it results back to the Court to appoint another: see 2 Black. Comm. 506.

(*a*) 2 Black. Comm. 506.

(*b*) See Wms. on Exors. (11th ed.), p. 174; Administration of Estates Act, 1925, s. 7, sub-s. 2.

(*c*) The chain of representation is not broken by a temporary grant of administration if probate is subsequently granted: Administration of Estates Act, 1925, s. 7, sub-s. 3; *vide supra*, note (*y*).

(*d*) 2 Black. Comm. 506. The chain of executorship is broken if, of two executors who have died after taking probate, it is impossible to show which was the survivor: *Richards* v. *All Persons* (1845), 4 N. C. Suppl. viii. But, in the case of deaths occurring after January 1, 1926, the presumption as to survivorship contained in section 184 of the Law of Property Act, 1925, might solve the difficulty.

time after the death of the testator renounce probate and execution of the will (*e*).

An executor cannot indefinitely delay his decision to accept or refuse the executorship. At any time (*f*) after the death of the testator he may, at the instance of some interested person, be cited to accept or refuse probate of the will (*g*); and should he fail to appear to such a citation he will be treated as if he had renounced (*h*).

And if he fails to appear to a citation to accept or refuse probate, is taken to have renounced.

The right of an executor to refuse the executorship is determined by acts which amount to an administration. For if an executor has once administered, he cannot afterwards refuse to prove the will; because by administering he has taken upon himself the burden and acquired the responsibility of an executor, and is therefore considered to have made his choice (*i*).

An executor who has intermeddled may be compelled to prove the will.

An executor who has intermeddled may be compelled to accept the executorship and to prove the will (*k*). And if after an executor has renounced, and administration has been committed to another, it appears that the executor had administered before renunciation, the letters of administration may be revoked, and the executor compelled to prove the will (*l*).

And if administration has been committed to another, it may be revoked.

(*e*) Bac. Abr. Exors. E. 9; *Douglas* v. *Forrest* (1828), 4 Bing., at p. 704. He may refuse, even though in the testator's lifetime he had agreed to accept the office: *Doyle* v. *Blake* (1804), 2 Sch. & Lef., at p. 239.

(*f*) "The time," says Swinburne, "is left to the discretion of the ordinary, who useth, at his pleasure, and when he will, not only within the year, but within a month or two, to cite him that is named executor to accept or refuse the executorship": Swinb., Part VI, s. 4, pl. 1.

(*g*) By section 159 of the Judicature (Consolidation) Act, 1925, which replaces 21 Hen. 8, c. 5, s. 6, the High Court has power to summon any person named as executor in a will to prove or renounce probate of the will, and to do such other things concerning the will as were customary before the Act.

(*h*) Court of Probate Act, 1858, s. 16; replaced, in respect of deaths after January 1, 1926, by the Administration of Estates Act, 1925, s. 5; see *post*, p. 229. If he appear to the citation, and pray time to consider whether he will act or not, it is said that the Court might grant letters *ad colligendum* in the interim: Swinb., Part VI, s. 2, pl. 7. But this practice seems now obsolete. If he appear, and refuse to act, the Court will grant administration with the will annexed to another: Swinb., Part VI, s. 2, pl. 3, 4.

(*i*) Bac. Abr. Exors. (E.) 10; *Haywood* v. *Bridges* (1767), cit. 3 Phill., at p. 579; *Jackson* v. *Whitehead* (1821), 3 Phillim., at p. 579; *Long* v. *Symes* (1832), 3 Hagg., at p. 774.

(*k*) Bac. Abr. Exors. (E.) 9; *vide post*, p. 509, n. If, after having been cited to do so, he fails to obey the citation within the time limited by it, he is subject to process for contempt of Court: *Mordaunt* v. *Clarke* (1868), 1 P. & D. 592; *Lister* (1894), 70 L. T. 812; *Coates* (1898), 78 L. T. 820; but no action will lie for neglect to take out probate: *Re Stevens*, [1897] 1 Ch. 422; [1898] 1 Ch. 162. If he administer, and omit to take out probate within six months after the death of the deceased, or within two months after the termination of any suit or dispute respecting the will, if there be any such which shall not be ended within four months after the death of the testator, he is liable to a penalty of double the amount of the duty chargeable: Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37, as amended by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40.

(*l*) Bac. Abr. Exors. (E.) 9; *Pytt* v. *Fendall* (1754), 1 Lee, 553. But the grant of administration is valid until revoked: Bac. Abr. Exors. (E.) 9;

If one of several executors, after administering, renounces.

Where one of several executors, after intermeddling, executes a renunciation, and probate is granted to his co-executors, his renunciation is invalid, and he may take probate of the will of the deceased (*m*).

Executor of executor cannot refuse if he once administer.

If the executor of an executor accepts the executorship of his immediate testator, he cannot renounce the executorship of the original testator; and if he intermeddles in the administration of the estate of the original testator, he cannot refuse to administer the estate of his immediate testator (*n*).

What acts amount to administration.

In considering what acts will amount to an administration so as to render an executor compellable to take probate, two general rules may be laid down. First, that whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will amount to an administration. Secondly, that whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship (*o*).

Taking possession of the testator's goods, unless the executor claim a property in them himself.

Hence, if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, this is an administration (*p*). But if he seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor (*q*).

Receiving debts and giving acquittance.

If an executor receives debts due to the testator, and especially if he gives acquittances for such debts (*r*), this amounts to an election of the executorship; so, if he releases a debt due to the testator (*s*).

Doyle v. *Blake* (1804), 2 Sch. & Lef., at p. 237. And it seems that the Court *may* accept an executor's refusal, although he has administered: Bac. Abr. Exors. (E.) 9; Wms. on Exors. (11th ed.), pp. 193, 194; *Doyle* v. *Blake*, *ubi supra*; and see *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

(*m*) *Badenach* (1864), 3 S. & T. 465.

(*n*) *Perry* (1840), 2 Curt. 655; *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25.

(*o*) Bac. Abr. Exors. (E.) 10; Ro. Abr. 917; *Long* v. *Symes* (1832), 3 Hagg. 771; *Rayner* v. *Green* (1839), 2 Curt. 248. An executor *de son tort* is a person who without any authority from the deceased or the Court, does such acts as belong to the office of an executor or administrator: Bac. Abr. Exors. (B.) 3. As to what acts shall constitute a man executor *de son tort*, see Bac. Abr. Exors. (B.) 3; Swinb., Part VI, s. 22; Wentw. Off. Exors., Chapter XIV; Godolph., Part II, c. 8; Wms. on Exors., Part I, Book III, Chapter V.

(*p*) Bac. Abr. Exors. (E.) 10. If he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration: Bac. Abr. Exors. (E.) 10.

(*q*) Bac. Abr. Exors. (E.) 10.

(*r*) *Pytt* v. *Fendall* (1754), 1 Lee, 553; *Coates* (1898), 78 L. T. 820.

(*s*) Bac. Abr. Exors. (E.) 10. If he takes possession of a legacy devised to him, this amounts to an administration, for a devisee cannot take his legacy without the assent of the executor: Rolle's Abridgment, 917.

Where two persons who had been named executors inserted in the newspapers an advertisement requesting all who had claims against the testator's estate to send in their accounts, and to pay all money due to the said estate to A and B (naming themselves), "his executors in trust," it was held that their conduct not merely showed an intention to take upon themselves the executorship, but was an absolute acceptance of the office (*t*). And where one of several executors joined in the execution of a power of attorney (wherein he was described as executor), whereby another was empowered to receive part of the testator's estate, that was held to be an act of administration which rendered him chargeable as executor (*u*).

Inserting advertisements for claims and accounts.

Joining in the execution of a power of attorney.

A letter written by one of several executors, stating that he and the others were executors, was held to afford sufficient evidence that he had acted as executor (*x*).

Writing a letter stating that he is executor.

An executor may, it should seem, pay the deceased's funeral expenses, or discharge the deceased's debts and legacies with his own money, without running the hazard of losing his right to renounce. These and other acts of necessity, such as feeding the deceased's cattle and the like, do not bind the executor; for they are to be esteemed offices of kindness and charity, and not such as shall involve him in the executorship (*y*).

Secus, paying deceased's funeral expenses with his own money, or doing offices of kindness and charity;

An executor who has not proved is not to be considered as acting, by assisting a co-executor who has proved in writing letters to collect debts, or even by writing directly to a debtor of the testator, and requiring payment (*z*). For an act which would otherwise amount to an intermeddling in the administration will not be so considered if done by an executor as agent for his co-executor, who has proved the will (*a*).

assisting co-executor who has proved; or acting as agent for his co-executor.

It is said that if one who is both trustee and executor acts under the will, and has not renounced, it will be presumed that he has acted in his superior capacity, that of executor (*b*).

Where executor and trustee intermeddles.

Taking the usual oath of office as executor is not an intermeddling in the estate, and will not preclude the executor from renouncing (*c*). An executor who has taken the oath of office, and entered an appearance in a suit in which the validity of the

Taking the oath of office as executor, or entering an appearance in a suit.

(*t*) *Long* v. *Symes* (1832), 3 Hagg. 771. See *Coates* (1898), 78 L. T. 820

(*u*) *Harisron* v. *Graham* (1700), 3 Hill's MSS. 239, quoted 1 P. Wms. 243 n.

(*x*) *Vickers* v. *Bell* (1864), 10 Jur. (N.S.) 376; and see *Re Stevens*, [1897] 1 Ch. 422; [1898] 1 Ch. 162.

(*y*) Bac. Abr. Exors. (B.) 3; *Long* v. *Symes* (1832), 3 Hagg., at p. 774.

(*z*) *Orr* v. *Newton* (1791), 2 Cox, 274.

(*a*) *Rayner* v. *Green* (1839), 2 Curt. 248; *Stacey* v. *Elph* (1833), 1 My. & K. 195. And see *Re Stevens*, [1898] 1 Ch. 162; *Harrison* v. *Graham*, *ubi supra*.

(*b*) *Pytt* v. *Fendall* (1754), 1 Lee, at p. 557.

(*c*) *McDonnell* v. *Prendergast* (1830), 3 Hagg., at p. 216. The refusal of the oath amounts to a refusal of the office of executor: *R.* v. *Raines* (1699), 1 Ld. Raym., at p. 363.

will is called in question, may yet be allowed to withdraw from the suit, and to renounce probate, provided he has not intermeddled with the effects (*d*). But an executor cannot renounce after probate has actually been granted to him (*e*).

Partial renunciation not allowed:

A person cannot accept one part of the duties of an executor and refuse the rest (*f*). Accordingly, as has been seen, the executor of an executor who has accepted the executorship of the latter testator cannot renounce the executorship of the former (*g*).

except as regards settled land.

An exception to the rule that partial renunciation is not allowed is introduced by section 23 of the Administration of Estates Act, 1925, which provides that where settled land becomes vested in a personal representative, not being a trustee of the settlement, upon trust to convey the land to or assent to the vesting thereof in the tenant for life or statutory owner in order to give effect to a settlement created before the death of the deceased and not by his will, or would, on the grant of representation to him, have become so vested, such representative may—(a) before representation has been granted, renounce his office in regard only to such settled land without renouncing it in regard to other property; (b) after representation has been granted, apply to the Court for revocation of the grant in regard to the settled land without applying in regard to other property (*h*).

Mode of renunciation.

An executor cannot refuse by any act or declaration other than a formal renunciation in writing signed by him, and entered and recorded in the Court (*i*).

An informal refusal by letter to take the office of executor is insufficient. Until the refusal is recorded in Court, no person can take the administration (*k*). Nor will the Court grant administration to another on the consent of the executor. It can only do so on the executor's renunciation of probate, or

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(*d*) *Jackson* v. *Whitehead* (1821), 3 Phill. 577. See *Panchard* v. *Weger* (1811), 1 Phill. 212; *Meek* v. *Curtis* (1827), 1 Hagg. 129. The early case, *Anon.* (1671), 1 Ventr. 335, where it was said "an executor having taken the oath could not be admitted to refuse," can no longer be regarded as an authority for that proposition: *Jackson* v. *Whitehead*, *ubi supra*.

(*e*) *Veiga* (1862), 3 S. & T., at p. 15.

(*f*) *Brooke* v. *Haymes* (1868), L. R. 6 Eq., at p. 30. See *Paule* v. *Moodie* (1620), 2 Roll. Rep. 132; 11 Vin. Abr. 139, pl. 10.

(*g*) *Ante*, p. 226.

(*h*) See *post*, Part I, Chapter VIII: "Special Personal Representatives in Respect of Settled Land."

(*i*) In practice the renunciation is entered in the Probate Registry: *vide post*, p. 495; it need not be under seal: *Boyle* (1864), 3 S. & T. 426; and may be made by an attorney, where the power of attorney expressly authorises him to renounce on behalf of the executor: *Rosser* (1864), 3 S. & T. 490.

(*k*) *Long* v. *Symes* (1832), 3 Hagg., at p. 776. Where the executors wrote a letter to the Ordinary signifying that they could not attend the executorship, and desiring him to commit the administration, that, being recorded, was holden a sufficient refusal: *Goodier's Case* (1590), 1 Leon. 135.

after a citation has been served upon him, and he has failed to appear thereto within the prescribed time (*l*).

A renunciation, until it is filed and recorded, is not final, and may be withdrawn (*m*).

It is not the practice to receive the renunciation of a party unless it be accompanied by the original will of the deceased to which the renunciation relates (*n*).

SUB-SECTION 2.—*Consequences of an Executor's Renunciation—Retractation.*

An executor who renounces is to be treated as if he had never been appointed executor.

Section 5 of the Administration of Estates Act, 1925, which replaces, where the death occurred after the commencement of the Act (*o*), the similar provisions of section 79 of the Court of Probate Act, 1857, and of section 16 of the Court of Probate Act, 1858, provides as follows: Where a person appointed executor by a will—

(i) survives the testator but dies without having taken out probate of the will; or

(ii) is cited to take out probate of the will and does not appear to the citation (*p*); or

(iii) renounces probate of the will;

his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor.

Retractation of renunciation by executor: before the Court of Probate Act, 1857;

Before the Court of Probate Act, 1857, where a sole executor or all the executors of a will renounced, and administration had been granted, the renunciation could not be retracted, for the reason that the representation had been suffered to go into another channel, and the executors could not be allowed to come in and alter the state of things to which their conduct had given rise (*q*). But an executor who had renounced might retract at any time before administration had passed the seal (*r*).

Where some executors proved and others renounced, those

(*l*) *Garrard* v. *Garrard* (1871), 2 P. & D. 238.

(*m*) *Morant* (1874), 3 P. & D. 151.

(*n*) *Fenton* (1825), 3 Add. 35. This practice may be departed from in a proper case: *ibid.*

(*o*) Administration of Estates Act, 1925, ss. 54, 56, and Second Schedule.

(*p*) It was held that under the corresponding provisions of section 16 of the Court of Probate Act, 1858, an executor who has been cited to take probate of a missing will, and has not appeared to such citation, is barred from taking probate of the original will when found: *Davis* v. *Davis* (1859), 4 S. & T. 208. There is a distinction between a citation to propound and prove a will in solemn form of law, and a citation to take probate. The latter form of citation is that referred to by the statutes: *Bewsher* v. *Williams* (1861), 3 S. & T. 62. *Vide post*, p. 545.

(*q*) See *Stiles*, [1898] P., at p. 14.

(*r*) *McDonnell* v. *Prendergast* (1830), 3 Hagg. 212.

who had renounced were allowed to retract at any time before an actual grant of administration *de bonis non*, but not afterwards. For until then they could be let in without altering the devolution of the representation, seeing that they would only occupy the position which they might originally have occupied (*s*).

since the Court of Probate Act, 1857.

It was at one time suggested that the words of section 79 of the Court of Probate Act, 1857 (which are now replaced by similar provisions in section 5 of the Administration of Estates Act, 1925), prevented retractation by an executor under any circumstances (*t*), but it was derided that there was nothing in that section to prevent the Court from allowing a retractation according to the old practice in a case fit for it (*u*); though such a retraction would not be permitted unless the executor could show that it would be for the benefit of the estate or of those interested under the deceased's will (*x*). If an executor has renounced after intermeddling in the effects, and subsequently desires to take probate, his right course is to apply to the Court for a declaration that his renunciation was invalid, and not for leave to retract (*y*).

Effect of withdrawal of renunciation.

Section 6 of the Administration of Estates Act, 1925, which applies whether the testator died before or after the commencement of the Act (*z*), provides that where an executor who has renounced probate has been permitted, before or after the commencement of the Act, to withdraw the renunciation and prove the will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be endorsed on the original probate or letters of administration (*a*).

Whether a person who has renounced probate as executor can take a representation to the same deceased in another capacity.

By the former Rule 50, N. C. B., it was provided that no person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character. Under this rule, a renunciation of probate by an executor was therefore a waiver of his right to represent the deceased in any other capacity. But this rule,

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(*s*) See *Stiles*, [1898] P., at p. 14.
(*t*) By counsel in *Badenach* (1864), 3 S. & T., at p. 466.
(*u*) *Stiles*, [1898] P. 12, affirming the *dictum* of Lord Penzance to that effect in *Badenach* (1864), 3 S. & T., at p. 466. See *Whitham* (1866), 1 P. & D. 503.
(*x*) *Gill* (1873), 3 P. & D. 113.
(*y*) *Badenach* (1864), 3 S. & T. 465.
(*z*) Administration of Estates Act, s. 6, sub-s. 2.
(*a*) See Rule 112, N. C. B., and *post*, p. 499.

though intended for the general guidance of the business of the Registry, was capable of modification by the Court if sufficient reason could be shown for a departure from it (*b*). But the amended Rule 50, N. C. B., which came into operation on January 1, 1926, runs as follows: "Except where otherwise provided in these Rules, no person who renounces administration (with or without the will) of the estate of a deceased person in one character is to be allowed to take representation to the same deceased in another character." No reference is made in the amended rule to the case of an executor who renounces probate, and there is nothing in the rule to prevent such an executor from being granted administration with the will annexed in some other capacity.

(*b*) *Loftus* (1864), 3 S. & T. 307. See *Richardson* (1859), 1 S. & T. 515; *Morrison* (1860), 2 S. & T. 129; *Wheelwright* (1878), 3 P. D. 71; *Rayner* (1908), 52 Sol. Jo. 226; and see *post*, p. 497. The rule did not prevent an executor, who had renounced, from taking administration with the will annexed as the attorney of the other executors: *Russell* (1869), 1 P. & D. 634; and see *Toscani*, [1912] P. 1, where an executor who had renounced was permitted to take administration (will) *de bonis non* as creditor.

CHAPTER VIII.

SPECIAL PERSONAL REPRESENTATIVES IN RESPECT OF SETTLED LAND.

Special provisions as to settled land.

Sections 22 to 24 of the Administration of Estates Act, 1925, contain, in relation to persons dying after the commencement of that Act (*a*), *i.e.*, January 1, 1926 (*b*), provisions with regard to the appointment of special or additional personal representatives in respect of settled land, *i.e.*, land vested in the deceased which was settled previously to his death and not by his will (*c*). That these provisions should be fully understood, it will perhaps be well to state shortly the purpose which they serve and the circumstances which render them necessary (*d*).

Settlements of land after Jan. 1, 1926.

Under the Law of Property Act, 1925, and the Settled Land Act, 1925, settlements of land can be effected in two ways only : (1) By vesting land in trustees upon trust for sale, with power to postpone the sale, the rents and profits being until sale held in trust for the persons beneficially entitled, and the proceeds of sale being settled in the way usual before the Acts (*e*); (2) By creating trusts of the land itself *in specie* for its enjoyment by persons in succession, corresponding to the uses customary in strict settlements before the passing of the Acts.

Vesting of settled land : settlements after 1925 ;

If the settlement is in the form last mentioned, the Settled Land Act, 1925, makes it compulsory that the fee simple or term which is the subject of the settlement (*f*) shall be vested

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(*a*) See section 54 of the Administration of Estates Act, 1925.

(*b*) *Ibid.*, s. 58, sub-s. 2.

(*c*) Administration of Estates Act, 1925, s. 22, sub-s. 1.

(*d*) The following summary of the effect of the new legislation is based on Underhill, The New Conveyancing, pp. 18—22; and on the " Law Notes " Guide to the New Property Statutes.

(*e*) With a trust for sale, the new legislation is concerned in a minor degree, though the Law of Property Act, 1925, ss. 23—33, contains provisions facilitating the exercise of the trust for sale. It must be borne in mind that the Settled Land Act, 1925, does not apply to land held upon trust for sale : Settled Land Act, 1925, s. 1, sub-s. 7, and section 3, as amended by the Law of Property (Amendment) Act, 1926.

(*f*) Section 1 of the Settled Land Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, Schedule, defines what constitutes a settlement. The Act applies to nearly every case where the beneficial interest in land is limited to persons in succession. As to what is settled land, and as to the duration of settlements, see the Settled Land Act, 1925, ss. 2 and 3. The sections are printed in Appendix I, *post*, pp. 737 *et seq.*

from time to time, by deeds or assents other than the settlement itself, in the person, called the "estate owner," who under the settlement has the powers conferred on tenants for life and other limited owners by the Act (*g*).

Settlements existing on Jan. 1, 1926.

And by the Second Schedule to the Act provision is made for the case of settlements existing when the Act came into operation, so that the land may be vested or declared to be vested, by a vesting instrument, in the tenant for life or statutory owner (*h*).

Devolution of settled land on death of life tenant or statutory owner.

The whole fee simple or term of years which is the subject of the settlement being thus vested in the tenant for life of full age or statutory owner, provision has to be made for its devolution on his death (*i*). Accordingly, it is provided, by sections 7 and 8 of the Settled Land Act, 1925, that on the death of a tenant for life or statutory owner in whom the settled land was vested, the fee simple or term of years which is the subject of the settlement is to vest in his personal representatives upon trust (subject to the personal representatives being satisfied that any death duties and costs will be provided for) to convey the settled land by a vesting assent, if it remains settled land (*k*), to the person who under the settlement or by virtue of the Act becomes the tenant for life or statutory owner; or to the person of full age, if any, who has become absolutely entitled under the settlement.

Special personal representatives for settled land.

It has apparently been considered undesirable to cast upon the general personal representatives of a deceased life-tenant or

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(*g*) Settled Land Act, 1925, ss. 4—15. The land is to be conveyed to or vested in the tenant for life or statutory owner for the legal estate the subject of the intended settlement: section 4. As to tenants for life and persons with the powers of tenants for life, see sections 19—29 of the Act. In this description, the Act includes practically all limited owners entitled to an estate in possession in land where there is no trust for sale, *e.g.*, the ordinary tenant for life, a tenant in tail, a tenant in fee simple with a limitation over, but not a mere lessee: sections 19, 20. The Act makes such persons estate owners, vesting the fee simple absolute or the term of years absolute in them, or providing machinery by which it may so be vested. A "statutory owner" (section 117, sub-section 1 (xxvi)) comes into play when the tenant for life, or person having the powers of a tenant for life, is an infant, or where an infant is beneficially entitled to an estate in fee simple or term of years absolute in possession (section 26), or when there are successive owners of land, not settled on trust for sale, and for any reason there is no person who has the powers of a tenant for life: section 23. The "statutory owner" will usually be the trustees of the settlement for the purposes of the Settled Land Act, but may be the personal representative, as where land is devised to an infant (section 26). By the vesting instrument, trustees for the purposes of the Settled Land Act are always to be named: section 5.

(*h*) Settled Land Act, 1925, Second Schedule, para. 1 of which provides that as soon as practicable after the commencement of the Act, the Settled Land Act trustees may, and at the request of the life-tenant shall, execute a vesting deed.

(*i*) Before the Act, the land would have passed automatically on the death of the tenant for life to the remainderman.

(*k*) As to this, see section 3 of the Settled Land Act, 1925.

statutory owner the duties above referred to, which include the duty of ascertaining who is the next person entitled under the settlement. Accordingly, by sections 22 to 24 of the Administration of Estates Act, 1925, and by section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, provisions are made by which, at the option of the deceased tenant for life or statutory owner, or of his general personal representatives, or of the Settled Land Act trustees, or of any person beneficially interested under the settlement, special personal representatives (who are generally to be the same persons as the Settled Land Act trustees) may be appointed in regard only to the settled land.

Special executors as respects settled land.

By section 22 of the Administration of Estates Act, 1925, it is enacted as follows :—

" (1) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof (*l*), and probate may be granted to such trustees specially limited to the settled land.

Probate to trustees of the settlement limited to settled land.

" In this sub-section ' settled land ' means land vested in the testator which was settled previously to his death and not by his will.

" (2) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets."

Administration (with will) to trustees of the settlement.

And by section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, which replaces section 10 of the Administration of Estates Act, 1925, it is provided that in regard to land settled previously to the death of the deceased and not by his will, administration with the will annexed may be granted to the trustees of the settlement (*m*), and such administration may be limited in any way the Court thinks fit; and that where the deceased died wholly intestate as to his estate, administration shall, as regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement, if willing to act (*n*).

Administration on intestacy to trustees of the settlement.

(*l*) By section 55, sub-section 1 (xxiv) of the Administration of Estates Act, 1925, " trustees of the settlement " has the same meaning as in the Settled Land Act, 1925. As to trustees of the settlement for the purposes of the Settled Land Act, 1925, see sections 30—35 of that Act, *post*, pp. 746 *et seq.*

(*m*) " Settled land " and " trustees of the settlement " have the same meaning as in the Settled Land Act, 1925 : Judicature (Consolidation) Act, 1925, s. 175, and *vide supra*, note (*l*).

(*n*) This section only applies in the case of persons dying after the date of the commencement of the Act, *i.e.*, January 1, 1926 : Judicature (Consolidation) Act, 1925, s. 162, sub-s. 2; s. 227, sub-s. 2. Where the deceased died on or after January 1, 1926, and there is land vested in the deceased

The following provisions are contained in section 23 of the Administration of Estates Act, 1925 :—

Provisions where, as respects settled land, representation is not granted to the trustees of the settlement.

" (1) Where settled land (*o*) becomes vested in a personal representative (*p*), not being a trustee of the settlement, upon trust to convey the land to or assent to the vesting thereof in the tenant for life (*q*) or statutory owner (*q*) in order to give effect to a settlement created before the death of the deceased and not by his will (*r*), or would, on the grant of representation to him, have become so vested, such representative may—

Renunciation by general representative as regards settled land.

" (a) before representation has been granted, renounce his office in regard only to such settled land without renouncing it in regard to other property;

Revocation of general grant in regard to settled land.

" (b) after representation has been granted, apply to the Court for revocation of the grant in regard to the settled land without applying in regard to other property.

Appointment of special or additional representative in respect of settled land.

" (2) Whether such renunciation or revocation is made or not, the trustees of the settlement, or any person beneficially interested thereunder, may apply to the High Court for an order appointing a special or additional personal representative in respect of the settled land, and a special or additional personal representative, if and when appointed under the order, shall be in the same position as if representation had originally been granted to him alone in place of the original personal representative, if any, or to him jointly with the original personal representative, as the case may be, limited to the settled land, but without prejudice to the previous acts and dealings, if any, of the personal representative originally constituted or the effect of notices given to such personal representative.

" (3) The Court may make such order as aforesaid subject to such security, if any, being given by or on behalf of the special or additional personal representative, as the Court may

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which was settled previously to his death, the trustees, at the date of the death, of such settled land, if any, must be cleared off by renunciation or citation before a general grant can issue : Rule 118, N. C. B. It is the practice to require that trustees of the settled land (if any) appointed after the date of the death, shall also be cleared off. If the trustees are not cleared off, the grant is made save and except the settled land.

(*o*) " Settled land " has the same meaning as in the Settled Land Act, 1925 : Administration of Estates Act, 1925, s. 55, sub-s. 1 (xxiv); by section 2 of the Settled Land Act, 1925, it is land which is, or is deemed to be, the subject of a settlement; and section 1 of the Act defines what constitutes a settlement, *vide supra*, p. 232, note (*f*).

(*p*) " Personal representative " means the executor, original or by representation, or administrator for the time being of a deceased person : Administration of Estates Act, 1925, s. 55, sub-s. 1 (xi).

(*q*) These terms have the same meaning as in the Settled Land Act, 1925 : Administration of Estates Act, 1925, s. 55, sub-s. 1 (xxiv); see the definition in section 117, sub-section 1 (xxviii) and (xxvi) of the Settled Land Act, 1925, and *vide supra*, p. 233, note (*g*).

(*r*) See sections 7 and 8 of the Settled Land Act, 1925, and *vide supra*, p. 233.

direct, and shall, unless the Court considers that special considerations apply, appoint such persons as may be necessary to secure that the persons to act as representatives in respect of the settled land shall, if willing to act, be the same persons as are the trustees of the settlement, and an office copy of the order when made shall be furnished to the Principal Probate Registry for entry, and a memorandum of the order shall be endorsed on the probate or administration.

" (4) The person applying for the appointment of a special or additional personal representative shall give notice of the application to the Principal Probate Registry in the manner prescribed.

" (5) Rules of Court may be made for prescribing for all matters required for giving effect to the provisions of this section, and in particular—

" (a) for notice of any application being given to the proper officer;

" (b) for production of orders, probates, and administration to the registry;

" (c) for the endorsement on a probate or administration of a memorandum of an order, subject or not to any exceptions;

" (d) for the manner in which the costs are to be borne;

" (e) for protecting purchasers and trustees and other persons in a fiduciary position, dealing in good faith with or giving notices to a personal representative before notice of any order has been endorsed on the probate or administration or a pending action has been registered in respect of the proceedings."

Power for special representatives to dispose of settled land.

Section 24.—" (1) The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property and assets of the deceased without the concurrence of the special personal representatives.

" (2) In this section the expression ' special personal representatives ' means the representatives appointed to act for the purposes of settled land and includes any original personal representative who is to act with an additional personal representative for those purposes."

Trustees of settled land to be cleared off before general grant can be made.

In view of these provisions, Rule 118, N. C. B., provides that in every oath to lead a grant of probate or administration (with or without will annexed) where the deceased died on or after January 1, 1926, the deponent shall swear to the best of his knowledge information and belief whether there is land vested in the deceased which was settled previously to his death and

not by his will (*s*); and the trustees, at the date of death (*t*), of such settled land, if any, shall be cleared off before a general grant shall issue.

A general executor or person entitled to a full grant may take a grant save and except settled land (*u*).

Grant "save and except" settled land.

(*s*) On application, otherwise than by trustees of settled land, for a grant of the whole estate, the names of the trustees of the settlement must be stated in the oath : Direction, December 3, 1925.

(*t*) *Vide supra*, p. 234, note (*n*).

(*u*) Rule 118, N. C. B.

CHAPTER IX.

PROBATE.

SECTION 1.

THE VARIOUS FORMS OF PROBATE.

SUB-SECTION 1.—*Probate in Common Form, and in Solemn Form, or per Testes.*

A testament may be proved in two ways.

A TESTAMENT may be proved in two ways, either in common form, or by form of law; which latter mode is also called the solemn form, and, sometimes, proving *per testes* (*a*).

Proof in common form.

A will is proved in common form where there is no contest about the will, but the executor, without citing the parties interested and in their absence, presents it at the Registry, and upon formal proof of its validity obtains the probate and seal of the Court thereto (*a*).

Proof in solemn form.

A will is proved in solemn form when it is propounded in an action to which the persons interested, as the widow and next-of-kin, are parties, and after the proof examined and fully heard receives the sentence and decree of the Court pronouncing for its validity (*a*).

Difference in effect between probate in common form and probate in solemn form.

The difference in effect between these two forms of probate is, that the executor of a will proved in common form may at any time thereafter be called upon, by those whose interests are adversely affected, to prove the will in solemn form, and if he then shall fail to establish its validity the probate so granted is revoked (*b*). But if the will is proved in solemn form, no person who has been a party or privy to the proceedings can afterwards

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(*a*) Wms. on Exors. (11th ed.), p. 232; Swinb., Part VI, s. 14; Godolph., Part I, c. 20, s. 4.

(*b*) *Vide post*, pp. 513, 547; see Wms. on Exors. (11th ed.), p. 236; Godolph., Part I, c. 20, s. 4; *Hoffman* v. *Norris* (1805), 2 Phill. 230, n.; *Merryweather* v. *Turner* (1844), 3 Curt. 802, 817; *Topping* (1853), 2 Rob. 620. The suggestion by Godolphin, perpetuated in Wms. on Exors. (11th ed.), p. 236, that the lapse of thirty years works a prescription, is discredited by the cases cited above. In *Blake* v. *Knight* (1843), 3 Curt., at p. 553, where the defendant after some years called in probate of a will, and put the executor to proof in solemn form, Sir John Nicholl said that though he was entitled to do so, yet, considering the time at which he had chosen to exercise his right, he was not entitled to any indulgence; he was entitled to have the law strictly administered, but to nothing beyond it.

by any fresh citation put the executor again to proof of the will (*c*).

Effect of laches, and acquiescence in probate in common form, by next-of-kin who afterwards desires to contest the will.

Mere acquiescence on the part of a next-of-kin in an executor taking probate of a will in common form is no bar to his afterwards calling in such probate, and putting the executor to proof of that will *per testes* (*d*). Nor is acquiescence a bar even though accompanied by the receipt of a legacy under the very will afterwards sought to be contested (*e*); but before being permitted to contest the will, the legatee must bring his legacy into Court (*f*). There are circumstances, however, in which long acquiescence accompanied by acts done by the next-of-kin under the will, have been held to amount to such a waiver of his rights as to preclude him from contesting the will, though proved only in common form, if there appears to be no reasonable ground for doubting its genuineness and validity (*g*).

(*c*) *Wytcherley* v. *Andrews* (1871), 2 P. & D. 327; *Young* v. *Holloway*, [1895] P. 87.

(*d*) *Per* Sir John Nicholl in *Bell* v. *Armstrong* (1822), 1 Add. 365, 373; and see *Goddard* v. *Smith* (1873), 3 P. & D. 7, where the executor of a later will entered a caveat against the probate of an earlier will, but later, before it had been warned, he withdrew the caveat and allowed the earlier will to be proved in common form, stating that he did not intend to seek to establish the later will. He afterwards cited the administrator with the earlier will annexed to bring in the grant, and it was held that he was not precluded from continuing a suit to revoke the grant and to determine which was the last will of the deceased. See also *Williams* v. *Evans*, [1911] P. 175, where an executor, who was also next-of-kin of the testator, and took probate in common form of the will, was held not to be debarred from afterwards instituting proceedings to disaffirm the will.

(*e*) *Cox* v. *Spencer* (1796), cit. 1 Add., at p. 374 (where the executor was cited to bring in probate of a will taken eight years before, at the suit of one Cox, whose mother had received an annuity under the will for five of the eight years, and Cox herself had received the annuity for the remaining three years); and see *Gascoyne* v. *Chandler* (1755), 2 Lee, 241 (legatee who renounces administration with the will annexed not barred from contesting the will); *Bell* v. *Armstrong* (1822), 1 Add. 365, 374 (where a citation issued at the instance of the next-of-kin, calling upon the executor to bring in the probate which he had obtained in common form with the perfect cognisance of the next-of-kin, who had accepted a legacy of £500 under the will); *Merryweather* v. *Turner* (1844), 3 Curt. 802, 811.

(*f*) *Bell* v. *Armstrong* (1822), 1 Add. 365, 374; *Cox* v. *Spencer* (1796), cit. 1 Add., at p. 374; *Pyefinch* v. *Palmore*, Prerog. 1767; *Ashby* v. *Hay*, Prerog. 1768; *Legge* v. *Brookman*, Prerog. 1777 : these cases are all referred to in *Bell* v. *Armstrong*, 1 Add., at p. 374. The bringing in of the legacy will be a test of the sincerity of the opposition to the validity of the will, and will be a security to the executor in case of the next-of-kin being condemned in costs : *ibid.*; see accord. *Braham* v. *Burchell* (1826), 3 Add. 243, at pp. 256, 257 (every legatee who puts in suit the validity of a will in this Court must bring into and leave in the registry the amount of the legacy, if paid, to abide the event of that suit). If, however, the legatee is a minor, it seems that he need not bring in his legacy : *Goddard* v. *Norton* (1847), 5 N. C. 76. The principle laid down in these cases has been acted on in recent years, but the cases are unreported.

(*g*) *Hoffman* v. *Norris*, Prerog. 1805, reported 2 Phillim. 230, n., and see 1 Add., at p. 375 (acquiescence totally unaccounted for for nine years in probate in common form. In a suit in Chancery, the next-of-kin taking out the citation had stated that he believed the deceased to have made his will and that the will had been duly proved, and he had received, during five years, interest on a portion of a lapsed legacy. Nothing was suggested that

An executor who proves in solemn form, shall not be put on proof of the will a second time.

If, however, the executor propounds and proves the will *per testes*, duly citing the deceased's next-of-kin to see proceedings, all next-of-kin so cited, generally speaking, are thereby forever barred. Nay, if he so propounds and proves it against certain only of the next-of-kin without having cited them all, the others, though uncited, if to a certain extent privy to and aware of the suit, shall not put the executor on proof *per testes* of the will so once already proved a second time (*h*).

In what cases an executor who has proved the will in solemn form may again be cited to the end that the probate should be revoked.

There are, however, two cases in which an executor who has proved the will in solemn form may again be cited to the end that the probate granted to him should be revoked.

First, if the judgment of the Court pronouncing for the will has been obtained by fraud, in which case it may be set aside not only as against those who obtained it by fraud, but as against all persons interested thereunder, for the will is either good or bad as against all the world (*i*). But a person will not be allowed to maintain an action to set aside, on the ground of fraud, a judgment establishing a will and granting probate of it, unless he adduces evidence of facts discovered since the judgment which render it reasonably probable that the action will succeed. If he is unable to do this, the proceedings in the action will be stayed as frivolous and vexatious, on the motion of the defendant (*k*).

Secondly, if the existence of a will of later date is discovered after the judgment has been pronounced, the parties having an interest under such later will may again cite an executor, who has proved an earlier will in solemn form, and obtain a revocation of the probate (*l*).

What persons are bound by a decree pronouncing for a will in solemn form.

All persons who were parties to the action,

It must further be noticed that the judgment in an action for probate in solemn form binds only those persons who were parties or privies to the suit. All persons who were actually parties to the suit, whether in the character of plaintiffs, defendants, or interveners, and persons who have been cited to see proceedings, whether they actually intervene or not, are

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excited any doubt of the genuineness and validity of the will); cf. *Braham* v. *Burchell* (1826), 3 Add. 243; *Merryweather* v. *Turner* (1844), 3 Curt. 802 (fourteen years' acquiescence after probate in common form, and ten years after the will had been declared to be well proved in Chancery); *Mohan* v. *Broughton*, [1899] P. 211; [1900] P. 56, C. A. (where an action for revocation of letters of administration was held to be barred by the laches and acquiescence of the plaintiff, who had been a party to administration proceedings in Chancery and had therein raised no question as to the legitimacy of an ancestor, on which the order of the Chancery Division was based).

(*h*) *Per* Sir John Nicholl in *Bell* v. *Armstrong* (1822), 1 Add., at p. 372; *Newell* v. *Weeks* (1814), 2 Philim. 224; and *vide infra*, p. 241.

(*i*) *Birch* v. *Birch*, [1902] P. 130, C. A.; *Priestman* v. *Thomas* (1884), 9 P. D. 70.

(*k*) *Birch* v. *Birch*, [1902] P. 130; see *Young* v. *Holloway*, [1895] P. 87.

(*l*) Wms. on Exors. (11th ed.), p. 459; Wentw. Off. Ex., 111, 112 (14th ed.).

bound by the judgment of the Court pronouncing for the will, and cannot, except in the two cases mentioned above, call it in question at a later date (*m*). But it is not necessary in the Probate Division that a person should be a party to the suit in order to be bound by the result. There is a practice in this Court whereby any person having an interest may make himself a party to a suit by intervening; and because of the existence of this practice it has been held that if a person, knowing what was passing, is content to stand by and see his battle fought by some one else in the same interest, he is bound by the result, and cannot be allowed to reopen the case (*n*).

and all persons who were cognisant of the proceedings, and had a right to intervene in them, are bound by the decree,

It follows that a person who is not a party to proceedings in the Probate Division is bound by the result if he was cognisant of the proceedings and had the right to intervene.

But if a person, though cognisant of the proceedings, could not, so far as he then knew, have intervened in them, he cannot be held bound by their result, if at a later date he discovers facts which would have given him a right to intervene had he known of them at the time (*o*).

The rule in question does not extend to cases in which the decree of the Court has been pronounced in consequence of a compromise entered into between the parties to the suit. Persons who, while cognisant of a suit, are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise, which binds only those by whom it was made (*p*).

unless the suit terminated in a compromise.

Sub-section 2.—*Limited, Double, and Cessate Probate.*

When probate is granted of the contents of a missing will, as contained in a draft, or copy, or in the depositions of the witnesses, the probate is limited until such time as the original will or a more complete copy is brought into the registry (*q*).

Probate limited until the original will is brought in,

And where there is a will and a codicil, and one of them is lost, in the absence of any evidence of the contents of the missing document, probate may be granted of the other, limited until

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(*m*) *Wytcherley* v. *Andrews* (1871), 2 P. & D., at p. 328.

(*n*) *Newell* v. *Weeks* (1814), 2 Phill. 224; *Ratcliffe* v. *Barnes* (1862), 2 S. & T. 486; *Wytcherley* v. *Andrews* (1871), 2 P. & D., at pp. 328, 329.

(*o*) *Young* v. *Holloway*, [1895] P. 87; see also *Peters* v. *Tilly* (1886), 11 P. D. 145.

(*p*) *Wytcherley* v. *Andrews* (1871), 2 P. & D., at p. 329; *Ritchie* v. *Malcolm*, [1902] 2 Ir. R. 403. But see *Re King; Jackson* v. *Att.-Gen.*, [1917] 2 Ch. 420, where charities which had been cited to see proceedings and did not appear were held bound by the terms of a compromise assented to by the Attorney-General on their behalf.

(*q*) See *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 205.

the original or a copy of the missing document be found and brought in (*r*).

or is transmitted to this country.

Where the original will is in the custody of a foreign Court or in the possession of a person residing abroad, who refuses to deliver it up, probate may be granted of a properly authenticated copy, limited until such time as the original shall be transmitted to this country (*s*).

In a case of urgency, where the original will is in the possession of a person residing abroad, who is about to transmit it to England, probate may be granted of a copy without waiting for the arrival of the original, and the probate is then limited in a similar way (*s*).

Probate of the will of a married woman no longer limited.

There has already been occasion to observe that since the Married Women's Property Act, 1882, the probate of the will of a married woman is general in form, and is not limited to the property which she had power to dispose of and did dispose of by her will (*t*).

Limited probate where the testator has limited the executor.

There are, however, still certain cases in which the probate is limited in form; for the Court will grant a limited probate wherever the testator has limited the executor (*u*).

If a testator appoints one executor for a special purpose or in respect of a specific part of his estate, and another executor for all other purposes, probate is granted to the latter, if he

Probate "save and except,"

is the first to apply, save and except that special purpose or specific part of the estate. On the other hand, if the limited executor is the first to obtain a grant, the other may take probate

or *cæterorum*.

cæterorum, *i.e.*, of the rest of the testator's estate. If both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say, probate is therein granted to the general executor of all the estate, save and except the property which vests in the limited executor; while as regards the latter, his probate is restricted according to the will.

Instances of limited probates.

Thus, in *In the Estate of Faulkner* (*x*) where the testator appointed executors except as to property embarked in trade, and appointed his widow executrix of his will in so far as it related to his business as a licensed victualler, probate was granted to the widow limited to the business. And in *In the Estate of Von Brentano* (*y*) where a testator, domiciled abroad,

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(*r*) *Coulthard* (1865), 11 Jur. (N.S.) 184; *Clements*, [1892] P. 254.
(*s*) *Lemme*, [1892] P. 89; *Von Linden*, [1896] P. 148; and see *post*, pp. 383, 384.
(*t*) *Ante*, p. 81.
(*u*) *Sutton* v. *Smith* (1753), 1 Lee, at p. 280; *Davies* v. *The Queen's Proctor* (1851), 2 Rob. 413; *Beer* (1851), 2 Rob. 349; *vide ante*, pp. 217—219.
(*x*) (1915), 31 T. L. R. 525.
(*y*) [1911] P. 172.

left an English will dealing exclusively with realty in England and appointing English executors, and left also a foreign will, appointing a foreign executor and dealing with all the rest of his property, including personalty in England, the Court granted to the English executors probate of the English will limited to the realty in England, and made a *cæterorum* grant to the foreign executor (*z*).

Probate limited to settled land.

As has been noted in an earlier chapter (*a*), section 22 of the Administration of Estates Act, 1925, provides that a testator may appoint, and in default of such express appointment, shall be deemed to have appointed, as his special executors in regard to settled land (*b*), the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land (*c*).

Wills invalid save as the exercise of a power of appointment.

It has already been stated that *probate* will not be granted of the will of a married woman, valid as the exercise of a power of appointment, but invalid as a will by the law of the testatrix's domicil. Administration with the will annexed, limited to the property comprised in the power, is granted to the appointee (*d*).

Wills revoked by marriage save in so far as they exercise a power of appointment.

And where a will which has been revoked by marriage exercises a power of appointment within the exception of section 18 of the Wills Act, administration with the will annexed is granted to the appointee, limited to the property over which the testator has a power of appointment (*e*).

Double probate.

Where there are divers executors named in the will, upon the grant of probate to one of them, it is the practice to reserve

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(*z*) Note that, by section 155 of the Judicature (Consolidation) Act, 1925, which replaces section 13 of the Administration of Estates Act, 1925, probate or administration in respect of the real estate of a deceased person, or any part thereof, may be granted either separately or together with probate or administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of trust estate only. But where the estate of the deceased is known to be insolvent, the grant of representation to the estate is not to be severed, except as regards a trust estate: see Rule 116, N. C. B. Note also that, save as in the Administration of Estates Act, 1925, expressly provided (*i.e.*, by sections 22—24 in respect of settled land: *vide ante*, Part I, Chapter VIII) no person entitled to a general grant in respect of the estate of a deceased person is to be permitted to take a limited grant except under the direction of the Judge: Rule 30, N. C. B. See as to this rule generally, *post*, pp. 357, 386, 387; and in its application to limited probate, *Von Brentano*, [1911] P. 172.

(*a*) *Ante*, Part I, Chapter VIII, "Special Personal Representatives in Respect of Settled Land."

(*b*) *I.e.*, land vested in the testator which was settled previously to his death and not by his will: Administration of Estates Act, 1895, s. 22, sub-s. 2.

(*c*) See also section 23 of the Administration of Estates Act, 1925, discussed and explained, *ante*, Part I, Chapter VIII. And see President's Probate Directions, 1925, No. 3, *post*, p. 888, and for the practice, *post*, p. 449.

(*d*) *Ante*, p. 81.

(*e*) *Ante*, p. 133.

power of making a like grant to the others (*f*). An executor to whom power is reserved may at any time during the lifetime or after the death of the proving executor take a grant of probate, unless he shall in the meantime have renounced, or have failed to appear to a citation to accept or refuse probate.

And this is what is called a double probate, which is in this manner: the first that comes in takes probate in the usual form, with reservation to the rest; afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards (*g*).

Cessate probate.

Where the original grant has been limited for any specified time, or until the happening of any specified event or contingency, a new grant is made upon the efflux of the time and the happening of the event referred to in the original probate. Such grants are distinguished from grants *de bonis non* and are known as second or cessate grants.

So if an executor is appointed for life or for a specified time, the grant to him ceases upon his death or at the expiration of the time, and the substituted executor, if any, takes a second or cessate grant of probate.

If probate is granted to an executrix during her widowhood, it ceases on her remarriage, and a cessate grant is made to the substituted executor, if any.

If probate has been granted of a copy of the will, limited until such time as the original shall be brought in, the grant ceases on the original being found and brought into the registry, and the executor takes probate of the original will. The same observation, *mutatis mutandis*, applies to cases where the grant is limited until such time as a more authentic copy shall be brought in.

Section 2.

OF WHAT INSTRUMENTS PROBATE IS NECESSARY.

Testamentary instruments disposing of

Probate of every testamentary instrument, whether will or codicil, which disposes of personal property situate in England

(*f*) By section 160 of the Judicature (Consolidation) Act, 1925, probate or administration shall not be granted to more than four persons in respect of the same property. This section applies to grants made after the date of the commencement of the Act, whether the testator or intestate died before or after that date: section 160, sub-section 3. Where there are more than four executors who have not renounced and are competent to take probate, the grant bears a notation that power is reserved to the other executors to apply on vacancies occurring: Rule 114, N. C. B.

(*g*) 4 Burn. E. L. 310 (9th ed.).

must be obtained in the Probate Division; otherwise its existence cannot be recognised by any Court of law or equity.

personal property situate in England.

Since the Land Transfer Act, 1897, a will disposing of real property in England, but neither appointing an executor, nor disposing of any personal estate, is in the case of a testator dying after the commencement of that Act entitled to probate (*h*).

Since the Land Transfer Act, 1897, a will disposing only of real property situate in England.

A will made in execution of a power must be proved in the Probate Division (*i*). According to the decision in the case of *Barnes* v. *Vincent* (*k*), the duty of the Ecclesiastical Court, whenever a will purporting to be made and executed under a power was presented for probate, was to grant probate if satisfied as to the testamentary capacity and intention of the maker of the instrument, and that the provisions of the Wills Act had been complied with, and to leave the Court which had to deal with the rights under the instrument to decide whether or not it was authorised by that power and by its execution; and their Lordships appear to have considered that, on a power being alleged, the Ecclesiastical Court should grant probate without inquiring as to the existence of the power. But in *In the Goods of Tharp* (*l*) it was pointed out by the Court of Appeal that the case of *Barnes* v. *Vincent* (*m*) was decided at a time when the Court of Probate, being an Ecclesiastical Court, was a Court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power; and that since the Judicature Act every one of the Divisions of the High Court of Justice has now jurisdiction to do that which might be done by any other Division. Accordingly it was laid down that, in cases of wills made under a power, it is not only competent to, but incumbent upon, the Probate Division, if that Court has all persons interested before it, to decide the question whether there was a power, and whether it was well executed (*n*).

Wills made in execution of a power.

A will disposing only of property in a foreign country is not entitled to probate in England (*o*), even though it contain an appointment of executors to administer the estate in the foreign country (*p*).

A will disposing only of property abroad is not entitled to probate in England.

(*h*) *Vide ante*, pp. 13—16; and as to the law before the Act, *ante*, p. 13.

(*i*) *Tatnall* v. *Hankey* (1838), 2 Moo. P. C., at pp. 351—353; *Goldsworthy* v. *Crossley* (1844), 4 Hare, 140.

(*k*) (1846), 4 N. C. Suppl. xxi; 5 Moo. P. C. 201.

(*l*) (1878), 3 P. D. 76.

(*m*) (1846), 5 Moo. P. C. 201.

(*n*) *Vide ante*, pp. 6, 7; and see *Gunn* (1884), 9 P. D., at p. 244; *Att.-Gen.* v. *Lord Ailesbury* (1887), L. R. 12 A. C., at p. 696.

(*o*) *Coode* (1867), 1 P. & D. 449; *Mann*, [1891] P. 293; *vide ante*, p. 11.

(*p*) *Mann*, [1891] P. 293; *Murray*, [1896] P. 65; and as to the practice where there are two independent wills, one disposing of property in England and the other of property abroad, *vide ante*, pp. 11, 12.

A will which, though it contains no disposition of property, nominates an executor to act in this country, is entitled to probate.

A will which contains the bare nomination of an executor to act in this country is entitled to probate, though it gives no legacy and appoints nothing to be done by him (*q*). So the nomination of executors in a testamentary paper which disposed only of real estate was sufficient, even before the Land Transfer Act, 1897, to entitle the instrument to probate (*r*), even though the executor renounced (*s*).

A paper which merely revokes all former wills.

A paper which contains no disposition of property or appointment of executors, but merely revokes all former wills, is neither will nor codicil and is not entitled to probate (*t*).

Declarations of trust.

The Courts of Equity will, in certain cases, give effect to a trust not disclosed or not fully disclosed in a testamentary instrument which has been admitted to probate, although the paper on which the terms of the trust have been written has not been proved as a testamentary instrument (*u*).

A will merely appointing testamentary guardians.

A will merely appointing testamentary guardians cannot be proved in the Probate Division (*x*).

A will may consist of several documents.

It has been seen that a will need not consist of one document only. As a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each duly executed, and together constituting the last will and testament of the deceased (*y*).

An unattested paper, incorporated by reference.

A paper not duly executed or attested may be entitled to probate, if incorporated by reference in a duly executed paper (*z*).

Probate of a will cannot be had during a *lis pendens* as to a codicil.

As a general rule, a will and all the codicils thereto must be proved at one and at the same time. Nor will probate of the will be granted to the executor while a contest subsists as to the validity of the codicil, for that being undetermined it does not appear what was the will, and the executors cannot take

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(*q*) Godolph., Part II, c. 5, s. 1; see *Brownrigg* v. *Pike* (1882), 7 P. D. 61; *Lancaster* (1859), 1 S. & T. 464.

(*r*) *O'Dwyer* v. *Geare* (1859), 1 S. & T. 465; *Barden* (1867), 3 P. & D. 325. As to the exception to this rule in the case of wills of married women made in the exercise of a power of appointment before the Married Women's Property Act, 1882, *vide* the cases cited, and *Tomlinson* (1881), 6 P. D. 209; *Brownrigg* v. *Pike* (1882), 7 P. D. 61; *Cubbon* (1886), 11 P. D. 169; *Hornbuckle* (1890), 15 P. D. 149.

(*s*) *Jordan* (1868), 1 P. & D. 555.

(*t*) *Fraser* (1869), 2 P. & D. 40; *secus* where the paper also contains provisions of a testamentary character: *Durance* (1872), 2 P. & D. 406. The grant is made as upon intestacy without annexing the paper writing, but with a note that it is so made in consequence of the execution of the document revoking the former will: *Toomer* v. *Sobinska*, [1907] P. 106. The case of *Brenchley* v. *Still* (1850), 2 Rob. 162, has not been followed. And see *ante*, p. 148.

(*u*) *Vide ante*, p. 190, note (*x*).

(*x*) *Morton* (1864), 3 S. & T. 422. See *Tollemache*, [1917] P. 246, but note as to the actual decision in this case section 4 of the Wills (Soldiers and Sailors) Act, 1918, *post*, p. 258.

(*y*) *Ante*, p. 134.

(*z*) *Ante*, Chapter V, pp. 180 *et seq.*

the common oath (*a*). But where there is a necessity for an immediate representation, the Court may, in a proper case, grant probate of a will only to the executors or some of them, reserving all questions as to the validity of a codicil which is being litigated. Such a probate does not empower the executors to distribute the estate affected by the codicil (*b*).

The rule relaxed in a proper case.

Under special circumstances the Court may grant probate of some papers only of those which constitute the will of the deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers when they arrive, and on an undertaking on his part that he will do so (*c*).

Probate of some alone of several testamentary papers, where the others are not in this country.

If a will has been proved, and subsequently a codicil thereto is discovered which neither revokes nor alters the appointment of executors contained in the will, a supplemental probate of the codicil may be granted to the executor (*d*). But if the codicil alters or revokes the appointment of executors in the will, the probate of the will is revoked, and a new probate of the will and codicil is granted to the executors entitled thereto (*e*).

Codicil discovered after will proved.

Where the will has been proved abroad, probate of the codicils, if any, must be obtained from the Court which granted probate of the will (*f*).

Probate of codicils where will has been proved abroad.

It has appeared in earlier chapters that a will may in part be admitted to probate, and in part probate may be refused; as, for instance, where some clause or clauses in the will have been inserted therein by fraud, or, *per incuriam*, without the knowledge of the testator (*g*).

Exclusion of words or clauses in the will from probate.

In such cases, as in cases where the will has been lost or destroyed after the death of the testator, and only part of its provisions can be proved, probate will be granted of the remainder of the will, omitting such clause or clauses, or of that part of the contents of the missing will which is proved to the satisfaction of the Court (*h*).

The Court has power to exclude from the probate of the

(*a*) *Neagle* v. *Cantillon* (1755), 2 Lee, 246.

(*b*) *Fowlis* v. *Davidson* (1845), 4 N. C. 149; see Tristram & Coote (16th ed.), p. 31, where a number of unreported cases are cited.

(*c*) *Robarts* (1873), 3 P. & D. 110; *vide post*, p. 384.

(*d*) Tristram & Coote (16th ed.), p. 32; and see *Speke* v. *Deakin* (1913), 30 T. L. R. 73.

(*e*) *Langdon* v. *Rooke* (1841), 1 N. C. 254; *Beetson* (1848), 6 N. C. 13.

(*f*) *Miller* (1883), 8 P. D. 167; *ante*, p. 25.

(*g*) *Ante*, pp. 78, 86 *et seq.*

(*h*) For the limits of this rule, see *Rhodes* v. *Rhodes* (1882), L. R. 7 A. C. 192; and (as to lost wills) *Woodward* v. *Goulstone* (1886), L. R. 11 A. C. 469; but see *Boehm*, [1891] P., at p. 251; *ante*, pp. 86, 87.

will, and from the copy kept at the registry, words which are gratuitously offensive, scandalous or libellous (*i*).

SECTION 3.

CONDITIONAL OR CONTINGENT WILLS.

Where a will is expressed to take effect on the happening of a contingency which fails, the will is not entitled to probate.

A will may be expressed so as to take effect only in the event of the happening of some contingency or condition, and if such is the case, and the contingency does not happen or the condition fails, the will is not entitled to probate.

But, in order that a will should be regarded as conditional or contingent and probate refused on the ground that the contingency to which the testator referred has not occurred, it must plainly appear from the terms of the will that the testator intended to limit its operation, and that its provisions were intended to take effect only in the event of the happening of the contingency, and not otherwise (*k*). If the testator refers to a contingency or the happening of an impending or anticipated event merely by way of ascribing a reason for his making a will, but does not express in terms his intention of limiting its operation to the happening of such contingency or event, the will shall not be regarded as contingent or conditional, nor shall probate thereof be refused on the ground that the contingency or event has not occurred (*l*).

The test as to the conditional nature of a will.

The distinction is clearly drawn by Sir F. H. Jeune in *In the Goods of Spratt* (*m*), in a judgment in which the preceding cases were exhaustively considered. "In cases of the character of the present," said the learned Judge, "the difficulty which arises in determining the intention of the testator as expressed in his will is that an ambiguity is caused by the use of language which renders it doubtful whether the testator meant to refer to a possible event as his reason for making a will, or as limiting the operation of the will made.

If the will is clearly expressed to take effect only on the happening or not happening of any event.

"If the will is clearly expressed to take effect only on the happening, or not happening, of any event, *cadit quæstio*, it is conditional (*n*).

(*i*) *Vide post*, p. 534.
(*k*) See *Porter* (1869), 2 P. & D., at p. 23.
(*l*) *Ibid.*; and see *Edmondson* v. *Edmondson* (1901), 17 T. L. R. 396.
(*m*) [1897] P. 28, at p. 29.
(*n*) In the following cases wills were held to be conditional on the happening of an event, and, as the event had not happened, probate was refused :—
A testator, intending to go to Ireland, made a will in the following terms : "*If I die before my return from my journey to Ireland* I wish," etc. Held : a conditional will : *Parsons* v. *Lanoe* (1748), 1 Ves. Sen. 189.
"Being on the eve of embarking for San Francisco . . . I do hereby, *in the case of my decease during my absence* being fully ascertained and proved, direct," etc. Sir C. Cresswell, while stating that the Court is unwilling by

" If the testator says, in effect, that he is led to make his will by reason of the uncertainty of life in general, or for some special reason, *cadit quæstio*, it is not conditional (*o*).

Contingency referred to merely as a reason for making the will.

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reason of such expressions to set aside testamentary papers which probably contain the deceased's intentions, held that the will was conditional on death during the voyage or at San Francisco: *Winn* (1861), 2 S. & T. 147; see *Roberts* v. *Roberts* (1862), 2 S. & T. 337.

" Being obliged to leave England to join my regiment in China . . . I leave this paper containing my wishes and desires. *Should anything unfortunately happen to me while abroad*, I wish, etc. . . . Everything I may be in possession of at that time or anything appertaining to me hereafter to be equally divided." Held, though reluctantly, that the provision as to the disposition of the property, and especially the use of the words " *at that time*," showed that the will was conditional on death abroad: *Porter* (1870), 2 P. & D. 22.

" *In case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London.*" Held: a conditional will: *Robinson* (1870), 2 P. & D. 171; contrast *Martin* (1867), 1 P. & D. 380; *Mayd* (1880), 6 P. D. 17.

A mariner's will commencing " *Instructions to be followed if I die at sea or abroad.*" Held: conditional: *Lindsay* v. *Lindsay* (1872), 2 P. & D. 459.

A husband made a will in which he left all his property to his wife. Subsequently he and his wife, being about to start upon a journey, executed a joint will expressed to take effect *in case they should be called out of the world at one and the same time and by one and the same accident.* By this will they revoked all former wills. The husband died in the lifetime of his wife. Held: that the joint will was a conditional will, dependent upon a contingency which did not happen, and was therefore inoperative even to revoke the previous will: *Hugo* (1877), 2 P. D. 73.

A testator in India executed a will commencing " I write this as my last will and testament *in case of a sudden or accidental death befalling me in India.*" He died in England. Held: a conditional will: *Jobson* v. *Ross* (1873), 42 L. J. P. 58. Contrast *Vines* v. *Vines*, [1910] P. 147.

(*o*) In the following cases wills were held to be unconditional, the intention of the testator clearly being not to limit the operation of the will, but to ascribe a reason for its execution:—

The testator, before proceeding on a voyage, made a will containing the following clause: " *Therefore, as I may easily die*, I think it my duty to inform you what you have to do with my property in case I should die." Held: unconditional: *Strauss* v. *Schmidt* (1820), 3 Phill. 209.

" All men are mortal, and no one knows how soon his life may be required of him. *Lest I die before the next sun*, I make this my last will." Held: unconditional: *Burton* v. *Collingwood* (1832), 4 Hagg. 176.

" In the prospect of a long journey, *should God not permit me to return home*, I make this my last will." The will was not, in fact, executed until after the testator's return from his journey. It seems clear, however, that the Court did not consider the language used to show that the will was intended to be conditional: *Cawthron* (1863), 3 S. & T. 417.

The testator, while stationed on the Gold Coast, wrote a letter containing the following: " *In the event of my death while serving in this horrid climate, or any accident happening to me*, I leave, etc. . . . I consider that every person should be prepared for the worst and particularly in such a treacherous climate as this . . . which has compelled me to write this letter." After the letter was written the testator left Africa, invalided, and died in England some three months later. Lord Penzance held that the testator did not intend to limit the operation of the will to the event of his death happening in Africa, but the decision of the Court seems to have been that the contingency contemplated by the testator was that of death from the effects of the climate of Africa, and that such contingency had actually happened: *Thorne* (1865), 4 S. & T. 36; see *Spratt*, [1897] P., at p. 32.

" *In case of any fatal accident happening to me*, being about to travel by railway, I hereby leave, etc." Held: not a conditional will, the reference to the railway journey being regarded merely as a reason ascribed for the execution of a will: *Dobson* (1866), 1 P. & D. 88.

The deceased, a military officer on active service, wrote: " If we remain

Where the intention of the testator, to be gathered from the words of the will, is doubtful, the whole language of the document and the surrounding circumstances must be considered.

"But if it be not clear whether the words used import a reason for making a will or impress a conditional character on it, the whole language of the document and also the surrounding circumstances must be considered (*p*). In such cases there are two criteria which are especially useful for determining the problem: first, whether the nature of the disposition made appears to have relation to the time or circumstances of the contingency (*q*); and, secondly, where the contingency is

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here for some time to come the chances are in favour of more of us being killed, and, as I may not have another opportunity of saying *what I wish to be done . . . in case of an accident*, I wish to make over everything I possess to you." Held: not conditional on the death of the deceased while on active service: *Spratt*, [1897] P. 28; and cf. *Winter* v. *Pawle* (1918), 34 T. L. R. 437, where a soldier, on active service with the Dardanelles Expedition, wrote: "If I do buy it, you must see that the few quids I have at Holt's go to J S": Held: unconditional on death during the Dardanelles operations.

"As I am about to leave home for Bangor, *should any accident, etc., take me out of this world*, I will to S C the remainder of my property. And should, in God's inscrutable providence, anything take S C away from this world before I again make my will, I will everything to E. McD." Held: the will was not conditional on any accident happening to the testator during his projected journey to Bangor: *Stuart* (1888), 21 L. R. Ir. 105.

A will contained the following clause: "I leave to P and D the house and lands of *L, until I am able to live there and enjoy it myself.*" The testator, after repeatedly revisiting and residing at *L*, died. It was proved that he was a man of peculiar religious notions, and believed that he would revisit the earth after his death, and had frequently stated that he would reside at *L* during the millenium. Held: the above clause was a devise and not a gift *inter vivos*, and took effect on the death of the testator, and that the words in italics should be rejected as a limitation until an impossible event: *Bunbury* v. *Doran* (1873), Ir. R. 8 C. L. 516, affirmed, Ir. R. 9 C. L. 284—Ex. Ch.

(*p*) In the following cases, where the words of the will were equivocal, the will was held not to be conditional, the Court coming to the conclusion, from the disposition of the property and the circumstances surrounding the execution, that the testator intended the will to operate without regard to the happening of the contingency:—

"I, W M, being physically weak in health, . . . have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *A* to the floating hospital ship *B W* in order to recruit my health; and *in the event of my death occurring during such time*, I hereby give and bequeath," etc. Held: the will was not contingent on the testator's death in consequence of the illness from which he was suffering when the will was made: *Martin* (1867), 1 P. & D. 380.

"On leaving this station for T and M, *in case of my death on the way*, know all men this is a memorandum of my last will." Held: not contingent on death before arriving at T or M: *Mayd* (1880), 6 P. D. 17; cf. *Vines* v. *Vines*, [1910] P. 147.

A testator made a will leaving the residue of his estate to his wife during her widowhood, but not disposing of the residue in the event of her dying a widow. Being about to sail with his wife from Calcutta to England, he wrote the following letter (in form a good will by Scots law) to his brother: "*If anything happens to us on the way*, my will has been accidentally packed in a tin box to which I cannot now get access. . . . However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter proceeded to deal with the disposition of the testator's estate after his wife's death, should she survive him. Neither the testator nor his wife died on the voyage. On the death of the testator, Held: that the letter was not conditional, but a valid testamentary document, and must be admitted to probate: *Halford* v. *Halford*, [1897] P. 36.

(*q*) *E.g.*, *Porter* (1870), 2 P. & D. 22.

connected with a period of danger to the testator, whether it is coincident with that period, because, if it is (*r*), there is ground to suppose that the danger was regarded by the testator only as a reason for making a will, but, if it is not (*s*), it is difficult to see the object of referring to a particular period, unless it be to limit the operation of the will."

The Court will endeavour to construe the will as unconditional.

The Court is unwilling to refuse probate of a testamentary paper on the ground that it is contingent, unless it is clear that the testator intended that it should operate only in a certain event or during a certain period (*t*).

A contingent will, if the contingency fails, is inoperative to revoke a previous will.

If a will is in terms clearly contingent, and the contingency has failed, the will cannot be set up by any subsequent declaration of adherence, or by any means, save by some act amounting to a re-execution of it (*u*). Without some such act it is a nullity, and is inoperative to revoke a previous will; for the contingency attaches to every part of the instrument, including the clause of revocation (*x*).

A conditional *codicil* may republish the will.

But a *codicil*, in other respects contingent on an event which has not happened, may, it seems, republish a will to which it refers, or render that will valid if it has not been duly executed, and, on that ground, is entitled to probate (*y*).

Declarations made by testator after the failure of the contingency.

In coming to its decision whether a will is or is not contingent on the happening of an event, the Court cannot take into consideration declarations made by the testator after the failure of the contingency, expressing his adherence to the provisions of the will (*z*), unless the language of the document is ambiguous (*a*).

Will conditional on assent of third person.

A will may be made conditional on the assent of a third person to its provisions, and if that assent is withheld the instrument is not entitled to probate (*b*).

Where the contingency is in suspense at the death of the testator.

When, on the death of the testator, the event on the happening of which the will is contingent is still in suspense,

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(*r*) *E.g.*, *Strauss* v. *Schmidt* (1820), 3 Phill. 209; *Cawthron* (1863), 3 S. & T. 417; *Mayd* (1880), 6 P. D. 17.

(*s*) *E.g.*, *Parsons* v. *Lanoe* (1748), 1 Ves. Sen. 189; *Roberts* v. *Roberts* (1862), 2 S. & T. 337.

(*t*) *Dobson* (1866), 1 P. & D. 88; see *Winn* (1861), 2 S. & T., at p. 149; *Porter* (1869), 2 P. & D., at p. 23.

(*u*) *Roberts* v. *Roberts* (1862), 2 S. & T. 337; *Parsons* v. *Lanoe* (1748), 1 Ves. Sen. 189; *Winn* (1862), 2 S. & T. 147; *Burton* v. *Collingwood* (1832), 4 Hagg. 176. As to execution after the contingency has failed, see *Cawthron* (1863), 3 S. & T. 417.

(*x*) *Hugo* (1877), 2 P. D. 73.

(*y*) *Da Silva* (1861), 2 S. & T. 315.

(*z*) *Martin* (1867), 1 P. & D., at p. 381; *Winn* (1861), 2 S. & T. 147; *Roberts* v. *Roberts* (1862), 2 S. & T., at p. 339.

(*a*) *Vines* v. *Vines*, [1910] P. 147, where Sir John Bigham held, on the authority of *Bryan*, [1907] P. 125, that where the language of the document is ambiguous, evidence of declarations by the deceased is admissible.

(*b*) *Smith* (1869), 1 P. & D. 717.

probate will, it seems, be granted at once, though such probate operates subject to the happening of the event, and only determines what is to be done with the property in the meantime (*c*).

A will in exercise of a power not necessarily contingent on the existence of the power.

A will intended to take effect as an exercise of a power of appointment is not necessarily contingent on the existence of the power; so if it turn out that the power was either not well created, or was defeated by the happening of some contingent event subsequently to the will, the disposition will not fail if the testator had a bequeathable interest in the property independent of the power (*d*).

Section 4.

JOINT AND MUTUAL WILLS.

Two persons may make a joint will.

A joint will is a single instrument whereby two persons give effect to their testamentary dispositions.

On the death of each testator, so much of the provisions of the joint will as relates to the disposition of his property is entitled to probate.

Two or more persons may make a joint will, which, if properly executed by each of them, is, so far as the property belonging to any one of them is concerned, as much his will and as well entitled to probate upon his death as if he had made a separate will dealing only with his own property (*e*). Such a will is, however, revocable at any time by either of the testators during their joint lives, and after the death of one of them by the survivor (*f*), but, if not altered or revoked, will, on the death of the survivor, be entitled to take effect as his last will (*g*).

(*c*) *Cooper* (1855), Dea. & Sw. 9; *Bangham* (1876), 1 P. D. 429.

(*d*) *Southall* v. *Jones* (1859), 1 S. & T. 298; *Sing* v. *Leslie* (1864), 2 H. & M. 68.

(*e*) Thus probate was granted of a joint will of two persons, as a distinct will, upon the death of each: *Stracey* (1855), Dea. & Sw. 6.

Two persons made a joint will, disposing of no personal estate, but containing the appointment of executors. Held: that the will was entitled to probate on the death of one of the joint testators: *Miskelly* (1869), Ir. R. 4 Eq. 62.

Where a husband and wife made a joint will, the Court, upon the death of the wife, granted probate of so much of the instrument as became operative upon her death: *Piazzi-Smyth*, [1898] P. 7.

As a point of practice, when a joint will is proved for the first time, notice should be given to the Record Keeper, who will have it entered in the calendar of wills deposited during lifetime.

(*f*) *Hobson* v. *Blackburn* (1822), 1 Add. 274.

(*g*) *Lovegrove* (1862), 2 S. & T. 453; *Fletcher* (1883), 11 L. R. Ir. 359. In *Raine* (1858), 1 Sw. & Tr. 144, A and B, two partners in a farming business and joint tenants in certain freeholds, executed a joint will containing various devises and bequests to take effect on the death of both of them. On the death of A, B surviving, application for probate of the document as of the will of A was refused, on the ground that the instrument was to have no effect until the death of both A and B. But this decision was disapproved of in the Irish case of *Miskelly* (1869), Ir. R. 4 Eq. 62; and was disapproved of and not followed in *Walker* v. *Gaskill*, [1914] P. 192.

Mutual wills —what are.

A mutual will is one of two testamentary papers made respectively by two persons, each giving the other similar rights in his property, and being in fact identical, so far as they can be, for the purpose of carrying out the intention of the two testators.

Joint and mutual wills —what are.

So far as their admissibility to probate is concerned, mutual and joint and mutual wills do not differ from any other form of will.

A joint and mutual will is a mutual will executed by the two testators in the form of a single instrument (*h*). So far as their title to probate is concerned, joint and mutual wills differ in no respect from any other form of joint will. On the death of one of the joint testators the Court will grant probate of so much of the instrument as becomes operative upon his death. And upon the death of the survivor the Court will grant probate of the instrument as his will if, and only if, the instrument remains unrevoked; for *so far as the admissibility of the instrument to probate is concerned*, the Court recognises no limitation on the right of the surviving testator to revoke or to alter the provisions of the joint and mutual will at his pleasure. Thus in *Hobson* v. *Blackburn* (*i*) Martha, Susannah, and Joshua Hobson made a joint and mutual will, dated September 2, 1794, containing provisions for the devolution of their property from the one to the others on the decease of each of them, and providing for its distribution after the death of the survivor. Joshua died in 1796, without having altered or revoked his part of the joint and mutual will, and probate thereof, as to his effects, was granted to Martha and Susannah. On November 30, 1820, Martha made a separate will, disposing of all of her property in a different manner from the dispositions in the joint and mutual will. On the death of Martha, in December, 1820, leaving Susannah surviving, probate was prayed of the joint will of September, 1794; but such probate was opposed on behalf of persons interested under the separate will of November, 1820. Sir John Nicholl said: "I have no hesitation whatever in rejecting the allegation propounding the mutual or conjoint will as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country, or, in other words, that it is unknown as a will to the law of this country at all (*k*). It may, for aught I know, be valid as a compact, it may be operative in equity,

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(*h*) As to the effect of joint and mutual wills by the Roman-Dutch law, see *Denyssen* v. *Mostert* (1872), L. R. 4 P. C. 236; *Dias* v. *Livera* (1879), L. R. 5 A. C. 123.

(*i*) (1822), 1 Add. 274.

(*k*) These words must be read with the rest of the judgment. They go no further than to deny that such a will can be made with the quality of being irrevocable, but if either of the testators dies without revoking it, the will is valid and entitled to probate as far as respects his property: *Piazzi-Smyth*, [1898] P. 7

to the extent of making the devisees of the will trustees for performing the deceased's part of the compact. But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's *will*, and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why, this very circumstance destroys its essence as a will and converts it into a contract; a species of instrument over which this Court has no jurisdiction. Upon these broad and, as I apprehend, sufficiently intelligible grounds, I reject this allegation."

But under certain circumstances a mutual will may be regarded as irrevocable in equity.

Although a mutual will cannot be admitted to probate as the will of the survivor of two co-testators if it has been revoked by him either during the lifetime or after the death of his co-testator, under certain circumstances, the provisions of a mutual will were enforced in equity as a compact, to the extent of making the devisees under a will, by which the survivor of two co-testators revoked a joint and mutual will, trustees for those who would have taken under the joint and mutual will, had it remained unrevoked. Since the Judicature Acts the Probate Division has a similar power, and, while admitting to probate the later will by which a joint and mutual will is revoked, might, in a proper case, direct the executors thereof to hold the property of the testator in trust for the persons who would have benefited under the joint and mutual will, had that instrument remained unrevoked. But in *Walker* v. *Gaskill* (*l*), where the Court was asked to make such a declaration of trust, Sir S. Evans, P., said : " I am asked to advance from the region of testamentary dispositions into that of contracts and trusts, and to declare certain trusts upon the footing of contract. Contracts and trusts are beyond and outside my jurisdiction in probate matters. Even if I ventured to declare any trusts, they would have to be administered in the Chancery Division and not in this. If I presumed to pronounce upon any contract or to make a declaration upon any trusts, in this case, I am not satisfied that I have all the necessary parties before me, and I have no knowledge of the state of the assets. What I am asked to do appertains specially to proceedings of the character expressly assigned to the Chancery Division. . . . In my opinion, I cannot accede to the prayer . . .; and I must leave [the defendants] to pursue their remedies in the other Division."

Position of the Probate Division in such cases.

The result of the cases on this point may be summarised as follows. Mutual wills, whether they are contained in the same or in different instruments, are revocable acts. Each testator

(*l*) [1914] P. 192, at p. 200.

is at liberty to revoke his will during the lifetime of his co-testator, with or without the concurrence of his co-testator, provided the co-testator has notice, so that he too may alter or revoke his will if he please. But where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who died first has, by the death, become irrevocable (*m*). But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of

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(*m*) In *Dufour* v. *Pereira* (1769), 1 Dick. 419, a husband and wife made mutual wills, and the wife, after her husband's death, possessed all his personal estate under his will, and enjoyed the interest thereof during her life. Lord Camden held that by this act she bound her assets to make good all her bequests in the mutual will, and that her subsequent will, made after the death of her husband, so far as it broke in upon the mutual will, was void. The learned Judge said : "Consider how far the mutual will is binding, and whether the accepting of legacies under it by the survivor is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly; it might have been revoked separately provided the person intending it had given notice to the other of such revocation." [The only object of notice is to enable the other party to the bargain to alter his or her will also : *Stone* v. *Hoskins*, [1905] P., at p. 197.] "But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either it could be done by the survivor by another will. It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not. The defendant hath taken the benefit of the bequest in her favour by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it, and therefore I am of opinion that the last will of the wife, so far as it breaks in upon the mutual will, is void." The judgment of Lord Camden is set out at much greater length than the report in Dickens in Hargraves' Juridical Arguments, Vol. II., p. 304 [see also 2 Harg. Jurid. Exerc. 101], where it is said : "A mutual will is a revocable act. . . . But to affirm that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract, either secretly during the joint lives or after at his pleasure, I cannot allow. . . . If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor that the joint will shall stand. It is too late afterwards for the survivor to change his mind, because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprised of this dissent. . . . This Court does not set aside the [later] will, but makes the devisee, heir, or executor, trustee to perform the contract."

In *Walpole* v. *Lord Orford* (1797), 3 Ves. 402, Lord Loughborough refused to enforce the compact of a mutual will on the ground of the uncertainty and unfairness of the compact, and that case leaves the decision in *Dufour* v. *Pereira* (1769), 1 Dick. 419, wholly unshaken (see note to *Hobson* v. *Blackburn*, 1 Add., p. 278). And the principle in *Dufour* v. *Pereira* (*ubi supra*) was affirmed by Sir Gorell Barnes in *Stone* v. *Hoskins*, [1905] P. 194; see also *Walker* v. *Gaskill*, [1914] P. 192.

trust or otherwise, even though he has received no express notice of the revocation during the lifetime of his co-testator. The only object of notice is to enable the other party to the bargain to alter his will also, and the survivor, who has notice as from the death of his co-testator that the latter has departed from the terms of the bargain, is not in any way prejudiced, for his will may be altered or revoked at his pleasure (*n*).

SECTION 5.

WILLS OF SOLDIERS AND SEAMEN.

Privileged wills of soldiers and seamen under section 11 of the Wills Act, 1837.

A will or codicil which is not entitled to probate under the general provisions of the Wills Act, 1837, may be admitted to probate as a good and valid disposition of personal property, if it is within the exception of section 11 of that Act, which enacts "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act" (*o*).

Similar provision of the Statute of Frauds.

This exceptive clause is the same as that in the Statute of Frauds (*p*), by which statute it became for the first time necessary that wills of personal property should be in writing, except when made "by any soldier being in actual military service, or any mariner or seaman being at sea."

A person who comes within the exception in section 11 of the Wills Act may make a will of personal property

Wherefore a person who comes within the exception in section 11 of the Wills Act, 1837, may dispose of his personal property, not only by a writing unattested by witnesses, but by a will made by word of mouth (*q*). The Court, if satisfied that a document, however informal, written by such a person was intended by him as a disposition of his personal estate (*r*) to

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(*n*) *Stone* v. *Hoskins*, [1905] P. 194; see also *Re Oldham*, *Hadwen* v. *Myles*, [1925] Ch. 75, where a husband and wife made mutual wills in the same form in pursuance of an agreement so to make them, but there was no evidence of any further agreement, and the wife, having survived and accepted her husband's property, subsequently married again and made a fresh will. It was held that in the circumstances there was no implied trust preventing the wife from disposing of her property as she pleased.

(*o*) By section 2 of the Wills (Soldiers and Sailors) Act, 1918, section 11 of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section : *vide infra*, p. 265.

(*p*) 29 Car. 2, c. 3, s. 23. As to the privileges and benefits enjoyed by soldiers in the making of testaments, see Swinb., Part I., s. 14; and see *Godman* v. *Godman*, [1920] P., at pp. 279, 280.

(*q*) *Drummond* v. *Parish* (1843), 3 Curt., at p. 527, in which case the origin and nature of the privilege is discussed in detail : *Scott*, [1903] P. 243.

(*r*) Where a soldier died before the Wills (Soldiers and Sailors) Act, 1918, came into operation, and his informal will, which could therefore only operate on personal estate, dealt with real as well as personal estate, the gifts of personal estate not being independent of those of the realty, it was held that the will was improperly admitted to probate : *Godman* v. *Godman*, [1919] P. 229; [1920] P. 261, C. A.

take effect after his death (*s*), or that the substance of a verbal declaration made by him with a like intent is proved (*t*), will grant probate of the will of the testator as contained in the informal document, or in a writing setting forth the substance of the verbal declaration.

by word of mouth, and by writing, however informal;

And since, before the Statute of Frauds, a soldier in actual military service, and a mariner or seaman at sea, might make a will of personal property at or after the age of fourteen, it has been held that such persons retain that privilege notwithstanding the provision of section 7 of the Wills Act, 1837 (*u*).

and even though an infant, provided he be over the age of fourteen.

Section 3, sub-section 1, of the Wills (Soldiers and Sailors) Act, 1918, which was passed on February 6, 1918, provides: "A testamentary disposition of any real estate in England or Ireland (*x*) made by a person to whom section 11 of the Wills Act, 1837, applies, and who dies after the passing of this Act (*y*), shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age (*z*) or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by a person domiciled in England or Ireland (*x*), it would have been valid."

Validity of testamentary dispositions of real property made by soldiers and sailors.

(*s*) The document must be intended as a final testamentary disposition, and must not be merely deliberative: *Boughton-Knight* v. *Wilson* (1915), 32 T. L. R. 146; and see *Beech* v. *Public Trustee*, [1923] P. 46, C. A. (where passages in a letter were held not to be expressions of what the testator wished to be done with his property, but only statements, partly erroneous, of what he thought he had done, and therefore inadmissible to probate as a soldier's will).

(*t*) It is not necessary for the validity of a soldier's nuncupatory will to prove that he knew that he was making a will, or knew that he had power to make a will while a minor or by word of mouth. It is enough if he intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death: *Dalrymple* v. *Campbell*, [1919] P. 7.

(*u*) *Farquhar* (1846), 4 N. C. 651; *McMurdo* (1867), 1 P. & D. 540; *Hiscock*, [1901] P. 78 Section 1 of the Wills (Soldiers and Sailors) Act, 1918, expressly declares and enacts that section 11 of the Wills Act, 1837, authorises and has always authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years. And see *ante*, p. 39, note (*o*).

(*x*) Exclusive of the Irish Free State: Irish Free State (Consequential Adaptation of Enactments) Order, 1923, printed in App. I, *post*, p. 735.

(*y*) The section applies to a person who made his will before, but died after, the passing of the Act: *Yates*, [1919] P. 93, applying *Re Bridger*, [1894] 1 Ch. 297.

(*z*) The Administration of Estates Act, 1925, s. 51, sub-s. 3, by implication partially repeals this enactment as regards real estate to which the infant is entitled under a "settlement"; an infant soldier or sailor can only make a will of such real estate if he has been married; see Guide to the New Property Statutes (2nd ed.), p. 361; and see *post*, p. 284.

Power to appoint testamentary guardians.

Before the passing of the Wills (Soldiers and Sailors) Act, 1918, a testamentary guardian could not be appointed by the informal will of a soldier or seaman valid under section 11 of the Wills Act, 1837, for such an appointment could only be made in the manner provided by section 8 of 12 Car. 2, c. 24, which required that such a testamentary appointment shall be attested by two witnesses (*a*). But section 4 of the Wills (Soldiers and Sailors) Act, 1918, provides that where any person dies after the passing of that Act having made a will which is, or which, if it had been a disposition of property (*b*), would have been rendered valid by section 11 of the Wills Act, 1837, any appointment contained in that will of any person as guardian of the infant children of the testator shall be of full force and effect.

Revocation of privileged wills.

Revocation of privileged wills.—As has been seen in a previous chapter (*c*), sections 18 to 21 of the Wills Act, 1837, contain provisions as to the revocation of wills. Section 18 provides that, with a specified exception, every will shall be revoked by marriage; section 19 that no will is to be revoked by presumption; section 20 that no will is to be revoked but by another will or codicil or by a writing executed like a will, or by destruction, and section 21 that no alteration in a will shall have any effect unless executed as a will. Section 22 provides that no will which has been revoked is to be revived otherwise than by re-execution or a codicil to revive it. It is proposed here to consider the extent to which these sections apply to the privileged wills of soldiers and seamen who, by section 11 of the Wills Act, 1837, may dispose of their personal estate as they might have done before the passing of that Act. This is a question of considerable interest which has not yet been fully explored.

Whether the general provisions of the Wills Act as to revocation and revival apply.

Section 20 of the Wills Act, 1837, provides as follows: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i.e.*, by marriage], or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

(*a*) *Tollemache*, [1917] P. 247; and see *Morton* (1864), 3 S. & T. 422; *Lady Chester's Case* (1671), 1 Vent. 207; 3 Keb. 30; *Ex p. Earl of Ilchester* (1803), 7 Ves. 348, 379.

(*b*) These words are necessary because the appointment of testamentary guardians is not in itself a disposition of personal property, so as to entitle the document to probate: *Morton* (1864), 3 S. & T. 422.

(*c*) *Supra*, Chapter IV. The sections are printed in App. I, *post*, pp. 658, 659.

In *Wood* v. *Gossage* (*d*) the testator made a will duly attested as required by section 9 of the Wills Act, 1837. Subsequently, at a time when as a soldier he was in actual military service, he wrote to his sister, in whose custody the will was, a letter in which he requested her to burn the will, as he had, he said, already cancelled it. The sister accordingly burned the will, though not in the testator's presence. It was held by the Court of Appeal that the will was revoked. This decision was based by the majority of the Court (Lord Sterndale, M.R., and Warrington, L.J.) on the consideration that the letter was a writing declaring an intention to revoke the will within the meaning of section 20 of the Wills Act, 1837, and that it was executed in the manner in which a will was thereinbefore required to be executed, because these words in the section must be taken to mean " in the manner hereinbefore required for the execution of the will which it is intended to revoke."

But Younger, L.J., based his decision on wider grounds. He said (*e*): " Before the Wills Act the special testamentary privileges in relation to their personal estate which were enjoyed by soldiers and sailors on active service consisted in their being dispensed from those formalities of execution required from other testators. They did not enjoy any testamentary capacity not possessed by other persons. . . . That section 11 of the Act must now be recognised to have a further effect results from the declaratory enactment contained in section 1 of the Wills (Soldiers and Sailors) Act, 1918, that section 11 of the Wills Act authorises and always has authorised any soldier being in actual military service to dispose of his personal estate as he might have done before the passing of the Act, though under the age of twenty-one years. The result follows that, for example, section 7, which enacts that ' no will made by any person under the age of twenty-one years shall be valid,' general as are its terms, has, on the now declared construction, no application to a soldier's or sailor's will. Similarly, in my judgment, section 20 has no relation to such a will. Its language is no more general than the language of section 9 (*f*), and if it were held, so far as its prescribed formalities are concerned, to extend to dispositions of soldiers and sailors referred to in section 11, it would, in my judgment, go far to deprive these testators of the privileges reserved to them in the matter of formalities by that section. For the power which a soldier has to revoke his soldier's disposition follows, as I think, from the power reserved to him by the statute to make one. It is, in my judgment, true to say that the

(*d*) [1921] P. 194. (*e*) [1921] P., at pp. 202, 203.
(*f*) This must be a misprint for section 7.

power of revocation is merely another aspect of the power of disposition, and that power which he had before the statute remained, I think, unaffected by the statute " (*g*). These observations, if well founded, have far-reaching consequences, for if true of section 20 of the Wills Act, 1837, they are equally true of the other sections mentioned above, namely sections 18—22, and it may be that all questions as to the revocation and revival of the privileged wills of soldiers and seamen are governed by the law which prevailed before both the Wills Act and the Statute of Frauds. These are matters, however, perhaps too speculative for development in a textbook.

Revocation by marriage.

In *In the Estate of Wardrop* (*h*) it was held that the will of a soldier in actual military service, whether executed according to the provisions of section 9 of the Wills Act, 1837, or not, falls within the general provision contained in section 18 of the Act, and is revoked by the testator's subsequent marriage. This decision was, however, arrived at before the decision of the Court of Appeal in *Wood* v. *Gossage* (*i*), and without adverting to the considerations indicated in that case.

Privileged will not invalidated by return to civil life.

The privileged will of a soldier or seaman is not invalidated by his return to civil life, in the absence of any expression of intention to the contrary in the document itself (*k*). Nor is such a will subject to the rule of Roman Law that a will made in the manner allowed for a soldier's will is only good for a year after the soldier's discharge (*l*).

Presumption as to unattested alterations in a soldier's or seaman's will.

Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator when as a soldier he was engaged in actual military service, it has been held that the alterations will be presumed to have been made during the continuance of such military service, and therefore will be included in the probate (*m*).

Construction of section 11 of the Wills Act.

Soldier.—The term " soldier " includes, it should seem, all persons in His Majesty's Regular Army, irrespective of rank (*n*).

(*g*) In *Booth* v. *Booth*, [1926] P. 118, 135—137, however, Lord Merrivale held that the Wills Act, when it limited the means of revocation of wills, included soldiers' wills—at least their written wills. But the conclusion arrived at in that case might have been based on another ground, namely that the privilege conferred by section 11 of the Wills Act upon soldiers is confined to those in actual military service, and that when a soldier ceases to be in actual military service, the general provisions of the Wills Act apply. In this connection reference may be made to *Re Limond*, [1915] 2 Ch. 210, where it was held that section 15 of the Wills Act, 1837, though general in terms, does not apply to privileged wills.

(*h*) [1917] P. 54.

(*i*) [1921] P. 194.

(*k*) *Coleman*, [1920] 2 Ir. R. 332.

(*l*) *Booth* v. *Booth*, [1926] P. 118.

(*m*) *Tweedale* (1874), 3 P. & D. 204.

(*n*) This seems to follow from the construction given to the term " mariner or seaman," *vide post*, p. 263.

Who is a "soldier."

It has been held to include a surgeon in the military service of the East India Company (*o*), a militiaman (*p*), a volunteer (*q*), and a female nurse employed, under contract with the War Office, on hospital ships (*r*). The military status of irregular troops was established in 1901 with regard to the Imperial Yeomanry, the Natal Police, and the South African Constabulary (*s*). The expression "soldier" includes a member of the Air Force (*t*).

"Actual military service."

In Actual Military Service.—Not every soldier is included in the provision under consideration; the section is expressly confined to those "in actual military service." The principle of the exemption contained in section 11 of the Act was adopted from the Roman Law; it must be taken to have been adopted subject to the limitations imposed by that law and by the Civil Law (*u*); it has therefore been held that, by the insertion of the words "actual military service," the privilege, as respects the British soldier, is confined to those who are *on an expedition* (*x*); in other words, there must be a state of war, and the soldier must be in some place for the purposes of that war (*y*).

The soldier must be *on an expedition.*

The meaning of the words "*in expeditione*," or, in the language of the Wills Act, "in actual military service," was considered by Sir F. H. Jeune in *In the Goods of Hiscock* (*z*). "I think it must be assumed, in the first place," said the learned Judge, "that a state of war exists, with which the soldier is, or may be, connected; but, assuming such a state of war to exist, the question arises when, or how soon, does the soldier become on actual military service? . . . I cannot help thinking that the true test to be applied in all these cases is this,—had the soldier done something—had he taken some step at the time when he made his will, towards joining the forces in the field? (*a*). The step may be a small one, both as regards place and time. In case of invasion or civil war . . . the step might be merely that a man was taken from his home to man the walls or defences of his own native town."

There must be a state of war,

and the soldier must have taken some step towards joining the forces in the field.

(*o*) *Donaldson* (1840), 2 Curt. 386.
(*p*) *Horton* v. *Leeds* (1855), 5 El. & Bl. 595.
(*q*) *Scott*, [1903] P. 243; *Hiscock*, [1901] P. 78.
(*r*) *Stanley*, [1916] P. 192.
(*s*) *Hebelen*, deceased; *Quack*, deceased; *Fletcher*, deceased; the cases are not reported; *Cory* (1901), 84 L. T. 270.
(*t*) Wills (Soldiers and Sailors) Act, 1918, s. 5, sub-s. 2.
(*u*) Not, however, for all purposes: *e.g.*, it is not subject to the rule of Roman law that a soldier's will is only good for a year after the soldier's discharge: *Booth* v. *Booth*, [1926] P. 118.
(*x*) *Drummond* v. *Parish* (1843), 3 Curt., at p. 542.
(*y*) *Hiscock*, [1901] P., at p. 82.
(*z*) [1901] P., at pp. 82, 83.
(*a*) Two sentences in the judgment have been combined, without, it is hoped, perverting the sense.

In the case of *Gattward* v. *Knee* (*b*), the same learned Judge somewhat extended his ruling in *In the Goods of Hiscock*, by holding that mobilisation may fairly be considered as a commencement of actual military service. He said (*c*): "I am of opinion that if the order for mobilisation has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning; I do not think a mere warning for active service would be sufficient" (*d*).

Mobilisation.

Accordingly it has been held that a will made by a soldier while quartered in barracks in England (*e*), or in the Colonies (*f*), is not within the exception—for instance, a will made by a soldier while in command of the Mysore division of the army stationed in the East Indies, who died while on a tour of inspection of the troops under his command (*g*).

On the other hand, a will made by a soldier while on his way from one regiment to another, both of which were engaged in actual military service, was held to be privileged (*h*), as was a will made by an officer who had gone with his regiment to Africa to join a military expedition into the interior, though the will was made before the expedition actually left the British settlement (*i*). And a will made at Gibraltar by an army paymaster, when he and his regiment were making ready under orders to go on board a troopship for the purpose of reaching the scene of operations which resulted in the bombardment of Alexandria, was held to be privileged (*k*).

And where a private in a volunteer battalion, who resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, and, pursuant to an order, went into barracks at Chichester, where he made his will, actually embarking for South Africa two days

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(*b*) [1902] P. 99.

(*c*) [1902] P., at p. 102; but see *Bowles* v. *Jackson* (1854), 1 Spinks, Eccl. & Adm. 294; see, however, the remarks of Lord Merrivale on that case in *Booth* v. *Booth*, [1926] P. 118, 127, 128.

(*d*) In *Kitchen* v. *Allman* (1919), 35 T. L. R. 613, during the late war, a soldier on "overseas leave," who had been told to hold himself in readiness to go overseas, was held to be in actual military service. Cf. *Dalrymple* v. *Campbell*, [1919] P. 7.

(*e*) *Drummond* v. *Parish* (1843), 3 Curt. 522.

(*f*) *White* v. *Repton* (1844), 3 Curt. 818; *Phipps* (1840), 2 Curt. 368; *Pery* (1844), 2 L. T. (o.s.) 335.

(*g*) *Hill* (1845), 1 Rob. 276.

(*h*) *Herbert* v. *Herbert* (1855), Dea. & Sw. 10.

(*i*) *Thorne* (1865), 4 S. & T. 36; *secus* the will of a soldier under orders to proceed from his station in one Indian Presidency to take part in the war going on in another, made two days before the march commenced: *Bowles* v. *Jackson* (1854), 1 Spinks, Eccl. & Adm. 294; but see *Gattward* v. *Knee*, [1902] P. 99, and *Booth* v. *Booth*, [1926] P. 118, 127, 128.

(*k*) *Booth* v. *Booth*, [1926] P. 118.

after the will was made; it was held that by taking the step of going into barracks with a view to being drafted to the seat of the war, he had brought himself within the operation of section 11 of the Wills Act, 1837 (*l*).

And where on September 7, 1899, a battalion stationed in India was "warned" for service, and two days later was "ordered to mobilise" for active service in South Africa and embarked on September 19, 1899; the informal will of a private soldier in that battalion, undated, but written between September 8 and 19, was held to be the will of a soldier "in actual military service" within the meaning of the section (*m*).

Although "actual military service" may continue after the fighting is over (*n*), a soldier in hospital in England who made a will on May 9, 1921, after hostilities had ceased, was held not to be in actual military service although by Order in Council 1921, No. 1276, it was ordered that August 31, 1921 should be treated as the date of the termination of the war (*o*).

"Mariner or seaman."

Mariner or Seaman.—According to the construction given by Sir William Wynne, and adopted by subsequent Judges, the term "mariner or seaman" does not exclude any person in His Majesty's navy, though superior officers of the ship, from the exception contained in the Act. The reasons for the exemption apply equally to a commander-in-chief as to a common seaman, and the learned Judge said that it was the inclination of his mind to hold that the term included the whole profession, because he "did not know where to stop" (*p*). Nor is the term confined to seamen in the navy; it applies equally to those in the mercantile marine (*q*).

Who is a mariner or seaman.

An admiral of the fleet (*r*), the purser of a man-of-war (*s*), and a surgeon in the navy (*t*) are "mariners and seamen" within the meaning of the section; and the description has

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(*l*) *Hiscock*, [1901] P. 78; see *Stopford* v. *Stopford* (1903), 19 T. L. R. 185; *Gordon* (1905), 21 T. L. T. 653.

(*m*) *Gattward* v. *Knee*, [1902] P. 99; *May* v. *May*, [1902] P. 103, n.; see *Bowles* v. *Jackson* (1854), 1 Spinks, Eccl. & Adm. 294; *supra*, note (*i*). See also *Kitchen* v. *Allman* (1919), 35 T. L. R. 613, note (*c*).

(*n*) See *Re Limond*, [1915] 2 Ch. 240, where military operations were undertaken for the opening up and occupation of the Tochi Valley, and the delimitation of the frontier was an operation incident to the war in question. The soldier was at the time he made the will part of the military escort of the delimitation party, and was held to be within the privilege because the actual military service did not cease until the full conclusion of the operations.

(*o*) *Grey*, [1922] P. 140.

(*p*) Sir William Wynne, in *Euston* v. *Seymour* (1802), cit. 2 Curt., at pp. 339, 340; Sir H. Jenner, in *Hayes* (1839), 2 Curt., at p. 340; *Saunders* (1865), 1 P. & D., at p. 18.

(*q*) *Morrell* v. *Morrell* (1827), 1 Hagg. 51; *Donaldson* (1840), 2 Curt., at p. 387; *Milligan* (1849), 2 Rob. 108; *Parker* (1859), 2 S. & T. 375.

(*r*) *Euston* v. *Seymour* (*ubi supra*).

(*s*) *Hayes* (*ubi supra*).

(*t*) *Saunders* (*ubi supra*).

even been held to apply to a female typist employed on a liner (*u*).

What constitutes being "at sea."

At Sea.—The cases on the construction of the term "at sea" go to this length: that where a man has joined a vessel on service and has commenced a voyage in it, a will made in the course of that voyage, though on shore, is within the exception (*x*). So where a seaman, while his ship was in harbour, went ashore on leave, and there met with an accident from which he died, a will made by him after the accident while on shore was held to be the will of a seaman "at sea" (*y*).

Will written on shore in the course of a voyage.

Will written on shipboard before the voyage has commenced.

In *In the Goods of Patterson* (*z*), a letter written by a mariner while on board his ship, which was lying in the River Thames at Gravesend, and before the ship had sailed on its voyage, was held to be a will made by a seaman "at sea." But in *In the Goods of Corby* (*a*), where a vessel was lying at Melbourne when the testator shipped on board as an able seaman to return to England, Dr. Lushington seems to have held that irregular papers, written by him on board on the very day on which he shipped, could not be admitted to probate as a mariner's will since the vessel did not sail until fifteen days afterwards.

Will written on a ship permanently stationed in harbour.

Ship in navigable river.

A will made on board a ship of war permanently stationed in Portsmouth Harbour, is within the section (*b*), as is a will made on board a ship of war in a *river*, by the commander-in-chief actually engaged in a naval operation (*c*). In *Hodson* v. *Barnes* (*d*) the question whether a pilot on the Manchester Ship Canal, while in performance of his duties, could be considered to be a mariner at sea was discussed but not decided.

Where a surgeon in the navy was invalided at a foreign station and wrote a letter at sea on board a steamship, on which he was a passenger homewards, it was held that although the deceased was not on duty at the date of the letter, yet, as he was returning from service, the document was entitled to probate as the will of a seaman "at sea" (*e*).

(*u*) *Hale*, [1915] 2 Ir. R. 362; cf. *Stanley*, [1916] P. 192 (female nurse a "-soldier"); and see *Anderson* v. *Downes*, [1916] P. 49 (member of local corps of St. John's Ambulance Association).

(*x*) *McMurdo* (1867), 1 P. & D., at p. 541.

(*y*) *Lay* (1840), 2 Curt. 375. Contrast *Euston* v. *Seymour* (*ubi supra*), where the commander-in-chief of the naval force at Jamaica, who lived on shore at an official residence, was held not to come within the exemptive clause relating to mariners "at sea," and, consequently, a nuncupative will made by him on shore was pronounced invalid.

(*z*) (1898), 79 L. T. 123.

(*a*) (1854), 1 Spinks, Eccl. & Adm. 292.

(*b*) *McMurdo* (1867), 1 P. & D. 540.

(*c*) *Austen* (1853), 2 Rob. 611; see *Patterson* (1898), 79 L. T. 123.

(*d*) (1926), 43 T. L. R. 71.

(*e*) *Saunders* (1865), 1 P. & D. 16.

In *In the Goods of Hale* (*f*), a typist in the employment of a steamship company was in the habit of travelling on the vessels of the company, and spent the periods between voyages at the company's offices in Liverpool. It was held that letters written by her from her lodgings in Liverpool, in contemplation of sailing, were written by her when as a mariner she was "at sea." But in *Barnard* v. *Birch* (*g*) a captain in the mail service, who commanded a steamship during cross-Channel voyages between Holyhead and Kingston, was actually at sea for the time each day spent in transit, but was on shore for the remainder of the day. A document was written by him at his house in Holyhead between voyages. It was held that he was not "at sea" within the meaning of the section when he signed the document (*h*).

Extension of section 11 of the Wills Act in the case of members of H.M. naval or marine forces.

Before the passing of the Wills (Soldiers and Sailors) Act, 1918, a mariner or seaman who was not at sea in the sense above adverted to, could not make an informal will even if so circumstanced that, had he been a soldier, he would have been regarded as in actual military service (*i*). But section 2 of the Wills (Soldiers and Sailors) Act, 1918, now enacts that section 11 of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section of the Wills Act, 1837. The section applies to a will made before the passing of the Act by a testator who dies after the date of the Act (*k*).

The Wills Act does not affect certain statutory provisions with respect to wills of petty officers and seamen and marines.

Section 12 of the Wills Act, 1837, provides that the Act shall not prejudice or affect any of the provisions contained in 11 Geo. 4 and 1 Will. 4, c. 20, respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in Her Majesty's navy. The statute referred to is now repealed, and the statutes now in force with regard to the wills of seamen and marines and the disposal of their effects are the Navy and Marines (Wills) Acts, 1865, 1897, and 1914, the Navy and Marines (Property of Deceased) Act, 1865, and Orders in Council dated December 28, 1865, and September 14, 1915, February 15, 1916 and September 7, 1916. These will be found in Appendix I.

(*f*) [1915] 2 Ir. R. 362.
(*g*) [1919] 2 Ir. R. 404.
(*h*) Cf. *Hodson* v. *Barnes* (1926), 43 T. L. R. 71.
(*i*) *Thomas* (1918), 34 T. L. R. 626; *Bowly, ibid.*; *Anderson* v. *Downes* [1916] P. 49.
(*k*) *Yates*, [1919] P. 93.

Merchant seamen.

With regard to the wills of merchant seamen, provision is made by the Merchant Shipping Act, 1894, sections 176—179, under which the Board of Trade may refuse to hand over a merchant seaman's property disposed of by his will to a person claiming thereunder unless the will has been executed with the formalities prescribed by sub-section 1 of section 177 of the Act.

Section 6.

EVIDENCE IN TESTAMENTARY CAUSES, AND PROOF OF THE CONTENTS OF A LOST WILL.

Wills Act, 1837.

Section 14. Will not to be void on account of incompetency of attesting witness.

Section 15. Gifts to an attesting witness to be void.

Section 14 of the Wills Act, 1837, provides : " If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid " (*l*).

Section 15 : " If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will " (*m*). This section does not apply to a

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(*l*) Further, as to competency of witnesses and parties, see 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

(*m*) Where the will is attested by more witnesses than two, the mere fact that witnesses are supernumerary witnesses does not save them from disqualification under section 15, if in fact they are attesting the execution of the will : *Doe* v. *Mills* (1833), 1 Moo. & R. 288 (a decision under 25 Geo. 2, c. 6, s. 1, which was to the same effect as section 15 of the Wills Act); *Randfield* v. *Randfield* (1863), 32 L. J. Ch. 668; *Wigan* v. *Rowlands* (1853), 11 Hare, 157. But where a will had been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person, who was also residuary legatee, appeared at the foot of the will, the Court received evidence to explain why such signature was written, and, on being satisfied that it was not written with the intention of attesting the signature of the testator, ordered it to be omitted from the probate : *Sharman* (1869), 1 P. & D. 661; followed in *Smith* (1889), 15 P. D. 2; but see *Mitchell* (1841), 2 Curt. 916; *Forest* (1861), 2 S. & T. 334; *Smith* (1864), 3 S. & T. 589; *Raine* (1865), 34 L. J. P. 125. In order to invalidate the legacy to an attesting witness, the interest bequeathed to him must be a beneficial interest, not, *e.g.*, a legacy in trust : *Ryder* (1843), 2 N. C. 462; *Cresswell* v. *Cresswell* (1868), L. R. 6 Eq. 69. A direction in the will that an executor, who was a solicitor, might charge and receive payment for all professional business to be

will made in the exercise of the privilege reserved to soldiers and seamen under section 11 of the Wills Act (*n*).

Inapplicable to privileged wills.

Section 17 provides: "No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

Section 17. Executor to be admitted a witness.

To prove the attestation of a will in the Court of Probate, it is not necessary to examine both attesting witnesses (*o*). But a party propounding a will is bound to call at least one of the attesting witnesses, if he can be produced, to prove due execution (*p*), and, if such witness fails to prove due execution, he is bound to call the other, although he may know him to be an adverse witness (*q*).

To prove due execution, not necessary to call both attesting witnesses, but one must be called.

In a suit for revocation of probate, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the Court, with doubt and hesitation, allowed the affidavit sworn by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of due execution and of testamentary capacity (*r*).

Affidavit of attesting witness admitted as evidence in suit for revocation.

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done by him under the will, was held to be avoided by the fact that he was one of the attesting witnesses: *Re Barber* (1886), 31 Ch. D. 665; *Re Pooley* (1888), 40 Ch. D. 1. A bequest of a legacy by a will is not void because the legatee attests a codicil which gives him nothing, nor does the residuary legatee under the will lose his share of the residue by attesting a codicil which revokes specific legacies in the will and thereby increases his share in the residue: *Gurney* v. *Gurney* (1855), 3 Drew. 208; *Tempest* v. *Tempest* (1856), 2 K. & J. 635; *Re Marcus* (1887), 57 L. T. 399; *Re Trotter*, [1899] 1 Ch. 764. See further, on this subject, Wms. on Exors. (11th ed.), pp. 812—814. The marriage, after the attestation of the will, of a devisee to one of the attesting witnesses does not avoid the devise: *Thorpe* v. *Bestwick* (1881), 6 Q. B. D. 311. See also *Aplin* v. *Stone*, [1904] 1 Ch. 543.

(*n*) *Re Limond; Limond* v. *Cunliffe*, [1915] 2 Ch. 240.

(*o*) By the practice of the Prerogative Court, both the attesting witnesses to a will were required to be produced by the party seeking to prove its due execution; but by the Court of Probate Act, 1857, s. 33, the rules of evidence observed in the Courts of common law are to be observed in the Court of Probate in the trial of all questions of fact. In those Courts, the execution of a will might be proved by calling only one attesting witness, if he could speak to the observance of all that was required by the statute. This rule, therefore, governs the practice of the Probate Court: *Belbin* v. *Skeats* (1858), 1 S. & T. 148; *Forster* v. *Forster* (1864), 33 L. J. P. 113.

(*p*) *Coles* v. *Coles* (1866), 1 P. & D. 70; *Bowman* v. *Hodgson* (1867), 1 P. & D. 362. In *Mackay* v. *Rawlinson* (1919), 35 T. L. R. 223, an undefended probate action, the execution of the will was proved by the solicitor who prepared it, and was present at its execution, though not an attesting witness. The learned Judge, however, appears to have accepted the statement of counsel that it was not essential to call an attesting witness.

(*q*) *Owen* v. *Williams* (1863), 4 S. & T. 202; *Coles* v. *Coles* (1866), 1 P. & D. 70.

(*r*) *Gornall* v. *Mason* (1887), 12 P. D. 142; cf. *Hayes* v. *Willis* (1906), 75 L. J. P. 86, but see *Cook* v. *Tomlinson* (1876), 24 W. R. 851; *Brown* v. *White* (1876), 24 W. R. 456; *Re Woolley's Trusts* (1876), 24 W. R. 783. Where the attesting witnesses are dead or insane, or absent in a foreign country, or not amenable to the process of the Court, or where they cannot be found after diligent inquiry, evidence of the witnesses' handwriting has always been admissible: Roscoe's Nisi Prius Evidence (17th ed.), p. 133, and see *Millar* v. *Sheppard* (1758), 2 Lee, 520; *Spain* (1915), 31 T. L. R. 435

An attesting witness who gives evidence against due execution may be contradicted by the party on whose behalf he is called.

If an attesting witness called by a party propounding the will gives evidence against the will, such party may cross-examine him, and may call evidence to disprove such of the facts stated by the witness as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he denies having made such statements, and is not a hostile but merely an adverse witness (*s*); for such a witness is not the witness of either party, but of the Court.

Procedure where the attesting witnesses decline to give any information.

The Court will not, under section 26 of the Court of Probate Act, 1857, order the attendance for examination in open Court of the attesting witnesses to a will because they have declined to give information as to the circumstances attending its execution to persons who are attacking the will (*t*); but where the attesting witnesses refused to make an affidavit as to the execution of a will, the Court, under the Court of Probate Act, 1857, section 24, required their attendance in person to state what they knew about the execution (*u*).

Admissibility of extrinsic evidence, including evidence of declarations of the testator, for certain purposes.

There has already been occasion, in the chapters in which these subjects are respectively considered, to discuss the admissibility of parol evidence, including proof of declarations of intention made by the testator, for the purpose of negativing the presumption that unattested alterations appearing on the face of a will were made after the execution (*x*); to rebut the presumption that a will not forthcoming at the death of the testator was destroyed by him *animo revocandi* (*y*); to prove the intention of a testator in cases of dependent relative revocation (*z*) or of revocation by implication (*a*); to prove that a paper was intended by the testator to be testamentary (*b*); and to determine what papers the testator intended to be constituent parts of his will (*c*).

Further, in dealing with the appointment of executors, there has been occasion to consider the question whether parol evidence is admissible to any, and, if to any, to what extent in order to assist the Court in ascertaining the meaning of the testator as expressed in his will (*d*).

(both attesting witnesses dead); *Phibbs*, [1917] P. 93 (neither witness could be found or identified); and see *ante*, p. 125.

(*s*) *Coles* v. *Coles* (1866), 1 P. & D. 70; *Jones* v. *Jones* (1908), 24 T. L. R. 839.

(*t*) *Evans* v. *Jones* (1867), 36 L. J. P. 70.

(*u*) *Sweet*, [1891] P. 400; *Bays* (1910), 54 Sol. Jo. 200; *vide post*, p. 503.

(*x*) *Vide ante*, p. 177.

(*y*) *Ante*, p. 160.

(*z*) *Ante*, pp. 164 *et seq.*

(*a*) *Ante*, pp. 138 *et seq.*

(*b*) *Ante*, pp. 117, 122.

(*c*) *Ante*, p. 179.

(*d*) *Ante*, pp. 215—217.

Evidence of statements made by the testator is inadmissible to prove that the will was duly executed,

or was executed in duplicate.

It remains to add that a statement by a testator that he has duly executed his will cannot be received as evidence of its due execution, for the exercise of the testamentary power being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the execution of the right (*e*). Not only are declarations made by a testator after the date of an alleged will inadmissible to prove its due execution, they are equally inadmissible to prove that the will was executed in duplicate (*f*).

Statements by deceased person charged with undue influence.

In a probate suit, where the defendant alleged that the will propounded had been obtained by the undue influence of a person since dead, evidence of statements made by that person not in the presence of the testator was admitted so far as the statements went to the plea of undue influence (*g*).

Proof of the Contents of a Lost Will.

The contents of a lost will may be proved by secondary evidence.

When the will of a testator is not forthcoming at his death, and there is evidence sufficient to satisfy the Court that the instrument was never destroyed by him *animo revocandi* (*h*), its contents may be proved by parol evidence.

In the case of *Sugden* v. *Lord St. Leonards* (*i*), where the whole question of the admissibility of extrinsic evidence to prove the contents of a lost will was considered by the Court of Appeal, the four following propositions were laid down :—

First.—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*k*).

Declarations, written or oral, made by the testator, either before

Second.—Declarations, written or oral, made by a testator, either before or after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (*l*).

(*e*) *Ripley* (1858), 1 S. & T. 68; *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 227. See *Doe* v. *Palmer* (1851), 16 Q. B., at p. 757; *Atkinson* v. *Morris*, [1897] P. 40.

(*f*) *Atkinson* v. *Morris*, [1897] P. 40, C. A.

(*g*) *Radford* v. *Risdon* (1912), 28 T. L. R. 342.

(*h*) *Vide ante*, pp. 158 *et seq.*

(*i*) (1876), 1 P. D. 154.

(*k*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at pp. 238—240, following *Brown* v. *Brown* (1858), 8 E. & B. 876 (see *Brown* (1858), 1 S. & T. 32), and setting at rest the doubt raised by Sir J. P. Wilde in *Wharram* v. *Wharram* (1864), 3 S. & T. 301. See also *Burls* v. *Burls* (1868), 1 P. & D. 472; *Johnson* v. *Lyford* (1868), 1 P. & D. 546; *Gardner* (1858), 1 S. & T. 109; *Harris* v. *Knight* (1890), 15 P. D. 170; *Clements*, [1892] P. 254; *Berry* (1891), 65 L. T. 763; *Attley* (1892), 67 L. T. 502; *Allan* v. *Morrison*, [1900] A. C. 604; *Crandon* (1901), 84 L. T. 330.

(*l*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154, at pp. 226, 228, *per* Cockburn, C.J., overruling, as regards declarations made *after* the execution of the will, *Quick* v. *Quick* (1864), 3 S. & T. 442 (Mellish, L.J., dissenting). See also *Johnson* v. *Lyford* (1868), 1 P. & D. 546. The decision in *Sugden* v. *Lord St. Leonards* (*ubi supra*), that statements by the testator *after* the

or after execution, are admissible as secondary evidence of the contents of a lost will.

Prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will (*m*); and so are declarations made by him subsequently to the execution of the will (*n*). There are no degrees of secondary evidence, and where a will has been lost or destroyed, the Court must take the parol evidence of its contents side by side with the supposed draft, and out of them extract, as best it may, the contents of the will (*o*). So where the will of a testator, after his death, was torn in pieces by his son while a copy was being made by the executor, and most of the pieces were recovered, but there were some blanks left, and in this incomplete state it was presented for probate, probate was granted of the incomplete will and the copy as together constituting the will of the deceased (*p*).

Admissibility of declarations by deceased persons other than the testator.

In *Sly* v. *Sly* (*q*) declarations of a deceased person (not the testator) who had been in possession of property, claiming a limited interest therein under a particular will, were admitted to prove the fact that such will had a legal existence and that certain persons were named executors therein, on the ground that they were in disparagement of the declarant's title; and a copy of the will, the original not being forthcoming, was used as evidence of the contents of such will.

The contents of a lost will may be proved by the evidence of a single witness.

Third.—The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and credibility are unimpeached (*r*).

But the Court must be guided in each particular case by the evidence submitted in proof of the contents of the will, having regard to the rule that in order to support a will propounded, when it is proved by parol evidence only, that evidence must be of extreme cogency and such as to satisfy the Court beyond all

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execution of the will are admissible to prove its contents, did not receive the approval of the House of Lords in *Woodward* v. *Goulstone* (1886), L. R. 11 A. C. 469, but that decision has not been overruled and is binding on the Courts, though its application will not be extended: *Atkinson* v. *Morris*, [1897] P., at p. 47.

(*m*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at p. 226. See *Johnson* v. *Lyford* (1868), 1 P. & D. 546.

(*n*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at pp. 227 *et seq.*

(*o*) *Burls* v. *Burls* (1868), 1 P. & D. 472.

(*p*) *Leigh*, [1892] P. 82; *Lafone* v. *Griffen* (1909), 25 T. L. R. 308. Where the will has been destroyed or rendered partially illegible by mere accident, as by stains, fading of the ink, and the like, the contents may be established by parol, as in the case quoted by Toller, p. 70, where a will was found gnawed by rats and in part illegible; on proof of the substance of the will, by the joining of the pieces, and by the memory of the witnesses, probate was granted; *vide ante*, p. 163, note (*k*).

(*q*) (1877), 2 P. D. 91. And see *Fawke* v. *Miles* (1911), 27 T. L. R. 202.

(*r*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154.

reasonable doubt that there really are before it the testamentary intentions of the testator (*s*).

Fourth.—Where the contents of a lost will are not completely proved, probate may be granted to the extent to which they are proved (*t*). Where the contents of a lost will are not completely proved.

(*s*) *Per* Lord Herschell, L.C., in *Woodward* v. *Goulstone* (1886), L. R. 11 A. C., at p. 475.

(*t*) *Sugden* v. *Lord St. Leonards* (1876), 1 P. D., at pp. 233—235. The reasons given for this rule by Jessel, M.R., were not assented to by Lord Herschell, L.C., in *Woodward* v. *Goulstone* (1886), L. R. 11 A. C., at p. 477, but he stated that he did not mean to cast doubt upon the decision in that case: *ibid.*, at p. 478.

CHAPTER X.

ADMINISTRATORS.

What is an administrator.

An administrator is the person, or one of the persons, to whom the representation of the deceased is committed by the Court for default of an executor (*a*). His office resembles that of an executor, but, since he has not been selected by the deceased, he is in general obliged to give a bond with sureties for the due performance of his office (*b*).

Section 1.

WHO IS CAPABLE OF BEING AN ADMINISTRATOR.

Speaking generally, the same are capable of being administrators as are capable of being executors (*c*).

Alien.

Even before the Naturalization Act, 1870, if a person entitled to a grant of administration was an alien, that was no disability (*d*). During a state of war, however, administration will not be granted to an alien enemy (*e*).

Married woman.

The fact that the person entitled to a grant of administration was a married woman was no disqualification, even before the Married Women's Property Act, 1882 (*f*). Administration was committed to her alone, not jointly with her husband (*g*); the general rule was, however, that a married woman could not take administration without her husband's consent (*h*).

Since the Married Women's Property Act, 1882, a married woman may be appointed administratrix without any consent on the part of her husband, and may act in that office as if she were a *feme sole* (*i*).

(*a*) See Godolph., Part II, Chapter 30, section 1, and as to the origin of administrators, *post*, pp. 280, 281.

(*b*) See *post*, pp. 455 *et seq.*

(*c*) See *ante*, Chapter VII, section 1, pp. 205 *et seq.*

(*d*) Com. Dig. Administrator (B.) 6; and see section 17 of the British Nationality and Status of Aliens Act, 1914, which now replaces section 2 of the Naturalization Act, 1870.

(*e*) *Vide ante*, p. 38, note (*f*).

(*f*) Com. Dig. Administrator (B) 6.

(*g*) *Brown* v. *Wood* (1648), Aleyn. 36.

(*h*) Bac. Abr. Exors. (F); *Lover* v. *Lover* (1842), 6 Jur. 156. See *Hardinge* (1840), 2 Curt. 640; *Bubbers* v. *Harby* (1842), 3 Curt. 50.

(*i*) The husband need no longer join in the administration bond: *Ayres* (1883), 8 P. D. 168.

Formerly, on renunciation of married woman (person solely entitled to administration), grant made to husband.

By the old practice, if the person solely entitled to a grant of administration was a married woman, and she renounced her right, the grant was made to her husband; for, it was said, the husband has an interest, the grant must follow the interest, and the wife cannot by renouncing deprive her husband of his right to the grant (*k*). It is, however, doubtful whether the grant would be so made since the Married Women's Property Act, 1882.

Public Trustee may be administrator.

Public Trustee Act, 1906 (6 Edw. 7, c. 55).

By the Public Trustee Act, 1906, s. 6, sub-s. 1, "If, in pursuance of any rule under this Act (*l*), the Public Trustee (*m*) is authorised to accept by that name probates of wills or letters of administration, the Court having jurisdiction to grant probate of a will or letters of administration may grant such probate or letters to the Public Trustee by that name, and for that purpose the Court shall consider the Public Trustee as in law entitled equally with any person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee shall not be required for the grant of letters of administration to any other person, and that, as between the Public Trustee and the widower widow or next-of-kin of the deceased, the widower widow or next-of-kin of the deceased shall be preferred, unless for good cause shown to the contrary" (*n*).

By section 6, sub-section 2 of the Act provision is made by which an executor who has obtained probate or an administrator who has obtained administration may, with the sanction of the Court, transfer the deceased's estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrators, if any (*o*).

(*k*) *Vanthienen* v. *Vanthienen* (1730), Fitz-Gibb. 203; *Wenham* v. *Wenham* (1848), 6 N. C. 17; *Haynes* v. *Matthews* (1859), 1 S. & T. 460.

(*l*) By the Public Trustee Rules, 1912, rule 6, "subject to the Act and these rules the Public Trustee is authorized . . . to accept by the name of the Public Trustee probate or letters of administration of any kind and either as principal or agent for any person." He can take a grant in the case of persons dying domiciled abroad: *Grundt*, [1915] P. 126, 128.

(*m*) The office of Public Trustee was created by the statute 6 Edw. 7, c. 55, which provides that the Public Trustee shall be a corporation sole (section 1, sub-section 2). As to grants to the Public Trustee as Custodian of Enemy Property, see *ante*, p. 38, note (*f*). Under section 175, sub-section 1 of the Judicature (Consolidation) Act, 1925, the Public Trustee may be granted administration as a "Trust Corporation," *vide infra*, p. 274.

(*n*) For the practice when the Public Trustee applies for a grant, see "Instructions with regard to Applications by the Public Trustee," *post*, pp. 898, 899. No bond or security is required from the Public Trustee, but he is subject to the same liabilities and duties as if he had given a bond or security: Public Trustee Act, 1906, s. 11, sub-s. 4. A limited grant may be made to the Public Trustee on his application, although he may be considered entitled to a general grant: Direction, July 20, 1915. The Public Trustee may take a grant as attorney for any person (Public Trustee Rules, April 15, 1912), and when he does so, the grant is made to "the Public Trustee" as the attorney and for the use and benefit of the constituent, omitting the words "and until he apply for and obtain a grant."

(*o*) See the sub-section printed *post*, App. I, p. 726.

Trust Corporations.

By section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, which has effect whether the deceased died before or after the commencement of the Act (*p*), the Court may grant administration (*q*) to a trust corporation (*r*), either solely or jointly with another person, and the corporation may act accordingly as administrator. Administration is not to be granted to a syndic or nominee of the trust corporation (*s*), but any officer authorised for the purpose by the trust corporation or the directors or governing body thereof may, on behalf of the corporation, swear affidavits, give security (*t*), and do any other act or thing which the Court may require with a view to the grant to the corporation of administration, and the acts of the officer so authorised are binding on the corporation (*u*).

Trustees of settled land.

By section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, in the case of persons dying after the commencement of the Act (*x*), administration with the will annexed in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and, where the deceased died wholly intestate as to his estate, administration shall, as regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement if willing to act (*y*).

Legal disqualifications.

A person who would otherwise be entitled to a grant of administration may be incapable of acting as administrator on account of some legal disqualification.

Lunatic.

If the person solely entitled to a grant of administration is a lunatic, the administration is committed to another for his use and benefit, in accordance with rules presently to be considered (*z*).

Minor.

If the person solely entitled to administration is a minor, administration is committed to another for his use and benefit until he attains the age of twenty-one years. In one case, indeed,

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(*p*) Judicature (Consolidation) Act, 1925, s. 161, sub-s. 5. See *ante*, p. 207, note (*i*).

(*q*) This includes all letters of administration, whether with or without a will annexed, and whether granted for general, special or limited purposes : Judicature (Consolidation) Act, 1925, s. 175, sub-s. 1.

(*r*) For the definition of a trust corporation, *vide ante*, p. 206, note (*h*).

(*s*) Judicature (Consolidation) Act, 1925, s. 161, sub-s. 2. A foreign trust corporation can, however, appoint an attorney, and an English trust corporation can apply as attorney : President's Directions, December 3, 1925, No. 2, *post*, p. 887, and see *ante*, p. 205.

(*t*) No surety is required from a trust corporation having its principal office within the jurisdiction, unless the registrar so directs : Rule 111, N. C. B.

(*u*) Judicature (Consolidation) Act, 1925, s. 161, sub-s. 3; and see Rule 111, N. C. B.

(*x*) Judicature (Consolidation) Act, 1925, s. 162, sub-s. 2.

(*y*) *Ibid.*, section 162, sub-section 1. See *ante*, Chapter VIII, "Special Personal Representatives in Respect of Settled Land," generally, and especially p. 234; and see Rule 118, N. C. B.

(*z*) *Vide post*, pp. 370 *et seq.*

the Court granted administration, limited to the receipt of dividends in the English Funds, to a minor residuary legatee, the wife of a minor, both domiciled in Portugal, on proof that by the law of Portugal she was competent to administer although within age (*a*). But in a later case (*b*) Sir C. Cresswell refused to grant letters of administration with the will annexed to a minor, who had been appointed administrator by the Court of the testatrix's domicil, on the ground that by so doing the Court would be acting in contradiction to the law of this country, by granting administration to a person under a disability, who cannot by the law of this country take upon himself the liabilities which the law casts upon an administrator—for example, cannot execute a bond.

Felon convict.

Where the person entitled to the grant is a felon convict, administration for his use and benefit is granted to the person entrusted, under the Felony Act, 1870, with the custody and management of his property, so long as such person shall continue to have such custody (*c*).

Murder or manslaughter of testator or intestate.

A person who is guilty of feloniously killing another cannot take any benefit under that other person's will or intestacy, and this applies equally to a case of manslaughter as to one of murder (*d*). Therefore, where a husband was convicted of the murder of his wife, it was held that his legal personal representative had no claim to administer the murdered wife's estate (*e*).

Material objections to fitness.

It has been seen that the Court has no power to inquire into the fitness of a person appointed executor and to exclude him from office on any ground other than some legal disqualification recognised by the common law (*f*). It will, however, appear in the course of the following chapters that a person whose title to a grant of administration depends, not upon statute, but upon the practice of the Court, or whose appointment is in the discretion of the Court, may be excluded from the administration on the ground of some material objection to his fitness (*g*).

Section 2.

NUMBER OF ADMINISTRATORS.

Provisions as to the number of administrators.

Section 160, sub-section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, which replaces section 12 of the

(*a*) *Countess da Cunha* (1828), 1 Hagg. 237.
(*b*) *H.R.H. the Duchess d'Orléans* (1859), 1 S. & T. 253.
(*c*) *Vide post*, p. 376. As to the vesting of property where an administrator becomes a convict, see section 65 of the Trustee Act, 1925, *ante*, p. 209, note (*y*).
(*d*) *Crippen*, [1911] P. 108; *Hall* v. *Knight*, [1914] P. 1.
(*e*) *Crippen*, *ubi supra*.
(*f*) *Ante*, p. 209.
(*g*) See *post*, pp. 295, 302, 367, 401 *et seq.*

Administration of Estates Act, 1925, and applies to grants made after the date of the commencement of the Act, whether the testator or intestate died before or after that date (*h*), provides that administration (*i*) shall not be granted to more than four persons in respect of the same property, and administration (*i*) shall, if there is a minority (*k*) or if a life intere,t arises under the will or intestacy, be granted either to a trust corporation (*l*), with or without an individual, or to not less than two individuals (*m*). And it is provided that the Court in granting administration may act on such *prima facie* evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by probate rules and orders (*n*).

In *In the Estate of Herbert* (*o*) it was held that the provisions of this sub-section must be read subject to the modification contained in section 162, sub-section 1 of the Act, namely, that the Court in the case of insolvency is to have a discretion to grant administration to some person other than those interested in the residue; and that under the latter section it is competent to the Court, even during a minority, to appoint a creditor to be a single administrator. But in *In the Estate of White* (*oo*) it was held by the Court of Appeal that there was no power, during the minority of an intestate's children, to appoint his widow as sole administratrix, even though the estate was deeply insolvent; and while *In the Estate of Herbert* (*o*) was not in terms over-ruled, the Court of Appeal appears to have considered that nothing contained in sub-section 1 of section 162 of the Supreme Court of Judicature (Consolidation)

(*h*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 3.

(*i*) *I.e.*, with or without a will annexed, and whether for general, special, or limited purposes: *ibid.*, s. 175, sub-s. 1.

(*k*) Except in cases where there are beneficiaries who are minors or infants or where life interests are created by the will, the fact that an executor is an infant does not of itself necessitate a grant to two persons: President's Directions, December 3, 1925, No. 9.

(*l*) As to trust corporations, *vide supra*, p. 274; and for definition, *ante*, p. 206, note (*h*). A grant to a trust corporation, made by reason of a minority or life interest, is limited "until further representation be granted": President's Directions, December 3, 1925, No. 7.

(*m*) Where a grant is made to two persons, it is immaterial that they represent the interest of a single individual, whether as attorneys or guardians or otherwise: President's Directions, December 3, 1925, No. 7.

(*n*) In every oath to lead a grant of administration with or without the will annexed, the deponent must state whether there is a life interest or a minority, and the registrar may call for such further evidence as he may require: Rule 113, N. C. B. When it is alleged by an applicant for a grant to a single grantee that a life interest has been cleared off by redemption, the registrar must be satisfied before making such grant that the whole life interest of the person in question, whether at present ascertainable or not, has been redeemed. Failing this, the grant must be made to two persons, whatever the value of the estate: President's Directions, Dec. 3, 1925, No. 5.

(*o*) [1926] P. 109. (*oo*) (1927), 43 T. L. R. 729.

Act, 1925, authorises a departure from the express provisions of section 160, sub-section 1 of that Act.

Appointment of additional personal representative during minority or life interest.

By section 160, sub-section 2 of the Act it is provided that if there is only one personal representative (not being a trust corporation (*p*)), then, during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, the Court may, on the application of any person interested or of the guardian, committee or receiver of any such person, appoint one or more personal representatives in addition to the original personal representative in accordance with probate rules and orders (*q*).

Rule as to joint grants.

Where it is sought to join, with a person entitled to a grant, a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*r*).

Section 3.

ACCEPTANCE OR REFUSAL OF OFFICE OF ADMINISTRATOR.

Person entitled to grant, cannot be compelled to accept it.

A person who is entitled to a grant of administration cannot be compelled to take a grant, even though he may have intermeddled with the effects in a manner which, had he been appointed executor, would have rendered him compellable to take probate (*s*).

Citation of person having a prior right requisite before grant to another.

It is an established maxim of the Court that where any party has a prior right to administration, the Court requires him to be cited or to renounce before administration will be granted to another person. Such citation answers two purposes : it either compels a representation to be taken by those who are primarily entitled to it, or, where they do not take it, the process provides a substitute for a voluntary renunciation on their part (*u*).

Rule relaxed in certain cases.

The Court will not relax this rule merely by reason that the party entitled to administration has in fact no interest in the estate of the deceased; but in certain cases, especially where the person entitled in priority was so entitled by the practice of the Court and not by statute, the Court has relaxed the rule,

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(*p*) *Vide supra*, note (*l*).

(*q*) See Rule 115, N. C. B.

(*r*) Rule 122, N. C. B.

(*s*) *Ackerley* v. *Oldham* (1811), 1 Phillim. 248; *Ackerley* v. *Parkinson* (1815), 3 M. & S. 411; *Fell* (1861), 2 Sw. & Tr. 126; *Davis* (1860), 4 Sw. & Tr. 213.

(*u*) 4 Burn, E. L. (9th ed.), 367; Wms. on Exors. (11th ed.), 221, 363; *Le Briton* v. *Le Quesne* (1756), 2 Lee, 261; *Barker* (1837), 1 Curt. 592; *Keene* (1859), 1 Sw. & Tr., at p. 267; *Pegg* v. *Chamberlain* (1860), 1 Sw. & Tr., at p. 528. *Vide post*, p. 510.

and granted administration to one with an inferior title, without requiring the renunciation or citation of those with a superior right (*x*).

Person entitled to a grant in priority to applicant presumed to be dead.

Where the special circumstances justify the conclusion that the person who would be entitled in priority to the applicant may reasonably be presumed to be dead, the Court may, in the exercise of its discretionary powers, grant administration to the applicant without requiring citation of that person, upon the applicant swearing that he believes himself to be the next-of-kin of the deceased (*y*).

Renunciation and retractation by person entitled to administration.

The rules as to renunciation by a person entitled to a grant of administration, and the circumstances in which he may be permitted to retract his renunciation, are fully discussed in a later chapter (*z*).

(*x*) *Rogerson* (1840), 2 Curt. 656; *Southmead* (1842), 3 Curt. 28; *Widger* (1842), 3 Curt. 55; *Burchmore* (1873), 3 P. & D. 139; *Gardiner* (1884), 9 P. D. 66; *Webb* (1888), 13 P. D. 71. These were grants for the use and benefit of the person entitled, without citation of or notice to the persons to whom such grants are committed by the practice of the Court: *Hardinge* (1840), 2 Curt. 640, citation of husband of sole next-of-kin dispensed with. In *Teece*, [1896] P. 6, administration of a small estate was granted, under the Court's discretionary powers, to a creditor, without citation of the next-of-kin, on proof that they had received notice of the application. See *Morgan* (1896), 75 L. T. 190. And under special circumstances, the Court has dispensed with citation of persons primarily entitled, in grants under the discretionary powers conferred by section 73 of the Court of Probate Act, 1857, and section 162 of the Judicature (Consolidation) Act, 1925; *vide post*, pp. 401 *et seq.*

(*y*) *Vide post*, p. 409.

(*z*) *Post*, Part II, Chapter VIII, sections 1 and 3.

CHAPTER XI.

GENERAL GRANTS OF ADMINISTRATION IN CASES OF INTESTACY.

In what circumstances general administration as on intestacy is granted.

If a person dies without having made any valid testamentary disposition of his property, he is said to die intestate, and the administration of his estate is committed by the Court to an administrator by a grant of letters of administration.

In certain cases administration as on intestacy is granted, although the deceased has made a valid will, *i.e.*—

(1) Where the testator died before January 1, 1926, and his will appoints no executor and disposes only of land of copyhold tenure or customary freehold, and admission or some act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*a*).

(2) Where the testator died before January 1, 1898 (*b*), and his will appoints no executor and disposes only of real estate (*c*).

(3) Where there is property in England, and the will appoints no executor to act in England and disposes only of property situate abroad (*d*).

(4) Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate, without requiring evidence as to the invalidity of the will (*e*).

(*a*) Such property does not vest in the deceased's personal representative under the Land Transfer Act, 1897, and a will disposing only of such property is not entitled to probate: see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 4. This section is repealed by the Law of Property Act, 1922, and in the case of persons dying after January 1, 1926, the Administration of Estates Act, 1925, ss. 1—3, provides for the devolution on the personal representative of all real estate to which a deceased person was entitled for an interest not ceasing on his death. As to the abolition of copyhold and customary tenure, see the Law of Property Act, 1922, ss. 128—137, Law of Property Act, 1925, s. 202.

(*b*) The date when the Land Transfer Act, 1897, came into operation.

(*c*) Such a will is not entitled to probate: *vide ante*, pp. 13, 246.

(*d*) Such a will is not entitled to probate: *Coode* (1867), 1 P. & D. 449. *Vide ante*, p. 11.

(*e*) *Morton* v. *Thorpe* (1863), 3 S. & T. 179; *Palmer* v. *Dent* (1850), 2 Rob. 284; or probate in common form of an earlier will: *ibid.* So administration as to an intestate will be granted where the testator is proved on affidavit to have died insane and the will on the face of it shows signs of insanity: *Bourget* (1837), 1 Curt. 591; where those interested under the will have been cited to propound it and have not appeared: *Perry* v. *Dike* (1858), 1 S. & T. 12. See *Whiting* v. *Deal* (1854), 2 Spinks, Eccl. & Adm. 56; *vide post*, p. 512, note (*r*).

Origin and sources of the jurisdiction of the Court.

At common law the disposal of intestates' estates was vested in the Ordinary.

The jurisdiction which the Ecclesiastical Courts exercised over the effects of persons dying without a will rested on a very ancient foundation; in the early periods of our history the Ordinary had by common law the absolute disposal of the personal property of all intestates (*f*), and, under the pretext of applying their goods to religious purposes (*in pios usus*), possessed himself of them not only in cases where the deceased left a widow and children or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet; but when the free spirit of our Constitution commenced those struggles which ultimately led to its emancipation, the abuses practised by the Ordinary in the administration of the effects of intestates became in their turn subjected to correction and control (*g*).

By Stat. Westminster II Ordinary bound to pay debts of intestate.

The first statute which abridged the power of the Ordinary was the statute 13 Edw. 1, st. 1, c. 19, commonly called the Statute of Westminster II, by which it is enacted: "Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the Ordinary to be disposed, the Ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament."

But though the Ordinaries were thus made liable to the creditors of the intestate for their just and lawful demands, the residue, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the Ordinary should approve. It is said (*h*) that the flagrant abuses of that power occasioned the Legislature again to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands or those of their immediate dependants.

31 Edw. 3, st. 1. Administration to be granted to the next and most lawful friends: whence administrators originate.

Wherefore the statute 31 Edw. 3, st. 1, c. 11, was passed, which provides "that in case where a man dieth intestate, *the Ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods*; which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's Court . . . and shall answer also in the King's Court to other to whom the said dead person was holden and bound, in the same manner

(*f*) But see *Dyke* v *Walford* (1846), 5 Moo. P. C. 434, where it is stated that the clergy had never at any time in this country a beneficial interest in the property of intestates.

(*g*) *Warwick v. Greville* (1809), 1 Phill., at p. 124, n.; 4 Burn, E. L. 353 (9th ed.). See 2 Black. Comm., pp. 494, 495.

(*h*) 2 Black. Comm. 495. But Lord North states that the statute was due to other causes: see Bac. Abr. tit. Exors. (F).

as executors shall answer; and they shall be accountable to the Ordinaries, as executors be in the case of a testament."

This, says Blackstone (*i*), is the original of administrators, who are only the officers of the Ordinary, appointed by him in pursuance of this statute; their title and authority being derived exclusively from the Ecclesiastical Judge, by grants which are usually denominated letters of administration (*k*).

21 Hen. 8, c. 5. Ordinary to grant administration to the widow or the next-of-kin.

The statute 21 Hen. 8, c. 5, enlarged the power of the Ecclesiastical Judge, and permitted him to grant administration either to the widow, or to the next-of-kin, or to both, at his own discretion, and, where there were two or more persons in the same degree of kindred, gave the Ordinary his election to accept whichever he pleased.

By the Statute of Distribution, administrator compelled to distribute.

Although an administrator was answerable for the debts of the deceased, there was nothing to compel him to distribute the surplus after the payment of debts (*l*). To remedy this injustice, and to oblige the administrator to distribute, the Statute of Distribution (22 & 23 Car. 2, c. 10) was passed.

By Court of Probate Act, 1857, jurisdiction of Ecclesiastical Courts transferred to the Court of Probate.

Upon this footing stood the general law of administrations until the year 1857, in which year the Court of Probate Act, 1857, was passed, whereby the jurisdiction of the Ecclesiastical and all other Courts to grant letters of administration of the effects of deceased persons was abolished, and that jurisdiction transferred to the newly constituted Court of Probate (*m*).

Section 73 of the Court of Probate Act, 1857.

The power of the Court of Probate in making grants of administration and in deciding to whom they should be granted was greatly enlarged, in comparison with that of the Ecclesiastical Courts, by section 73 of that Act (*n*).

Jurisdiction of the Court of Probate now exercised by the Probate Division.

The jurisdiction of the Court of Probate, as has been stated, is now exercised by the Probate Division of the High Court of Justice, to which it was transferred by the Judicature Acts of 1873 and 1875.

Since the Land Transfer Act, 1897, real estate devolves to and becomes vested in the deceased's personal representative,

Until the year 1897 the rights and duties of an administrator extended only to the personal estate and effects of the deceased, but in that year the Land Transfer Act, 1897 (*o*), was passed, which provides: "Where real estate (*p*) is vested in any person without a right in any other person to take by survivorship it

(*i*) 2 Black. Comm. 496.
(*k*) Wms. on Exors. (11th ed.), p. 314.
(*l*) *Carter v. Crawley* (1682), Sir T. Raym., at p. 500.
(*m*) *Vide ante*, pp. 2, 3.
(*n*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73. *Vide post*, pp. 401 *et seq.*
(*o*) 60 & 61 Vict. c. 65.
(*p*) The expression did *not* include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor was necessary to perfect the title of a purchaser from the customary tenant: s. 1, sub-s. 4.

shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him " (*q*).

and letters of administration may be granted in respect of real estate.

Under the Act, which came into force on January 1, 1898, letters of administration may be granted, in cases of death after the commencement of the Act, in respect of real estate only, although there is no personal estate (*r*).

The Court, in granting administration, is to have regard to the rights of persons interested in real estate.

And by section 2, sub-section 4, of the Act, " Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

Changes in the law in the case of deaths after Jan. 1, 1926.

So stood the law on December 1, 1925, but complete changes have been effected by the Law of Property Act, 1922, and the series of statutes which now replace that Act and came into force on January 1, 1926.

Repeal of 13 Edw. 1, st. 1, c. 19, 31 Edw. 3, st. 1, c. 11, 21 Hen. 8, c. 5, Statute of Distribution, and Court of Probate Act, 1857, ss. 70–80.

By the second schedule to the Administration of Estates Act, 1925, the following statutes are repealed : Statute of Westminster II (13 Edw. 1, st. 1, c .19); 31 Edw. 3, st. 1, c. 11; 21 Hen. 8, c. 5; the Statute of Distribution (22 & 23 Car. 2, c. 10), and sections 70 to 80 of the Court of Probate Act, 1857; but only so far as they apply to deaths occurring after the commencement of the Act (*s*).

Abolition of descent to heir, curtesy dower and escheat.

With regard to the real estate and personal inheritance (*t*) of every person dying after the commencement of the Administration of Estates Act, 1925, that Act, by section 45, sub-section 1, abolishes :

(a) All existing modes rules and canons of descent, and of

(*q*) 60 & 61 Vict. c. 65, s. 1, sub-s. 1. (*r*) *Ibid.*, s. 1, sub-ss. 3, 5.

(*s*) Administration of Estates Act, 1925, s. 56, and see Judicature (Consolidation) Act, 1925, s. 162, sub-s. 2. The law in force before the passing of the Act, therefore, still applies in the case of deaths occurring before the commencement of the Act, but the existing law has been modified by certain statutory provisions which apply whether the deceased died before or after January 1, 1926. The chief of these are section 160 of the Judicature (Consolidation) Act, 1925, which replaces section 12 of the Administration of Estates Act, 1925, and contains provisions as to the number of personal representatives : *vide ante*, p. 276; and section 161 of the Judicature (Consolidation) Act, 1925, replacing section 14 of the Administration of Estates Act, 1925, giving power to grant representation to a trust corporation : *vide ante* p. 274.

(*t*) " Real and personal estate " means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will : section 52. As to the devolution of an entailed interest, see section 130 of the Law of Property Act, 1925.

devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

(b) Tenancy by the curtesy (*u*) and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

(c) Dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise (*v*); and

(d) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall, or to a mesne lord for want of heirs.

Savings: real estate of lunatic or defective;

These provisions do not affect the right of any person to take beneficially, by purchase, as heir either general or special (*w*), and they do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic (*x*) or defective (*y*) living and of full age at the commencement of the Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity (*z*), was entitled at his death (*a*). Any such beneficial interest (not being an interest ceasing on his death), without prejudice to any will of the deceased, devolves in accordance with the general law in force before the commencement of the Act applicable to freehold land, and that law applies to such a case, notwithstanding any repeal (*a*). Chattels real and chattels personal are, however, subject to the new law, and it will be noticed that the realty is to devolve in accordance with

(*u*) This is subject to an exception in the case of a lunatic wife: see the Administration of Estates Act, 1925, s. 51, sub-s. 2, and see section 130, sub-section 4 of the Law of Property Act, 1925, as to tenancy by the curtesy of an entailed estate.

(*v*) This is subject to an insignificant exception in the case of freebench: see section 45, sub-section 1 (c) of the Act; and to the exception provided by section 51, sub-section 2 in the case of a lunatic husband.

(*w*) Administration of Estates Act, 1925, s. 51, sub-s. 1.

(*x*) "Lunatic" includes a lunatic whether so found or not: *ibid.*, s. 55, sub-s. 1 (viii).

(*y*) "Defective" includes every person affected by section 116 of the Lunacy Act, 1890, as extended by section 64 of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed: *ibid.*, s. 55, sub-s. 1 (viii).

(*z*) For the purposes of the sub-section, a lunatic or defective who dies intestate as respects any beneficial interest in real estate is not to be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged: Administration of Estates Act, 1925, s. 51, sub-s. 2. In relation to a lunatic not so found, "committee" includes a person on whom the powers of a committee are conferred under section 1 of the Lunacy Act, 1908: Administration of Estates Act, 1925, s. 55, sub-s. 1 (viii).

(*a*) Administration of Estates Act, 1925, s. 51, sub-s. 2.

the *general* law in force before 1926, so that any special custom, such as gavelkind, does not apply.

real estate of unmarried infant;

It is provided by section 51, sub-section 3 of the Administration of Estates Act, 1925, that where an infant dies after the commencement of the Act without having been married, and independently of that sub-section he would, at his death, have been equitably entitled under a settlement (*b*) (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly. This means that the interest is to cease, for, as he has died unmarried, the hypothetical entail must be at an end, and an infant is expressly excluded from the new statutory power to dispose of an entailed interest by will (*c*). The sub-section, therefore, partially repeals the Wills (Soldiers and Sailors) Act, 1918, as regards real estate to which an infant is entitled under a "settlement"; an infant soldier or seaman can only make a will of such real estate if he has been married (*d*).

entailed interest.

Section 45 of the Administration of Estates Act, 1925, does not affect the descent or devolution of an entailed interest (*e*).

Provisions as to the devolution of real and personal estate on death after 1925.

Subject to these exceptions, Part IV of the Administration of Estates Act, 1925, drastically alters the law of the devolution of the beneficial interest in property on the death of the owner intestate on and after January 1, 1926. The new code is discussed in detail later in this chapter (*f*). It is sufficient here to note that the same law is made to apply to real and personal estate without distinction, but this law is not the former law with reference to the devolution of personal estate. The Statutes of Distribution, as well as the Inheritance Act, are superseded. Husband and wife are put on a footing of equality; and so are father and mother, and grandfather and grandmother respectively. The mother regains an old priority over brothers and sisters which she lost in 1685. The whole-blood takes priority over the half-blood, and kindred more remote than first cousins and their issue are excluded from participation. Representation of deceased persons by their issue is allowed through all their degrees, but the provisions as to representation do not apply to parents or grandparents. To save the cost of taking out letters of administration to the estates of infants, the beneficiaries

(*b*) "Settlement" has the same meaning as in the Settled Land Act, 1925: Administration of Estates Act, 1925, s. 55, sub-s. 1 (xxiv).

(*c*) Law of Property Act, 1925, s. 176.

(*d*) See Guide to the New Property Statutes, by Rivington & Fountaine (2nd ed.), p. 361.

(*e*) Administration of Estates Act, s. 45, sub-s. 2, s. 51, sub-s. 4.

(*f*) *Post*, pp. 315 *et seq.*

only take absolutely vested interests on attaining twenty-one, or marriage (*g*).

Provisions of the Legitimacy Act, 1926.

The Legitimacy Act, 1926 (*h*), introduces a new class of persons who are entitled to share in the estate of an intestate, subject to the provisions of that Act, viz., legitimated persons (*i*). But the Act does not affect any rights under the intestacy of a person dying before the commencement of the Act (*k*), *i.e.*, January 1, 1927 (*l*). The Act also contains provisions which confer on an illegitimate child and the mother of an illegitimate child, the right to succeed on the intestacy of the other (*m*).

Devolution of real estate on personal representatives.

Part I of the Administration of Estates Act, 1925, contains provisions as to the devolution of real estate on the personal representative of the deceased, to which there has already been occasion to refer (*n*). Real estate (*o*) to which a deceased person was entitled for an interest not ceasing on his death is to devolve on his personal representatives like a chattel real (*p*), and the personal representatives (*q*) are to be deemed the heirs and assigns of the deceased within the meaning of all trusts and powers (*r*), and are to be his representatives in regard to such real estate as well as in regard to his personal estate (*s*). Moreover, real estate passing under any gift contained in the deceased's will which operates as an appointment under a general power to appoint by will is to vest in the personal representative (*t*), and so is an entailed interest, disposed of by the deceased's will under section 176 of the Law of Property Act, 1925 (*u*), but an entailed interest not disposed of by the will does not so vest (*x*), though any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will does so vest (*y*).

The interest of a deceased person under a joint tenancy where another tenant survives the deceased, does not vest in his personal representative (*z*), nor does the interest of a corporator sole in

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(*g*) This summary is abstracted from the Guide to the New Property Statutes, by Rivington & Fountaine (2nd ed.), p. 356.
(*h*) 16 & 17 Geo. 5, c. 60.
(*i*) These provisions are discussed in detail *infra*, pp. 317—319.
(*k*) Legitimacy Act, 1926, s. 10, sub-s. 2.
(*l*) *Ibid.*, s. 12, sub-s. 2. (*m*) *Ibid.*, s. 9.
(*n*) *Ante*, Chapter I, pp. 14—16.
(*o*) For the definition of "real estate" see Administration of Estates Act, 1925, s. 3, sub-s. 1, *ante*, p. 13, note (*m*)
(*p*) Administration of Estates Act, 1925, s. 1, sub-s. 1.
(*q*) *I.e.*, the executor, original or by representation, or administrator for the time being of a deceased person : *ibid.*, s. 55, sub-s. 1 (xi).
(*r*) *Ibid.*, s. 1, sub-s. 2. (*s*) *Ibid.*, s. 1, sub-s. 3.
(*t*) *Ibid.*, s. 3, sub-s. 2. (*u*) *Ibid.*, s. 3, sub-s. 2.
(*x*) *Ibid.*, s. 3, sub-s. 3. As to its devolution, see Law of Property Act, 1925, s. 130, sub-s. 4.
(*y*) Administration of Estates Act, 1925, s. 3, sub-s. 3.
(*z*) *Ibid.*, s. 3, sub-s. 4.

the corporation's real and personal estate, which will devolve on his successor, and this applies on the demise of the Crown as respects all property vested in the Crown as a corporation sole (*a*).

Application to real estate of law affecting chattels real.

By the Administration of Estates Act, 1925, s. 2, sub-s. 1, it is provided that, subject to the provisions of that Act, all enactments and rules of law, and all jurisdiction of any Court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of the Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of that Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him. And

Power to grant representation of real and personal estate separately or together.

by section 155 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*b*), probate or administration in respect of the real estate of a deceased person, or any part thereof, may be granted either separately or together with probate or administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of trust estate only, and a grant of administration to real estate may be limited in any way the Court thinks proper; but it is provided that, where the estate of the deceased is known to be insolvent, the grant of representation to the estate shall not be severed except as regards a trust estate.

Discretion of Court as to persons to whom administration is to be granted.

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, which replaces section 10 of the Administration of Estates Act, 1925, it is provided that in granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person, or the proceeds of sale thereof, and that where the deceased died wholly intestate as to his estate, administration shall—

(a) Unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose; and

(b) As regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement if willing to act.

(*a*) Administration of Estates Act, 1925, s. 3, sub-s. 5.

(*b*) This section replaces section 13 of the Administration of Estates Act, 1925.

This section only applies in the case of persons dying after the date of the commencement of the Act, and the Court in granting administration in the case of persons dying at any time before that date acts in accordance with the principles and rules in accordance with which it would have acted if the Act had not passed (*c*).

Provisions as to the number of personal representatives.

By section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*d*), which applies to grants made after the commencement of the Act, whether the testator or intestate died before or after that date (*e*), administration is not to be granted to more than four persons in respect of the same property. If any beneficiary is an infant, or a life interest arises under the will or intestacy, administration must be granted either to a trust corporation, with or without an individual, or to not less than two individuals (*f*); and, in such cases, if there is only one personal representative (not being a trust corporation), the Court on application may appoint an additional representative (*g*).

Section 1.

PERSONS DYING BEFORE 1926.

With the exception of the provisions contained in sections 160 and 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, with reference to the number of personal representatives and the grant of representation to trust corporations, the statutory changes in the law outlined above apply only in the case of persons dying after January 1, 1926, and the Court, in granting administration in the case of persons dying at any time before that date, acts in accordance with the principles and rules in force prior to January 1, 1926 (*h*).

Those principles and rules are discussed in the following sub-sections of this section, which apply only in cases where the intestate died before January 1, 1926.

Sub-section 1.—*Grant to the Husband.*

Exclusive right of the husband to be his wife's administrator

Where a married woman dies intestate before January 1, 1926, the husband, whether as her next and most lawful friend under

(*c*) Judicature (Consolidation) Act, 1925, s. 162, sub-s. 2.
(*d*) This section replaces section 12 of the Administration of Estates Act, 1925; and see *ante*, p. 276.
(*e*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 3.
(*f*) *Ibid.*, s. 160, sub-s. 1, *vide ante*, p. 276.
(*g*) *Ibid.*, s. 160, sub-s. 2, *vide ante*, p. 276.
(*h*) *Ibid.*, s. 162, sub-s. 2.

the statute of Edw. 3 (*i*), as some assert (*k*), or independently of statute by virtue of his *jus mariti* at common law, as other authorities insist (*l*), has the right to be appointed administrator of his wife's estate if he survive her, exclusively of all other persons (*m*). And the Court has no power or election to grant administration to any other person, save in the excepted cases hereafter mentioned (*n*).

recognised by the stat. 29 Car. 2, c. 3,

This right of the husband was expressly recognised by the statute 29 Car. 2, c. 3, which provides that the Statute of Distribution (*o*), "shall not extend to the estates of femes covert that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act."

unaltered by the Married Women's Property Act, 1882,

The Married Women's Property Act, 1882, has not affected the husband's right to a grant of administration to his deceased wife's estate if she die intestate before January 1, 1926, for that Act has not altered the devolution of the undisposed of separate property of a married woman (*p*), the quality of separate property, whether created by statute or by settlement, ceases on the death of the married woman, and thereupon her undisposed of property devolves as if the separate use had never existed (*q*).

unaffected by the Land Transfer Act, 1897.

The prior right of the husband of an intestate to a grant is not affected by the Land Transfer Act, 1897, and where there is both real and personal estate he is entitled to a grant in priority to the heir-at-law (*r*). But, under special circumstances, the husband may be passed over, and the grant made to the heir-at-law under section 73 of the Court of Probate Act, 1857 (*s*). Where a wife leaves real estate and no personal estate, the husband, unless he is tenant by curtesy of the real estate, has no interest, and will be passed over in favour of the heir-at-law.

(*i*) 31 Edw. 3, st. 1, c. 11. *Vide ante*, p. 280.

(*k*) 3 Salk. 21; *Elliott* v. *Gurr* (1812), 2 Phill. at p. 19; *Fettiplace* v. *Gorges* (1789), 1 Ves. Jun. at p. 49; *Re Lambert's Estate* (1888), 39 Ch. D. 626.

(*l*) Com. Dig. Administrator B (6); *Watt* v. *Watt* (1796), 3 Ves., at p. 247.

(*m*) *Humphrey* v. *Bullen* (1737), 1 Atk. 458.

(*n*) *Sir George Sand's Case* (1705), 3 Salk. 22; *Fawtry* v. *Fawtry* (1690), 1 Salk. 36.

(*o*) 22 & 23 Car. 2, c. 10.

(*p*) *Re Lambert's Estate* (1888), 39 Ch. D. 626.

(*q*) *Per* Stirling, J., in *Re Lambert's Estate* (1888), 39 Ch. D. 626, at p. 633; and see the cases there cited.

(*r*) See Land Transfer Act, 1897, s. 2, sub-s. 4; *Ardern*, [1898] P. 147; Instructions to the officers of the registries under the Land Transfer Act, 1897 (*post*, p. 886), No. 7. But see as to the effect of section 160 of the Judicature (Consolidation) Act, 1925, *infra*, p. 289.

(*s*) *Ardern*, [1898] P. 147. But in grants after January 1, 1926, where the husband is tenant by the curtesy, the heir-at-law could not take a sole grant: see Judicature (Consolidation) Act, 1925, s. 160, *infra*, p. 289.

Effect of Judicature (Consolidation) Act, 1925, s. 160.

The husband's right to be sole administrator has, however, been encroached upon by section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, which applies to grants made after the commencement of that Act, whether the testator or intestate died before or after that date, and requires that administration shall be granted either to a trust corporation, with or without an individual, or to not less than two individuals, if there is a minority or if a life interest arises under the intestacy. Where there is realty and the husband is tenant by the curtesy, the husband cannot, after January 1, 1926, obtain a sole grant, for a life interest arises under the intestacy; and the same applies to cases in which there is both realty and personalty, and the heir-at-law is a minor, for in those cases there is a minority. In such circumstances the husband must either consent to the grant being made to a trust corporation, or join with a trust corporation in taking the grant, or there must be a joint grant to the husband and the heir-at-law or his guardian (if the heir-at-law is a minor). Moreover, where, in such circumstances, administration has been granted to the husband alone, the Court has power, under sub-section 2 of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, to appoint one or more additional administrators.

The husband has no right to the grant unless there has been a valid marriage, or if the marriage has been dissolved,

Husband passed over.—Where there has never been a valid marriage (*t*), or where the marriage has been dissolved during the lifetime of the parties (*u*), the husband has no right to a grant of administration.

And, as a result of the long-established practice recognised by the Court to vest the right of administration in the person who

(*t*) A distinction has been drawn between marriages which are voidable on the ground of some canonical disability, *e.g.*, impotence, and marriages invalid on the ground of a civil disability, *e.g.*, prior marriage, unsoundness of mind, consanguinity and affinity. The former are esteemed valid unless declared null in the lifetime of the parties; the latter are void *ab initio*, and the husband is not entitled to a grant of administration: see *Elliott* v. *Gurr* (1812), 2 Phill. 16, 19; and, as to marriages void for insanity, *Browning* v. *Reane* (1812), 2 Phill. 69. It seems that a conviction for bigamy, though pleaded and proved, is not conclusive evidence in an administration suit that the husband's marriage with the intestate was void *ab initio*: *Wilkinson* v. *Gordon* (1824), 2 Add. 152. The Deceased Wife's Sister's Marriage Act, 1907, and the Deceased Brother's Widow's Marriage Act, 1921, validate the marriage of a man with his deceased wife's sister or his deceased brother's widow whether contracted before or after the dates of the Acts, but the fact that a marriage contracted before the date of the Acts is made valid by the Acts does not prejudicially affect any right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of the Acts respectively, existing in respect of any property: Deceased Wife's Sister's Marriage Act, 1907, s. 2; Deceased Brother's Widow's Marriage Act, 1921, s. 1.

(*u*) A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate, and the Court will pass over the surviving spouse without citation: *Wallas*, [1905] P. 326; *Nares* (1888), 13 P. D. 35 (wife). As to divorce by foreign law, see *Argent* v. *Argent* (1865), 4 S. & T. 52.

or if he has parted with all his interest in his wife's fortune.

is possessed of the beneficial interest in the personal estate, it has been held that if the husband has parted with all his interest in his wife's fortune, he shall not have administration to her estate (*x*).

Administration to wife dying after judicial separation or protection order.

So where a wife has been judicially separated from her husband, or has obtained a protection order under 20 & 21 Vict. c. 85, or a separation order under the Summary Jurisdiction (Married Women) Act, 1895, and afterwards dies intestate during the lifetime of her husband, the Court may grant administration to her next-of-kin, limited to such property as she had acquired or become possessed of since the separation (*y*), without specifying of what that property consisted (*z*). The husband, having no interest in the property, is not entitled to a general grant of administration, though if the wife were possessed of other separate property he would be entitled to a grant *cæterorum* or to a grant " save and except " (*a*).

Administration to wife living apart from husband under separation deed.

Where a husband agrees by deed of separation that if his wife shall die intestate her next-of-kin shall be entitled to her property, upon her death intestate during his lifetime administration, limited to the property to which they are entitled by virtue of the deed, will be granted to her next-of-kin, to the exclusion of the husband, who has no interest in that property (*b*).

Husband convicted of murder of wife.

A husband convicted of the murder or the manslaughter of his wife forfeits all interest in her estate, and neither he nor his representatives can claim administration to her estate (*c*).

Husband cited to accept a grant.

Where the husband renounces, or has been cited to take out administration to the estate of his intestate wife, and has failed to do so, the Court will grant administration to her next-of-kin or heir-at-law (*d*).

(*x*) Com. Dig. Administrator B (6), *in notis*; *Rex* v. *Bettesworth* (1740), Str. 1111; see 2 Hagg. App. 149.

(*y*) See, as to judicial separation, the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25, now repealed and replaced by section 194 of the Judicature (Consolidation) Act, 1925; as to protection orders, Matrimonial Causes Act, 1857, s. 21 (repealed, so far as it relates to the High Court, by the Judicature (Consolidation) Act, 1925); *Worman* (1859), 1 S. & T. 513; *Faraday* (1861), 2 S. & T. 369; *Weir* (1862), 2 S. & T. 451; *Brighton* (1865), 34 L. J. P. 55; *Stephenson* (1866), 1 P. & D. 287; as to separation orders, 58 & 59 Vict. c. 39, s. 5, sub-s. (a); *Jones* (1904), 74 L. J. P. 27.

In such cases, it is not, as a general rule, necessary to cite the husband : *Brighton* (1865), 34 L. J. P. 55; unless a question as to the validity of the order arises : *Faraday* (1861), 2 S. & T. 369. A claim to discharge a protection order may be included in a probate action : *Mudge* v. *Adams* (1881), 6 P. D. 54; *Mahoney* v. *McCarthy*, [1892] P. 21; *Hopkins* v. *Bulbeck* (1920), 64 Sol. Jo. 409.

(*z*) *Worman* (1859), 1 S. & T. 513; but see *Tharp* (1878), 3 P. D. 76.

(*a*) In *Stephenson* (1866), 1 P. & D. 287, a general grant to the next-of-kin of the wife appears to have been made. And see *Jones* (1904), 74 L. J. P. 27.

(*b*) *Allen* v. *Humphrys* (1882), 8 P. D. 16. But the husband should be cited, for he might dispute the deed : *Megson* (1899), 80 L. T. 295.

(*c*) *Crippen*, [1911] P. 108; *Hall* v. *Knight*, [1914] P. 1.

(*d*) See *Bell* (1859), 1 Sw. & Tr. 288; *Moore*, [1891] P. 299.

A husband's right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy. Where the husband of a deceased intestate had left this country and had been adjudicated bankrupt before he had administered to his wife's estate, the Court refused to regard his right to administer as "property divisible among his creditors" under section 44 of the Bankruptcy Act, 1883, but made a grant of administration to the wife's estate to his trustee in bankruptcy under section 73 of the Court of Probate Act, 1857 (*e*).

Husband's right to administer does not vest in his trustee in bankruptcy.

If the wife were an executrix to another, then, as to the goods which she had in that capacity, her husband has no title to a grant of administration; for in this case the administration is not of the goods of the wife, but *de bonis non administratis* of her testator, to be granted in accordance with the rules which apply to that species of grant (*f*).

Husband has no right to administration of property held by the wife as executrix to another.

Grant to the Husband's Representatives.—When a wife dies intestate, and her husband, who survives her (*g*), afterwards dies without having taken out administration to her estate, letters of administration to the estate of the wife will be granted to the legal personal representatives of the husband, in preference to her next-of-kin (*h*).

If the husband survives the wife, and dies before he obtains administration, the grant is made to his representatives.

The next-of-kin of the husband must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate (*i*).

Husband's next-of-kin must first constitute themselves

If the husband's representatives are co-administrators, they

(*e*) *Turner* (1886), 12 P. D. 18. But see *Bowron* (1915), 84 L. J. P. 92; and see *post*, p. 311.

(*f*) 3 Salk. 21.

(*g*) As to proof of survivorship, *vide post*, pp. 419 *et seq.*

(*h*) Formerly the practice was otherwise. The Ecclesiastical Court considered itself bound by the statute to grant administration in such a case to the next-of-kin of the wife: *Reece* v. *Strafford* (1800), 1 Hagg. 347; and see the cases collected in 2 Hagg. App., pp. 158 *et seq.* In equity, however, such administrator was considered as trustee for the representatives of the husband: *Cart* v. *Rees*, cited in *Squib* v. *Wyn* (1717), 1 P. Wms. 377, 381; *Humphrey* v. *Bullen* (1737), 1 Atk. 458; *Elliott* v. *Collier* (1747), 3 Atk. 526. This practice of granting administration to those who had no beneficial interest in the estate to be administered was in direct conflict with the general principle that the grant follows the interest. Its inconvenience was pointed out by Sir John Nicholl in *Gill* (1828), 1 Hagg. 341; and in *Fielder* v. *Hanger* (1832), 3 Hagg. 769, it was decided that in future the rule that the grant follows the interest must prevail, and that, unless it could be shown that the representatives of the husband had no interest, and that the property of the wife belonged to her next-of-kin, the former are entitled to the grant. And this practice was afterwards uniformly followed: see *Partington* v. *Att.-Gen.* (1869), L. R. 4 H. L. 100. In grants after January 1, 1926, the rights of the husband's representatives are subject to the provisions of the Judicature (Consolidation) Act, 1925, s. 160, as to the number of representatives where a minority or life interest arises under the intestacy: *vide supra*, p. 289.

(*i*) *Crause* (1858), 1 S. & T. 146; *Partington* v. *Att.-Gen* (1869), L. R. 4 H. L. 100, 115, overruling *Gutteridge* v. *Stilwell* (1833), 1 M. & K. 486; *Harding* (1872), 2 P. & D. 394.

his personal representatives.

must all join in taking out administration to the wife's estate (*k*).

If property belongs to wife's next-of-kin, they are entitled in preference.

If the next-of-kin of the wife are entitled to the beneficial interest in her estate (as by settlement), administration will be granted to them, and not to the husband's representatives, on the principle that the grant follows the interest (*l*). And, as has been seen, the representatives of a husband who has been convicted of the murder or manslaughter of his wife, have no title to administer to the wife's estate (*m*).

Where there is real estate, wife's heir-at-law entitled in priority.

Where the wife dies intestate, leaving both real and personal estate, her heir-at-law is, since the Land Transfer Act, 1897, entitled to a grant in priority to the representatives of her husband, who survived her (*n*).

If husband's representatives renounce, grant made to wife's next-of-kin.

If the husband's representatives renounce, or are cited and fail to appear, the grant will be made to the wife's next-of-kin (*o*).

Wife's next-of-kin entitled to the grant under section 33 of the Wills Act.

Where the deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death, the Court granted administration limited to the estate bequeathed to her by will of her next-of-kin, and dispensed with the renunciation and citation of the personal representative of her husband, who survived her, but died in the lifetime of her father; on the ground that, under section 33 of the Wills Act, 1837, the deceased must be taken to have died immediately after the death of the testator (her father), and, had that been the case, she would have died a widow, and her son would have been entitled to administration (*p*).

Sub-section 2.—*Grant to the Widow.*

By stat. 21 Hen. 8, c. 5, the Court may grant administration to the widow, or next-of-kin, or both jointly, in its discretion.

The statute 21 Hen. 8, c. 5, s. 2, provides: "In case any person die intestate . . . then the Ordinary . . . shall grant the administration of the goods of the . . . person deceased to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good."

In cases governed by the statute, it is, therefore, in the discretion of the Court to grant administration to the widow alone, or to the next-of-kin alone, or to the widow jointly with the next-of-kin. And it has been held that the Court may, in

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(*k*) *Nayler* (1851), 2 Rob. 409. But one alone of several *executors* may take a grant: *ibid.*; and see *post*, p. 304.

(*l*) *Pountney* (1832), 4 Hagg. 289; *Austen* v. *Hodges* (1860), cited Tristram & Coote (16th ed.), p. 118.

(*m*) *Vide supra*, p. 290.

(*n*) *Roberts*, [1898] P. 149.

(*o*) *Bell* (1859), 1 S. & T. 288.

(*p*) *Councell* (1871), 2 P. & D. 314.

its discretion, grant administration to the next-of-kin as to a part, and to the widow as to the rest of the estate (*q*).

The title of the widow to a grant being in the discretion of the Court, it was held that a *mandamus* would not issue to compel the Ordinary to commit the administration to her; for that would be to deprive the Ordinary of his election, in granting it to her, or to the next-of-kin (*r*).

Widow entitled to sole grant, except where there is a minority or life interest.

Grant to the Widow alone.—Before the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court, in the exercise of its discretion, granted administration to the widow of the intestate, to the exclusion of his next-of-kin (*s*) or heir-at-law (*t*), except for good cause shown (*u*). But in the case of grants made after January 1, 1926, whether the intestate died before or after that date, his widow can only obtain a sole grant where there is no minority or life interest arising under the intestacy. Thus if the next-of-kin or any of them are minors, or there is real estate and the heir-at-law is a minor, or if the widow is tenant for life of real estate in right of dower, she must either consent to a grant to a trust corporation, or join with a trust corporation in taking the grant, or there must be a joint grant to the widow and either the next-of-kin or the heir-at-law, or the guardian of the minor next-of-kin or minor heir-at-law (*x*). But where the husband died before January 1, 1926, intestate and without issue, and the net value of the real and personal estate does not exceed £500, the widow may still take a sole grant irrespective of the ages of the heir-at-law and next-of-kin; for she is entitled to the whole estate under the provisions of the Intestates' Estates Act, 1890.

Joint grant to widow and one of next-of-kin.

Joint Grant to Widow and Next-of-Kin.—It was formerly the practice of the Court to prefer a sole to a joint administration, and where a joint grant was made to the widow and one of the next-of-kin, to require that all the other next-of-kin should consent that the grant shall be so made (*y*). The consent of minor next-

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(*q*) *Fawtry* v. *Fawtry* (1690), 1 Salk. 36; and see now section 155 of the Judicature (Consolidation) Act, 1925. (*r*) *Anon* (1725), 1 Stra. 552.

(*s*) *Webb* v. *Needham* (1823), 1 Add., at p. 495; *Conyers* v. *Kitson* (1831), 3 Hagg., at p. 557; *Stretch* v. *Pynn* (1752), 1 Lee, at p. 36; *Goddard* v. *Goddard* (1821), 3 Phill., at p. 638; and see *Rogerson* (1840), 2 Curt. 656; *Chappell* v. *Chappell* (1843), 3 Curt., at p. 431.

(*t*) The prior right of the widow of an intestate to a grant is, it seems, not affected by the Land Transfer Act, 1897: see Additional Instructions under the Land Transfer Act (*post*, p. 886), No. 7.

(*u*) As to what is good cause for passing over the widow, *vide post*, pp. 295, 296.

(*x*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1. Where a sole grant has been made to the widow, the Court has power to appoint one or more additional representatives during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered: *ibid.*, sub-s. 2.

(*y*) *Newbold* (1866), 1 P. & D., at p. 286.

of-kin was considered insufficient, unless there were special grounds for the application for a joint grant (*z*). After the Land Transfer Act, 1897, if the deceased left real estate, the consent of the heir-at-law also was considered requisite. And in such a case a joint grant might be made to the widow and the heir-at-law, with the consent of all the next-of-kin.

Joint grant to widow and heir-at-law.

Joint grant to widow and person entitled in distribution (not next-of-kin).

It was at one time held that the Court is precluded by the statute 21 Hen. 8, c. 5, from making a joint grant to the widow and one of the persons entitled in distribution who was not next-of-kin (*a*), even with the consent of the next-of-kin and all other persons entitled in distribution. But in a later case it was held that the Court might make such a grant under section 73 of the Court of Probate Act, 1857, where there were special circumstances which rendered that course convenient (*b*).

Present practice.

Where administration is granted after January 1, 1926, to the widow and one of the next-of-kin, or to the widow and the heir-at-law, it is still necessary in cases where there is no minority or life interest to obtain the consent of all other persons equally entitled to the grant. And where it is sought to join with the widow a person not equally entitled, *e.g.*, a person entitled in distribution but not next-of-kin, then whether or not there is a minority or life interest, all persons with a prior right must be cleared off by renunciation or by a Registrar's order on summons for a joint grant (*c*).

The marriage must not be potentially polygamous.

Widow passed over.—The only kind of marriage which the English law recognises is one which is essentially the voluntary union for life of one man with one woman, to the exclusion of all others, and therefore if the marriage is potentially polygamous, the English Court would no doubt refuse to recognise the claim of a surviving female spouse to a grant of administration as the intestate's "widow" (*d*). A divorced wife has no interest in the estate of her former husband and is passed over without citation, the grant being made to his next-of-kin (*e*). But a wife who has been judicially separated from her husband on the ground

A divorced wife has no right to a grant.

Widow judicially separated—

(*z*) *Newbold* (1866), 1 P. & D. 285. And see *Dickinson*, [1891 P. 293, where the consent of a minor (next-of-kin) aged twenty was accepted, there being special circumstances to justify the Court in making a joint grant.

(*a*) *Browning* (1861), 2 S. & T. 634.

(*b*) *Grundy* (1868), 1 P. & D. 459. This was a grant *de bonis non*, but such grants are governed by the same rules as original grants; it therefore seems that the contrary decision in *Browning* (1861), 2 S. & T. 634, must be regarded as dissented from.

(*c*) Rule 122, N. C. B.

(*d*) See *Belshah* v. *Majid*, *The Times* Newspaper, December 17, 18, 1926, January 14, 1927 (Mohammedan's two "wives" contend for grant); and cf. *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130, 133. As to the effect of marriages between a man and his deceased wife's sister or deceased brother's widow, see *ante*, p. 289, note (*t*).

(*e*) *Nares* (1888), 13 P. D. 35. As to divorce by foreign law, see *Ryan* v. *Ryan* (1816), 2 Phill. 332; *Argent* v. *Argent* (1865), 4 S. & T. 52; *Nares*, *ubi supra*.

of a matrimonial offence committed by her, is still his wife, and does not by that fact alone forfeit her right to a grant of administration; though the Court may regard her conduct as good ground for exercising its discretion in favour of the next-of-kin (*f*). Accordingly it has been held that the Court will not pass over the widow, who has been judicially separated from her husband on the ground of her cruelty, without giving her an opportunity of showing cause against the application (*g*).

will not be passed over, unless cited.

Though usually a preference is given to the widow, yet it has always been held and repeatedly been decided that the widow may be set aside and administration, at the discretion of the Court, be granted to the next-of-kin (*h*). This discretion will, however, only be exercised on reasonable considerations and for good cause (*i*).

Widow may be passed over for good cause,

Thus the widow was passed over and the grant made to the next-of-kin where she had, by her marriage settlement, barred herself of all interest in her husband's estate (*k*).

as where she has barred herself of all interest in the estate, or has eloped from her husband,

And where the widow, many years before the death of her husband, had eloped with another man, with whom she had cohabited until his death, the Court granted administration to the next-of-kin of the husband to the exclusion of the widow (*l*).

The fact that the widow has lived separate and apart from her husband has been held sufficient to justify her exclusion (*m*), *a fortiori* if she has contracted a second marriage during his lifetime (*n*). And where the second wife of an intestate had put forward a forged will, and had claims adverse to those of his daughter, the Court passed over the widow and granted administration to the daughter (*o*).

or has lived separate and apart from him.

In a contest with next-of-kin other than children of the deceased, the circumstance that the widow has married again after the death of the intestate is no valid ground of objection to her; but where the deceased has left children, one of whom, supported by the rest, applies for administration in preference to the widow, the circumstance that the widow had married again *might* induce the Court to grant administration to the child (*p*).

Where widow has contracted second marriage after death of husband.

(*f*) *Pettifer* v. *James* (1714), Bunbury, 16; *Davies* (1840), 2 Curt. 628.

(*g*) *Ihler* (1873), 3 P. & D. 50.

(*h*) *Conyers* v. *Kitson* (1831), 3 Hagg., at p. 557; *Anderson* (1864), 3 S. & T. 489; *Williams* (1830), 3 Hagg. 217.

(*i*) *Conyers* v. *Kitson*, *loc. cit.*

(*k*) *Walker* v. *Carless* (1758), 2 Lee, 560. And see *Hughes* (1873), 3 P. & D. 140.

(*l*) *Fleming* v. *Pelham* (1807), 3 Hagg. 217, n.; *Conyers* v. *Kitson* (1831), 3 Hagg. 556; *Anderson* (1864), 3 S. & T. 489; *Boddan* (1873), 28 L. T. (N.S.) 368; *Stevens*, [1898] P. 126.

(*m*) *Lambell* v. *Lambell* (1831), 3 Hagg., at p. 570.

(*n*) *Chappell* v. *Chappell* (1843), 3 Curt. 429.

(*o*) *Paine* (1916), 33 T. L. R. 98.

(*p*) *Webb* v. *Needham* (1823), 1 Add. 494.

Where misconduct is alleged as a ground for passing over the widow, she must be cited, unless her adultery has been established in a suit.

Whenever application is made for a grant of administration to the next-of-kin to the exclusion of the widow, on a suggestion of misconduct on her part, the widow must be cited, in order that she may have an opportunity of answering the charges (*q*). But where her adultery has been established in a suit instituted by the deceased in his lifetime the widow need not be cited (*r*).

Representatives of the widow.

Representatives of widow.—The representatives of a widow who survives her intestate husband and afterwards dies without taking administration, have no title to the grant as against the next-of-kin or heir-at-law, except where the net value of the real and personal estate does not exceed £500, and the widow was entitled to the whole of it under the Intestates' Estates Act, 1890. In such a case, a grant may be made to the representatives of the widow under section 73 of the Court of Probate Act, 1857, without citing the next-of-kin (*s*).

Sub-section 3.—*Grant to Next-of-Kin or Heir-at-Law.*

Failing widow or husband, or if the widow or husband renounces, administration is granted to the "next-of-kin."

If the intestate dies before January 1, 1926, and has left no widow or husband, as the case may be, administration is to be granted to the "next-of-kin."

Subject to the rights of the heir-at-law, administration is granted to the next-of-kin of an intestate wife, although her husband survived her, if he has renounced his right to a grant, or has been cited to take out administration to the intestate and has failed to do so.

Administration to the estate of an intestate husband is (subject to the rights of the heir-at-law) granted to his next-of-kin although his wife survived him, if she has renounced her right to a grant, or has been cited and failed to appear, or is passed over for any of the reasons discussed in the preceding sub-section.

Since the Land Transfer Act, 1897, where the assets include real estate, the heir-at-law is equally entitled with the next-of-kin.

Right of the Heir-at-Law.—The Land Transfer Act, 1897, s. 2, sub-s. 4, provides: "Where a person dies possessed of real estate . . . his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin."

Instructions to the officers of the Principal and District Probate Registries have been framed under the Act and will be found in the Appendix (*t*).

If the deceased did not die possessed of any real estate the Act does not apply. Where, however, the deceased left real and

(*q*) *Middleton* (1888), 14 P. D. 23; *Ihler* (1873), 3 P. & D. 50.

(*r*) *Frost*, [1905] P. 140; *Conyers* v. *Kitson* (1831), 3 Hagg. 556. As to the effect of the lunacy of the widow, *vide post*, p. 372.

(*s*) *Bryant*, [1896] P. 159; *Green* (1901), 84 L. T. 61; cf. *Rees* v. *Cart* (1718), 2 Hagg. App. 161.

(*t*) *Post*, pp. 885—887; and see Rule 109, N. C. B.

personal estate the next-of-kin and heir-at-law are equally entitled to a grant.

Grant to heir-at-law without notice to next-of-kin.

Where the title of the person applying for administration as heir-at-law is clear, and there is no personalty, a grant may be made to him without notice to the next-of-kin; but where the title of the applicant as heir-at-law is doubtful, or the amount of the personalty is large as compared with the realty, notice must be given to the next-of-kin (*u*).

Where heir-at-law and next-of-kin contend for a grant.

Where the heir-at-law and one of the next-of-kin contend for a grant, the Court, in the exercise of its discretion, is guided by the same considerations as in a case where there is a contest between two or more of the next-of-kin (*x*).

Prior right of husband or widow not affected.

The prior right of the husband or widow of the intestate to a grant is not affected by the Act (*y*).

When the heir-at-law must be "cleared off."

Although the next-of-kin and heir-at-law are equally entitled to a grant, yet, in the case of the renunciation of the husband of an intestate, the heir-at-law must be cleared off (*z*), before a grant is made to the next-of-kin, who have no interest in the estate under such circumstances (*a*). But on the renunciation of the widow of an intestate, the grant may be made to her next-of-kin, without clearing off her heir-at-law (*b*).

A grant will not be made to a person who, though not one of the next-of-kin, is entitled in distribution to the personal estate, without clearing off the heir-at-law as well as the next-of-kin (*c*); nor to the representative of a next-of-kin, without clearing off the heir-at-law (*d*).

Who are "next-of-kin."

Who are "next-of-kin."—It now becomes necessary to ascertain who are the "next and most lawful friends" of the intestate, and his "next-of-kin," entitled to the grant of letters of administration under the statutes, in the case of persons dying intestate before January 1, 1926.

Those blood relations of the deceased who at the time of his death are within the nearest degree

Of the blood relations of the deceased, those persons who at the time of his death are within the nearest degree of relationship to him are his next-of-kin, to whom, or to one of whom, the Court is, under the statute 21 Hen. 8, c. 5, to commit the administration of his estate, to wit:

(*u*) *Barnett*, [1898] P. 145. On the application of one of the co-heiresses of the deceased for administration, it was held that the consent of the other co-heiresses must be applied for: *Wright* (May 31, 1903).

(*x*) *Vide post*, pp. 301, 302.

(*y*) Instructions under the Land Transfer Act, 1897 (*post*, p. 886), No. 7; *vide ante*, pp. 288, 293.

(*z*) *I.e.*, renounce, or be cited.

(*a*) Instructions under the Land Transfer Act, 1897, No. 8.

(*b*) *Ibid.*, No. 8.

(*c*) *Ibid.*, No. 11.

(*d*) *Ibid.*, No. 12.

of relationship to him, are his "next-of-kin."

1. *The child or children* of the deceased (*e*).

2. *The grandchild or grandchildren* of the deceased, who dies without child (*e*).

3. *The great-grandchild or great-grandchildren* of the deceased, who dies without child or grandchild, and so on until all lineal descendants are exhausted (*f*).

4. *The father* of the deceased, who dies without issue (*g*).

5. *The mother* of the deceased, who dies without issue or father (*h*).

6. *The brothers* $\frac{and}{or}$ *sisters* of the deceased, who dies without issue, father or mother (*i*).

7. *The grandparent or grandparents* of the deceased, who dies without issue, parent, brother or sister (*k*).

8. *The uncles, aunts, nephews, nieces, great-grandfathers and great-grandmothers* of the deceased, who dies without issue, parent, brother, sister, or grandparent (*l*).

9. *The great-uncles, great-aunts, cousins german* (*m*), *great-nephews, great-nieces, and great-great-grandparents* of the deceased, who dies without issue, parent, brother, sister, grandparent, uncle, aunt, nephew, niece, or great-grandparent : and so on, until the collateral relations of the deceased to the remotest degree are exhausted; all being equally entitled to a grant who stand in the same degree.

Relations on the mother's side equally entitled with those on the father's side.

Half-blood and females not excluded.

By the law applicable in the case of intestates dying before January 1, 1926, persons who are in the nearest degree of kindred to the deceased at the time of his death are equally his next-of-kin, and therefore members of the class from whom his administrator or administrators are to be selected, whether they are relations on the side of his mother or of his father (*n*); whether

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(*e*) Though the parents of the deceased are as near akin to him as his children, for they are both in the first degree, in our law children are preferred to parents, and so are the lineal descendants of the deceased to the remotest degree : 2 Black. Comm. 504; *Carter* v. *Crawley* (1675), Sir T. Raym., at p. 500; *Evelyn* v. *Evelyn* (1753), Ambl. 192.

(*f*) See note (*e*), *supra*.

(*g*) Both father and mother are in equal degree of kindred, but since the father is entitled to the whole personal estate, he is preferred to the mother : see *Blackborough* v. *Davis* (1701), 1 P. Wms. at p. 51; *Ratcliff's Case* (1592), 3 Co. Rep. 40a.

(*h*) *Ratcliff's Case, loc. cit.* The mother is entitled to administration in priority to brothers and sisters : *Blackborough* v. *Davis, loc. cit.*

(*i*) Brothers or sisters of the deceased are entitled to administratiin to the exclusion of his grandfather or grandmother : *Evelyn* v. *Evelyn* (1753), Ambl. 192; *S. C.* 3 Atk. 762.

(*k*) Grandparents are entitled to administration to the exclusion of uncles and aunts : *Blackborough* v. *Davis* (1701), 1 P. Wms. 41.

(*l*) See *Burton* v. *Sharp* (1700), cited 1 Lord Raym. 686.

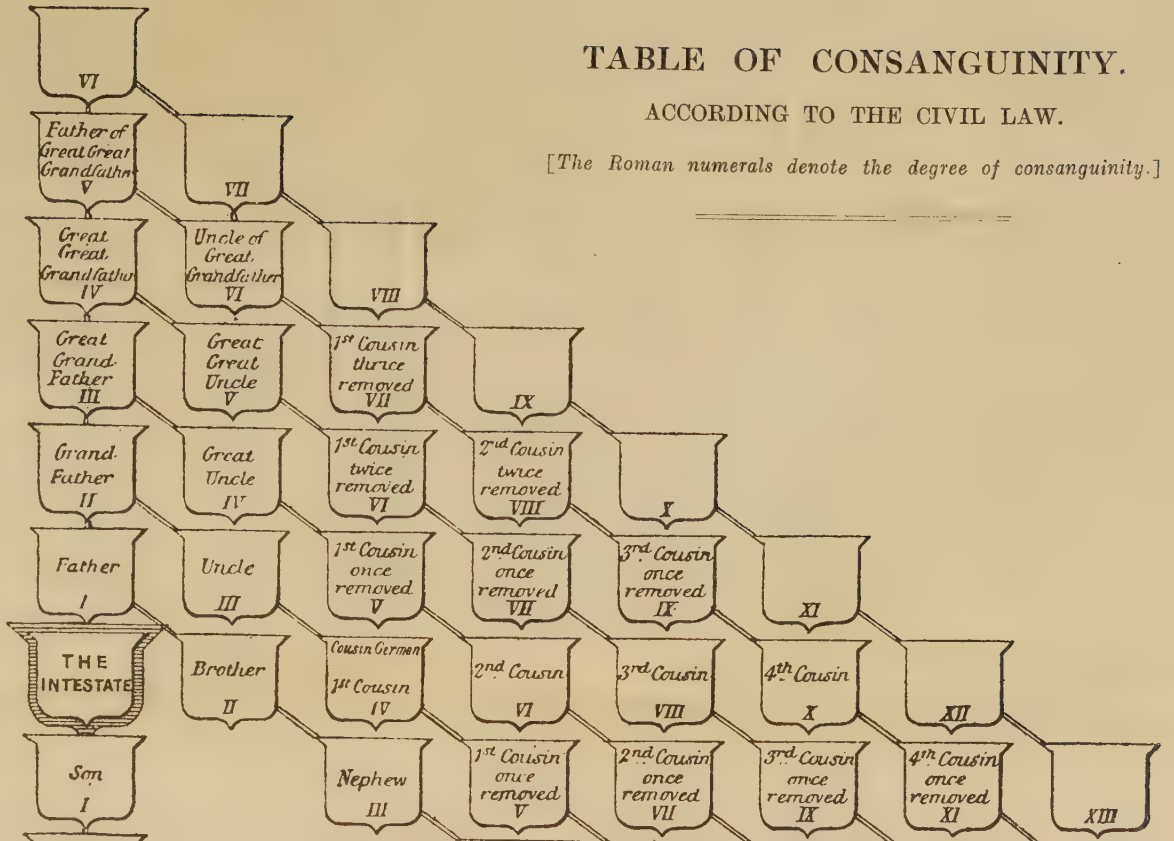
(*m*) *I.e.*, sons and daughters of an uncle or aunt.

(*n*) *Moor* v. *Barham* (1723), cited 1 P. Wms. 53.

TABLE OF CONSANGUINITY.

ACCORDING TO THE CIVIL LAW.

[The Roman numerals denote the degree of consanguinity.]



relations of the whole or of the half-blood (*o*); whether male or female (*p*). Primogeniture gives no *right* to preference in the grant of administration (*q*).

Primogeniture gives no right to preference.

Where several Next-of-Kin claim the Grant.—The statute 21 Hen. 8, c. 5, s. 2, further provides : " Where divers persons claim the administration as next-of-kin, which be equal in degree of kindred to the . . . person deceased, and where any person only desireth the administration, as next-of-kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary be at his election and liberty to accept any one or more making request, where divers do require the administration."

By stat. 21 Hen. 8, c. 5, where there are several next-of-kin in equal degree, the Court may grant administration to any one or more of them in its discretion.

Joint Grant to two or more of the Next-of-Kin.—Under this statute it was held that the Court might, in its discretion, make a joint grant of administration to two or more of the next-of-kin, but it was contrary to the practice of the Court to join more than three persons in an administration (*r*). If the assets include real estate a joint grant may, since the Land Transfer Act, 1897, be made to one or more of the next-of-kin and the heir-at-law.

Former practice as to joint grants.

The Court never forced a joint administration on unwilling parties, because if the administrators were at variance, that might almost put an end to the administration. Further, the Court preferred a sole to a joint administration, because it was considered infinitely better for the estate; co-administrators must join and be joined in every act, and this was regarded not only as inconvenient to themselves, but what was of more consequence, as inconvenient to those who had demands on the estate either as creditors, or as entitled in distribution (*s*).

Therefore, before a joint administration would be granted, the persons who were to be joined as administrators must have consented (*t*); and in the absence of such consent the Court would grant administration to one of the claimants, in accordance with the rules stated in the succeeding paragraphs.

These considerations are, however, rendered in some circumstances obsolete in the case of grants made after January 1, 1926, even though the intestate died before that date, by the

Effect of section 160 of the Judicature (Consolidation) Act, 1925.

(*o*) 2 Black. Comm. 505; *Smith* v. *Tracy* (1677), 1 Ventr. 323; wherefore a brother of the half-blood excluded an uncle of the whole blood : *Collingwood* v. *Pace* (1675), 1 Ventr. at p. 424; and the Court granted administration to the sister of the half- or the brother of the whole blood at its discretion : *Brown* v. *Wood* (1648), Aleyn, 36. *Vide post*, p. 301.

(*p*) *Brown* v. *Wood* (1648), Aleyn, 36. *Vide post*, p. 302.

(*q*) *Warwick* v. *Greville* (1809), 1 Phill. at p. 125. *Vide post*, p. 301.

(*r*) *Blakelock* (1828), 1 Hagg. 682.

(*s*) *Warwick* v. *Greville* (1809), 1 Phill. at p. 126. See *Dampier* v. *Colson* (1812), 2 Phill. at p. 55; *Leggat* v. *Leggat* (1753), 1 Lee, 348; *Coe* v. *Hume* (1833), 4 Hagg. 398; *Bell* v. *Timiswood* (1812), 2 Phill. 22; *Coppin* v. *Dillon* (1833), 4 Hagg. at p. 376; *Iredale* v. *Ford* (1859), 1 S. & T. at p. 307.

(*t*) See the cases cited in the preceding note.

provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, the policy of which seems to be, in cases where there is a minority or life interest, to prefer a joint to a sole administration, unless the administrator is a trust corporation, no doubt in the belief that the security thereby afforded to persons interested counterbalances the attendant disadvantages. That section provides that administration shall not be granted to more than four persons in respect of the same property, and that administration shall, if there is a minority or if a life interest arises under the intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals. And provision is made by sub-section 2 of section 160 for the appointment of one or more additional administrators if there is only one administrator (not being a trust corporation) during the minority of a beneficiary or the subsistence of a life interest, and until the estate is fully administered.

Where a grant is applied for after January 1, 1926, and the intestate died before that date, a sole grant cannot be made to one of the next-of-kin or to the heir-at-law in any case where a life interest arises under the intestacy (*e.g.*, where there is real estate of which the surviving spouse, who has renounced, is tenant for life by the curtesy or in right of dower), or if any one of the next-of-kin or of the persons entitled in distribution or the heir-at-law (where there is real estate) is a minor. In such circumstances administration will be granted either to a trust corporation alone, with the consent of the next-of-kin and heir-at-law, or to a trust corporation jointly with one of the next-of-kin or the heir-at-law (if there is real estate), or a joint grant will be made to two or more of the next-of-kin (not exceeding four), or to one of the next-of-kin jointly with the heir-at-law (where there is real estate). In other cases, not covered by the section, joint grants may still be made in accordance with the former practice, provided the persons to be joined are equally entitled to the grant and consent to be joined as administrators. But where it is sought to join with a person entitled to the grant a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*u*).

Where, of several next-of-kin, one alone applies for grant, Court may require notice to the others.

Grant to one alone of several Next-of-Kin.—Subject to what has been said above as to the necessity for a joint administration where there is a minority or where a life interest under the intestacy, where there are several next-of-kin, and only one applies for the grant, the Court will grant administration to him

(*u*) Rule 122, N. C. B.

priori petenti, without requiring the consent or renunciation of the other next-of-kin; but the Court may require notice to be given to them, if it thinks fit (*x*). Where two or more of the intestate's next-of-kin contend for the grant the Court is guided by the following principles and rules of practice in making its election.

Where there are several next-of-kin in equal degree,

The statute 21 Hen. 8, c. 5, leaves it to the Court to grant letters of administration to the next-of-kin; none has a legal preference; the selection rests with the discretion of the Court. That discretion, however, is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in exercising it the Court is not to be guided by the wishes or feelings of the parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property (*y*).

the Court may grant to any at its discretion.

In the exercise of its discretion the Court must look to the benefit of the estate.

The first duty of the Court, then, is to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution: the primary object is the interest of the property (*z*).

In the absence of material objection, the Court grants administration to him whom the majority of the persons interested desire.

Where two or more of the next-of-kin claim the grant, and there is no material objection on the one hand, or reason for preference on the other, the Court, in its discretion, will place the administration in the hands of the person to whom the majority of interests are desirous of entrusting the estate (*a*). This rule weighs very strongly with the Court, but is not invariably followed (*b*).

When the contest for an administration is between one of the whole blood and one of the half-blood, the whole blood is preferred, even though the majority of those interested in distribution concur in the half-blood, unless material objections can be proved against him of the whole blood (*c*).

Whole blood preferred to half-blood.

Primogeniture gives no right; but if the claims of the applicants are precisely equal, if the scale is exactly poised, being the elder would incline the balance, but it would not weigh against the wish of the majority of the interests (*d*).

Primogeniture.

(*x*) See Rule 28, N. C. B. This rule is not, in practice, invariably enforced: *vide post*, p. 452.

(*y*) *Warwick* v. *Greville* (1809), 1 Phill., at pp. 124, 125. (*z*) *Ibid.*

(*a*) *Per* Sir John Nicholl in *Budd* v. *Silver* (1813), 2 Phill. 115. See *Elwes* v. *Elwes* (1728), 2 Lee, 573; *Cartright's Case* (1680), 1 Freem. 258; *Iredale* v. *Ford* (1859), 1 S. & T. 305; *Warwick* v. *Greville* (1809), 1 Phill. 123; *Coppin* v. *Dillon* (1833), 4 Hagg., at p. 376; *Mercer* v. *Morland* (1758), 2 Lee, 499.

(*b*) *Wetdrill* v. *Wright* (1814), 2 Phill., at p. 248; *Sawbridge* v. *Hill* (1871), 2 P. & D. 219; *Stainton* (1871), 2 P. & D. 212.

(*c*) *Mercer* v. *Morland* (1758), 2 Lee, 499; *Webb* v. *Griffin* (1727), 2 Lee, at p. 500; *Stratton* v. *Linton* (1861), 31 L. J. P. 48, where the guardian of a minor next-of-kin of the whole blood was preferred.

(*d*) *Per* Sir John Nicholl in *Warwick* v. *Greville* (1809), 1 Phill., at p. 125;

Male preferred to female applicant.

To the same extent, a male is preferred to a female applicant, as more likely to be acquainted with and able to conduct business (*e*), but not if the majority of the interests concur in the female applicant (*f*); and the latter, if with the consent of the male she is *prior petens*, is preferred to the male, even if he afterwards opposes her application (*g*). On the same principle, one of the next-of-kin who is accustomed to business will, *cæteris paribus*, be preferred to others without such experience (*h*).

Person accustomed to business preferred.

When none of these considerations apply, the Court will grant administration to the person whose application was the earlier, on the principle "*qui prior est tempore potior est jure*" (*i*).

Prior petens.

Material Objections.—Where material objections exist against the appointment of one of the applicants as administrator, the Court will exclude the objectionable applicant and grant administration to the other claimant (*k*).

Next-of-kin a bankrupt,

The fact that one of two applicants for administration had been twice a bankrupt, and had paid no dividend under his last bankruptcy, was held sufficient ground for his exclusion in favour of the other next-of-kin in whom the majority of the interests concurred (*l*).

or has an interest incompatible with due administration.

Again, one of the applicants may have an interest incompatible with the due administration of the estate; thus it was held good reason for passing over one of the applicants for administration, that a question was likely to arise between the estate of the deceased and a son of this applicant respecting the validity of a gift, the suggestion being that the claims of the estate might not be strongly asserted by the father against his son (*m*).

Next-of-kin also creditor.

On somewhat similar grounds, the fact that one of the next-of-kin has a disputed claim, as creditor, against the property of the deceased, is rather adverse than favourable to his preference as administrator (*n*).

When administration granted to

When administration has been granted to one or more of the next-of-kin, others in the same degree of relationship have,

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Coppin v. *Dillon* (1833), 4 Hagg., at p. 376; *Cardale* v. *Harvey* (1752), 1 Lee, at pp. 179, 180.

(*e*) *Chittenden* v. *Knight* (1758), 2 Lee, 559; *Iredale* v. *Ford* (1858), 1 S. & T. 305.

(*f*) *Iredale* v. *Ford* (1858), 1 S. & T. 305.

(*g*) *Cordeux* v. *Trasler* (1865), 4 S. & T. 48.

(*h*) *Williams* v. *Wilkins* (1812), 2 Phill. 100.

(*i*) *Cordeux* v. *Trasler* (1865), 4 S. & T. 48.

(*k*) See *Woolf*, [1918] W. N. 205, where two of the next-of-kin were daughters, both German subjects resident in Germany, and therefore alien enemies during the late war. Administration was granted to the intestate's son, a British subject resident in England. Cf. *ante*, p. 38.

(*l*) *Iredale* v. *Ford* (1859), 1 S. & T. 305; *Bell* v. *Timiswood* (1812), 2 Phill. 22.

(*m*) *Budd* v. *Silver* (1813), 2 Phill. 115.

(*n*) *Webb* v. *Needham* (1823), 1 Add. 494. Cf. *Toole*, [1893] 2 Ir. R. 188 (no grant to accounting party).

during the lifetime of the administrator, no title to a grant (*o*). But upon the death of the administrator, or the survivor of the administrators, a next-of-kin who has even renounced (*p*) his title to the original grant may come in and take administration *de bonis non* (*q*).

one, others in equal degree of kindred have no right to administration during his lifetime.

It is an established rule of the Court that the right to the administration of the effects of an intestate follows the right to the property therein (*r*). In certain early cases it has been held that the rule permits the exclusion even of the next-of-kin of an intestate, if he has no interest in the property, notwithstanding the express provisions of the statute of Henry VIII, on the ground that in such a case the next-of-kin is excluded by the spirit, though contrary to the letter, of the Act (*s*).

Next-of-kin excluded when they have no interest.

In *West* v. *Willby* (*t*) Sir John Nicholl said : " The principle is clear that the next-of-kin, when he has no interest, may be excluded, and the administration granted to a person who has an interest in the effects " ; and the learned Judge quoted an old case before the Delegates (*u*) where the facts were as follows : Lord Hollis died intestate; Bridges claimed administration as next-of-kin ; the effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased : it was held that the next-of-kin was excluded, and administration was granted to the Duke of Newcastle.

In *Young* v. *Peirce* (*x*), where a deceased intestate left two sons, one of whom, for valuable consideration, released all his right to the personal estate, on the death of the other son, it was held that his executor and universal legatee was entitled to administration of the intestate's estate in preference to the surviving son, who had released his interest.

If the estate is insolvent, it may be said that the next-of-kin has no interest (*y*); and the Court has special powers in dealing with such cases under section 73 of the Court of Probate Act, 1857 (*z*).

Estate insolvent.

(*o*) Wms. on Exors. (11th ed.), p. 339, citing Toller, 98.

(*p*) Provided that he can get the leave of the Court to retract his renunciation; *vide post*, pp. 498—500.

(*q*) *Skeffington* v. *White* (1828), 1 Hagg., at p. 702.

(*r*) *Withy* v. *Mangles* (1843), 10 Cl. & Fin., at p. 248; *Gill* (1828), 1 Hagg., at p. 342; *Wetdrill* v. *Wright* (1814), 2 Phill., at p. 248; *Elwes* v. *Elwes* (1728), 2 Lee, at p. 575.

(*s*) *Withy* v. *Mangles* (1843), 10 Cl. & Fin., at p. 248; *West* v. *Willby* (1820), 3 Phill., at p. 381.

(*t*) (1820), 3 Phill., at p. 381.

(*u*) *Bridges* v. *The Duke of Newcastle* (1712), cit. 3 Phill., at p. 381.

(*x*) (1689), 1 Freem. 496.

(*y*) *Haynes* v. *Matthews* (1859), 1 S. & T., at p. 462.

(*z*) *Vide post*, pp. 401 *et seq.*; but, unless the Court sees fit to exercise its special powers under that section, the next-of-kin, though the estate is deeply insolvent, is entitled to a grant in preference to a creditor : *vide post*, p. 309.

If the next-of-kin die before administration is granted, his representative is entitled to the grant.

Grant to Representatives of Deceased Next-of-Kin.—On the principle that the right to administration of the effects of the deceased follows the right to the property therein, it has long been held that under the statute of Henry VIII the Court is bound only to grant the administration to such person as is next-of-kin *at the intestate's death*, and not to one who is not entitled to the beneficial interest in the effects, though, by the death of intermediate persons, he may have become next-of-kin at the time the grant is required (*a*). Accordingly, it is the established rule that if all who were next-of-kin at the time of the death of the intestate are dead, then the personal representative of such next-of-kin, being entitled to the beneficial interest, is also entitled to the administration, whether original or *de bonis non*; with this limitation, however, that a person who at the time of the intestate's death was entitled in distribution (though not next-of-kin) is preferred to the personal representative of the deceased next-of-kin (*b*); and subject, where the intestate died after January 1, 1898, and before January 1, 1926, to the prior right of the heir-at-law, where there is real estate.

But a person originally entitled in distribution preferred to representative of deceased next-of-kin.

The ground of making the grant to the personal representatives of those who were next-of-kin at the time of the intestate's death, in preference to those who have become next-of-kin at the time of the grant, is that the former are possessed of the beneficial interest in the intestate's effects; and that interest, by the Statute of Distribution, vests in them immediately on the intestate's death, and is consequently transmitted to their representatives, although no administration had been taken out during the lifetime of such distributees (*c*).

Where representatives of deceased next-of-kin are co-executors.

Where the representatives of a deceased next-of-kin are co-executors, any one of them may take the grant of administration to the deceased whom their testator was entitled to represent; but co-administrators must all join in taking out such a grant (*d*).

Where co-administrators.

But the grant may be made to one of two or more co-administrators if the others renounce, or have been cited and failed to appear (*e*).

(*a*) 2 Hagg. App. 150; *Savage* v. *Blythe* (1796), 2 Hagg. App. 150; *Almes* v. *Almes* (1796), 2 Hagg. App. 155; and see the learned reporter's note, 2 Hagg. App., p. 156.

(*b*) 2 Hagg. App. 157.

(*c*) 2 Hagg. App. 157.

(*d*) *Nayler* (1851), 2 Rob. at p. 410.

(*e*) *Hancock* v. *Lightfoot* (1864), 3 S. & T. 557; *Crook*, cited *ibid.*, p. 558, where a grant was made to one of three administrators without notice to the others, of whom one was a lunatic and the other resident abroad.

SUB-SECTION 4.—*Grant to Persons entitled in Distribution.*

Where all next-of-kin are dead, grant to persons originally entitled in distribution (though not next-of-kin).

Persons originally entitled in distribution, though not next-of-kin—*e.g.*, sons and daughters of a deceased brother of the intestate, who leaves a brother him surviving—are, by the practice of the Court, preferred to the representatives of the deceased next-of-kin, on the ground that the right of a party originally entitled is preferred to that of a party having a derivative interest (*f*). Accordingly, if all the next-of-kin are dead, the grant will be made to such persons. But the matter is in the discretion of the Court (*g*), who may prefer the representatives of the next-of-kin, if they have a greater interest in the estate (*h*). If the widow, next-of-kin, and all persons entitled in distribution are dead, administration will be granted, subject to the right of the heir-at-law, if any, to the legal personal representative of any one of them (*i*).

So, if next-of-kin, etc., renounce.

If the widow, next-of-kin, and heir-at-law (where there is real estate) have renounced, or have been cited, and have failed to appear, administration will be granted to any person entitled in distribution to the intestate's personal estate. Thus, on the renunciation of the mother of an intestate, the grant may be made to a brother, or to the son of a deceased brother, entitled in distribution to the personal estate.

The foregoing observations are, however, subject, in the case of grants made after January 1, 1926, to the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, which requires that administration shall be granted to a trust corporation, with or without an individual, or to not less than two individuals, if there is a minority or if a life interest arises under the intestacy.

Who are entitled in distribution to the personal estate of an intestate.

It is necessary very briefly to summarise the rules for the distribution of an intestate's personal estate. The statutes which regulate its distribution, in the case of persons dying before January 1, 1926, are 22 & 23 Car. 2, c. 10; 29 Car. 2, c. 3; 1 Jac. 2, c. 17; and 53 & 54 Vict. c. 29.

1. *The husband*, if he survives his intestate wife, is entitled to the whole of her personal estate.

2. *The wife*, who survives her intestate husband :

(a) If there are descendants, is entitled to *one-third* of his personal estate, and the descendants to the remainder, which is shared among them in the same way as the

(*f*) *Carr* (1867), 1 P. & D. at p. 292. *Vide ante*, p. 304.
(*g*) *Carr*, *loc. cit.*
(*h*) *Savage* v. *Blythe* (1796), 2 Hagg. App. 150; *Almes* v. *Almes* (1796), 2 Hagg. App. 155.
(*i*) *Vide ante*, p. 304.

whole estate would have been shared had the wife not survived.

(b) If there are no descendants, is entitled to *one-half* of his personal estate, and the next-of-kin to the other half, which they share in the same way as the whole estate would have been shared had the wife not survived.

If the husband has died since September 1, 1890, and before January 1, 1926, *without issue*, the wife is (under the Intestates' Estates Act, 1890) entitled to the whole of his estate, provided the net value of his real and personal estate does not exceed £500. If it exceeds £500, she has a charge upon the whole estate for £500, with interest at the rate of four per cent. until payment, in addition to her share in the balance of the estate. The Act applies only where the husband dies wholly intestate.

If there are no next-of-kin, as where the intestate was a bastard, one-half goes to the wife, the other half to the Crown.

3. *Children.*—If there is no wife or husband (as the case may be), the children are entitled to the whole of the personal estate in equal shares, the children or remoter issue of a deceased child sharing with them *per stirpes*.

4. *Grandchildren.*—Failing children : the grandchildren are entitled to the whole of the personal estate, which is divided among them *per stirpes* and not *per capita*, great-grandchildren and more remote descendants taking with them *per stirpes*. Failing grandchildren : the above rule applies to more remote descendants.

5. *The father.*—Failing widow and lineal descendants : the father is entitled to the whole personal estate.

6. *The mother.*—Failing father : the mother takes all ; but if there be brothers, sisters, or nephews and nieces (being children of brothers or sisters who died in the lifetime of the deceased), she shares the estate with them, the nephews and nieces taking their parents' share *per stirpes*. No other relations share with the mother.

7. *Brothers and sisters.*—Failing mother : brothers and sisters share equally, nephews and nieces (being children of brothers and sisters who died in the lifetime of the deceased) taking with them *per stirpes*.

8. *Grandfathers and grandmothers.*—Failing brothers and sisters : grandfathers and grandmothers share equally. If only one, that one takes all.

9. *Nephews, nieces, etc.*—Failing grandparents : nephews and nieces share together with uncles, aunts, great-grandfathers, and great-grandmothers equally, they being all in the third degree, and so on with other kindred according to their degree ; all those

in the same degree taking an equal share *per capita*, those in the nearer excluding those in the more remote degree (*k*).

If person entitled to a grant dies, and his representative renounces, grant may be made to next-of-kin or residuary legatee of *jus habens*,

Grant to a Person having a Derivative Interest.—If the representative of the person solely entitled to a grant refuses to take out a grant to the estate of the original intestate, a grant may be made to a person having an indirect or derivative interest in the intestate's estate, as being next-of-kin or residuary legatee of the intestate's husband, widow, or next-of-kin (*l*).

Thus administration of a wife's estate may be granted to the residuary legatee of her husband, on the husband's executor, who has proved his will, renouncing administration to the estate of the wife (*m*).

or to creditor of *jus habens*.

On the same principle, where a person, being the sole party interested in and the sole party entitled to represent the estate of a deceased person, died without taking a grant to such person, and his personal representative had filed a renunciation and consent, the Court, under section 73 of the Court of Probate Act, 1857, granted administration to a creditor of the party so originally interested and entitled (*n*).

Again, where the deceased died a spinster and intestate, leaving a brother (her only next-of-kin), who had since died, and of his will his widow and universal legatee had taken probate as executrix, administration was granted to a son of the deceased brother on the renunciation of his executrix (*o*).

On renunciation and consent of person solely entitled to the grant, it may be made to his issue as having a *spes successionis*.

Grant to Persons having a Spes Successionis.—On the renunciation and consent of the sole party interested in and entitled to represent the estate of the deceased person, the grant may be made to the child of that party, on the principle that his child has indirectly a *spes successionis* to the property of the deceased (*p*).

On this principle, on the renunciation and consent of the father (sole next-of-kin) of an intestate, administration may be granted to the father's son, daughter, or grandchild (*q*).

So, on the renunciation and consent of the brother of the intestate, who was the sole next-of-kin and only person entitled to the personal estate of the deceased, administration was granted to a son of that brother (*r*).

(*k*) See Table of Consanguinity, facing p. 298, *ante*.
(*l*) *Blagrave* (1828), 2 Hagg. 83. And see *Allen* (1864), 3 S. & T. 559.
(*m*) *Vizer* (1853), unreported.
(*n*) *Fraser* (1867), 1 P. & D. 327; *vide post*, p. 412.
(*o*) *Blagrave* (1828), 2 Hagg. 83.
(*p*) See *Johnson* (1862), 2 S. & T. 595; *Williams* (1870), 2 P. & D., at p. 82; *Trigg*, [1901] P. 42.
(*q*) Tristram & Coote (16th ed.), p. 125.
(*r*) *Keane* (1828), 1 Hagg. 692; *Johnson* (1862), 2 S. & T. 595; *Williams* (1870), 2 P. & D. 81. A similar grant was made to the son of two cousins german (only next-of-kin of deceased) : *Williams* (May 13, 1890).

Wife has no *spes successionis* through her husband.

A wife has no *spes successionis* through her husband, and on his renunciation the grant will not be made to her. Prior to the Married Women's Property Act, 1882, a husband was entitled to take out administration in right of the wife, to her next-of-kin deceased intestate, and her renunciation in favour of a third person, *e.g.*, a creditor of the deceased, could not deprive the husband of this right (*s*). It is doubtful whether this right, which was based on the *jus mariti*, rather than on a *spes successionis*, was abrogated by the statute above referred to, but it is certain that since the passing of the Administration of Estates Act, 1925, which places both spouses on an equal footing, a husband has no *spes successionis* through his wife.

Semble, since the Married Women's Property Act, 1882, the husband has no *spes successionis* through the wife.

Sub-section 5.—*Grant to a Creditor.*

Creditor is entitled to grant, if none of the kindred will take administration.

If the widow of an intestate, his next-of-kin (*t*), and all persons entitled in distribution, together with the representatives of any of such persons who have died subsequently to the deceased, have renounced, or have been cited to accept a grant and have failed to appear, the grant may be made to a creditor of the intestate.

Administration is only granted to a creditor failing any other representative, in which case, there being nobody to sue, the creditor, unless he is himself appointed administrator, and so enabled to pay himself, must of necessity lie out of his debt (*u*).

But where a person whose duty and interest it is to take the grant is willing to undertake it, a creditor has no right.

But where a person whose duty and interest it is to take the grant is ready and willing to undertake the administration, he or she it is that is entitled to the grant, and not the creditor (*x*). The claim of a creditor, then, can only avail when all persons entitled to a grant renounce, and the estate is likely to be unadministered (*y*). And since a creditor has a right to administration not by the statute, but only by the practice of the Court, if circumstances show that the creditor is not a

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(*s*) *Haynes* v. *Matthews* (1859), 1 S. & T. 460.

(*t*) If the deceased left real estate, his heir-at-law must also be cleared off. A person representing a next-of-kin, *e.g.*, guardian of a minor, is preferred to a creditor: *John* v. *Bradbury* (1866), 1 P. & D. 245.

(*u*) *Webb* v. *Needham* (1823), 1 Add. at p. 497. See *Elme* v. *Da Costa* (1791), 1 Phill. at p. 177.

(*x*) *Webb* v. *Needham* (1823), 1 Add. at p. 498; *Graham* v. *Maclean* (1841), 2 Curt. at p. 663; *Dimes* v. *Cornwell* (1850), 2 Rob. at p. 143.

(*y*) *Haynes* v. *Matthews* (1859), 1 S. & T. at p. 462. The Court has, however, special powers under section 73 of the Court of Probate Act when the estate is insolvent, and the next-of-kin have therefore no interest: *vide post*, p. 406; and see *Farrands* (1876), 1 P. D. 459. But a creditor has an interest in the estate of his deceased debtor, and after clearing off all other possible representatives, is entitled to a general grant without invoking section 73 of the Court of Probate Act, 1857, and without justifying security: *Hake*, [1920] W. N. 117.

proper person, the Court may, it seems, refuse to grant administration to him (*z*).

Grant to creditor refused if not a proper person.

A creditor who applies for administration cannot deny the interest of a next-of-kin or question his fitness to be appointed administrator (*a*), unless, indeed, the estate is insolvent and the next-of-kin has no interest (*b*); nor can a creditor oppose a will (*c*) : for if a will is put forward for probate, or a next-of-kin claims the administration, then a person offers to make himself the representative of the deceased, and that is all a creditor can require (*d*).

Before administration granted to him, creditor cannot deny interest, or oppose a will.

But when a creditor has obtained administration the case is different; he has a right to maintain it against the executor or next-of-kin, and, if the grant to him is sought to be revoked, he may deny the interest of the applicant, or oppose the will propounded (*e*); indeed, he has the same right as the next-of-kin to oppose a will (*f*).

Secus when a creditor has obtained administration.

Who are Creditors.—A person is entitled to a grant of administration as creditor of an intestate, although his right of action for his debt is barred by the Statute of Limitations (*g*).

Creditor entitled, even though his right of action be statute barred.

A surety who, after the death of the principal, pays off the debt, is entitled, as a creditor, to pray administration to the estate of the principal (*h*).

Surety who pays off debt of principal.

Administration has been granted to a person, as creditor, who has merely an equitable claim against the estate of the deceased; as where, on the direction of a testator, his executor or administrator has carried on the testator's business after his death and has incurred debts to the applicant, who is entitled in equity to claim against the estate of the testator to the extent that the testator has authorised it to be used in the business (*i*).

Creditor in equity.

Guardians of the union or parish wherein a pauper has died are entitled, under the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), ss. 16, 17, to reimburse themselves out of his effects in respect of the expenses incurred by them in his burial and maintenance; they have been regarded as his creditors

Guardians of union or parish wherein pauper intestate has died.

(*z*) *Menzies* v. *Pulbrook* (1841), 2 Curt. at p. 850.
(*a*) *Dabbs* v. *Chisman* (1810), 1 Phill., at p. 159; *Haynes* v. *Matthews* (1859), 1 S. & T. 460.
(*b*) *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 850; *Haynes* v. *Matthews* (1859), 1 S. & T., at p. 462; see *Furlonger* v. *Cox* (1811), cited 3 Phill. 381; *West* v. *Willby* (1820), 3 Phill. 374.
(*c*) *Elme* v. *Da Costa* (1791), 1 Phill., at p. 177; *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 850.
(*d*) *Elme* v. *Da Costa* (1791), 1 Phill., at p. 177.
(*e*) *Dabbs* v. *Chisman* (1810), 1 Phill., at p. 159; *Elme* v. *Da Costa* (1791), 1 Phill., at p. 177; *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 851.
(*f*) *Dabbs* v. *Chisman* (1810), 1 Phill., at p. 160, note (*c*).
(*g*) *Coombs* (1866), 1 P. & D. 193; *Coombs* v. *Coombs* (1866), 1 P. & D. 288.
(*h*) *Williams* v. *Jukes* (1864), 34 L. J. P. 60.
(*i*) *Fairland* v. *Percy* (1875), 3 P. & D. 217.

to this extent, and as such their nominee is entitled to administration (*k*).

Creditors of executrix who intermeddles without probate and dies possessed of property of testator.

Where an executrix, who, without having taken probate, had intermeddled in the estate of her testator, died possessed of property belonging to him, after citation of her next-of-kin and their non-appearance, it was held that the representative of the testator was entitled as a creditor to a grant of administration to her estate (*l*).

Where intestate is assignee in bankruptcy, and is alleged to have misappropriated bankrupt's effects, his co-assignee not a creditor.

Assignee of the intestate's partner.

A person who was joint assignee with the deceased of the estate of a bankrupt, and alleged that the deceased had applied to his own use £500 of the bankrupt's effects, was held not to be himself a creditor to the deceased's estate, though a trustee for the bankrupt's creditors (*m*); and where a surviving partner has assigned his share in the profits of the partnership, it was said that the assignee was not thereby constituted creditor of the estate of a deceased partner, who had died leaving the partnership accounts unsettled (*n*).

Mother of intestate, creditor for moneys paid to advance him in his profession.

The mother of an intestate, who had expended £900 in the purchase for him of two commissions in the army, was granted administration to his estate as creditor, after citation of the father (*o*).

Creditor for funeral expenses.

An undertaker, who applies for a grant as creditor for the funeral expenses, must show the circumstances under which the expenses were incurred and by whose authority he undertook the funeral, for, as a general rule, the person who gave the order for the funeral is responsible for the expenses. But, in a proper case, the grant may be made to the undertaker as creditor (*p*).

Receiver appointed by Court of Chancery.

In *In the Goods of Mayer* (*q*), proceedings in Chancery had been taken, by persons having claims against the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but had not taken out administration. After citation and non-appearance of the widow, next-of-kin, and all persons entitled in distribution, the Court made a general grant of administration to the receiver appointed, by the Court of Chancery, with authority to collect, get in, and receive the estate and to apply to the Court of Probate for administration.

(*k*) *Windeatt* v. *Sharland* (1871), 2 P. & D. 217, 266. See *Findlay* (1863), 3 S. & T. 265; *Eccles* (1889), 15 P. D. 1; *Hockin* (1895), 73 L. T. 316; *Everley*, [1892] P. 50; *vide post*, p. 407.

(*l*) *Mellor* (1883), 8 P. D. 108.

(*m*) *Snape* v. *Webb* (1757), 2 Lee, 411.

(*n*) *Cawthorn* v. *Chalie* (1824), 2 Sim. & Stu. 127.

(*o*) *Aitkin* v. *Ford* (1829), 3 Hagg. 193.

(*p*) *Newcombe* v. *Beloe* (1867), 1 P. & D. 314; *Fowler* (1852), 16 Jur. 894.

(*q*) (1873), 3 P. & D. 39. As to a grant to an official manager of a joint-stock company, in the course of liquidation, to the estate of a deceased contributory, see Tristram & Coote, 16th ed., p. 129.

Intestate a bankrupt—grant to his trustee in bankruptcy.

Where the intestate has died a bankrupt, or where the estate is insolvent, on the renunciation of his next-of-kin, and of the heir-at-law (where there is real estate), the Court will grant administration to his trustee in bankruptcy or to the official receiver of his estate (*r*). These persons are not indeed creditors of the deceased, but they represent his creditors, and are the persons in whom the whole property of the bankrupt vests by Act of Parliament; they represent the estate, and are enabled to act in all respects on behalf of the estate (*s*). But they are not entitled to a grant unless the next-of-kin and heir-at-law renounce their statutory rights, or be cited and fail to appear (*t*); the Court has, however, special powers under section 73 of the Court of Probate Act, 1857, where the estate is insolvent (*u*).

Husband of intestate a bankrupt—grant to his trustee in bankruptcy.

If the husband of an intestate wife is a bankrupt, on the renunciation of the husband and of the heir-at-law (where there is real estate), the grant may be made to the official receiver or the husband's trustee in bankruptcy (*x*).

Next-of-kin of intestate a bankrupt—grant to his trustee in bankruptcy.

If the sole next-of-kin, being the only person entitled to the estate of the deceased intestate, is a bankrupt, the Court, on his renunciation and consent, will grant administration to his trustee in bankruptcy (*y*).

Creditor of intestate a bankrupt—grant to his trustee in bankruptcy.

It seems that where a creditor of the deceased has become a bankrupt, a grant may be made to the trustee in bankruptcy of the creditor (*z*). And where a creditor had obtained administration of the estate of an intestate, and died a bankrupt without having fully administered, leaving his debt still unsatisfied, the Court granted administration *de bonis non* to the person to whom his trustee in bankruptcy had assigned the unsatisfied debt, limited to the interest in the intestate's estate so assigned (*a*).

Person who has bought up debt after death of debtor.

Subject to the above exceptions, it is the established practice of the Court to refuse to decree administration of an intestate's

(*r*) *Belcher* v. *Maberly* (1840), 2 Curt. 629. The Bankruptcy Act, 1869, abolished the official assignees and substituted for the creditors' assignees a trustee to be appointed by the creditors, *i.e.*, the trustee in bankruptcy. As to the "official receiver," see the Bankruptcy Act, 1883, and, now, the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59). See *Thacker*, [1900] P. 15; *Knapp* (1890), 63 L. T. 252; *Renninson* (1894), 1 Manson's Reports, 475.

(*s*) *Drew* v. *Long* (1854), 1 Spinks' Ecc. & Adm., at p. 400.

(*t*) *Ibid.*, at p. 397, but see *Morgan* (1896), 75 L. T. 190; *Bowron* (1915), 84 L. J. P. 92.

(*u*) *Post*, p. 406.

(*x*) *Turner* (1886), 12 P. D. 18. The trustee is not entitled to a grant in priority to the husband, for the husband's right to administer to his wife's estate is not such a right as will vest in his trustee in bankruptcy: *ibid.* See *Conolly* (1896), 74 L. T. 461; *Causton*, [1906] P. 124; *Morgan* (1896), 75 L. T. 190.

(*y*) *Cope* (1890), 15 P. D. 107; *Astbury* (1899), 80 L. T. 296.

(*z*) *Downard* v. *Dickinson* (1864), 3 S. & T. 564; see *Coles* (1863), 3 S. & T. 181.

(*a*) *Burdett* (1876), 1 P. D. 427.

estate to a person who has bought up a debt after the death of the intestate (*b*). "But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has assigned it, by way of mortgage or otherwise, to the parties seeking the grant" (*c*).

Married woman intestate: Creditor for ante-nuptial debt, for post-nuptial debt.

Administration to the estate of an intestate wife may be granted to her creditor for an ante-nuptial debt, after citation of the husband (*d*), or to her creditor for a debt incurred since her marriage, provided her husband and heir-at-law (where there is real estate) have first been cited or have renounced.

Grant to executors of creditor.

A grant may be made to the executors of a creditor, on the renunciation of the next-of-kin or residuary legatee (*e*).

Administration granted to married woman as creditor; on her death, her husband not entitled as creditor, but only as representative of wife.

Where a woman, who had taken administration to the estate of the deceased as a creditor, married, and died without having satisfied her debt, it was held that, as the debt had not been reduced into possession, her husband was not entitled in his own right as a creditor, but only as the representative of his wife, to take administration *de bonis non* of the estate of the deceased (*f*).

Joint grants.

Necessity for joint grants.—Before January 1, 1926, the Court did sometimes grant administration to more creditors than one, but it preferred that one should be fixed upon (*g*). However, by section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, which applies to grants made after January 1, 1926, whether the intestate died before or after that date, administration must be granted either to a trust corporation, with or without an individual, or to not less than two individuals if there is a minority, or if a life interest arises under the intestacy. In *In the Estate of Herbert* (*gg*) it was held that this provision must be read subject to the modification of section 162, subsection 1, namely, that the Court in the case of insolvency is to have a discretion to grant administration to some person other than those interested in the residue; and that under this section (or under section 73 of the Court of Probate Act, 1857, which still applies in the case of intestates dying before

(*b*) *Baynes* v. *Harrison* (1856), 1 Dea. & Sw. 15; *Downard* v. *Dickinson* (1864), 3 S. & T., at p. 566; *Depit* v. *Delerieleuse* (1861), 2 S. & T. 131; *Day* v. *Thompson* (1863), 3 S. & T. 169; *Coles* (1863), 3 S. & T. 181; but see *Cosh* (1909), 25 T. L. R. 785.

(*c*) Wms. on Exors. (11th ed.), p. 356, citing *Godfrey* (1861), 2 S. & T. 133; *Coles* (1863), 3 S. & T. 181; *Downard* v. *Dickinson* (1864), 3 S. & T. 564. And see *Almes* v. *Almes* (1796), 2 Hagg. App. 155; *Dodgson* (1859), 1 S. & T. 259; *Quilliam* (1898), 79 L. T. 472.

(*d*) *Hudleston* v. *Hudleston* (1852), 2 Rob. 424.

(*e*) *Jones* v. *Beytagh* (1821), 3 Phill. 635.

(*f*) *Risdon* (1869), 1 P. & D. 637.

(*g*) *Harrison* v. *All Persons in General* (1815), 2 Phillim. 249.

(*gg*) [1927] P. 109.

January 1, 1926) it is competent to the Court, even during a minority or during the subsistence of a life interest, to appoint a creditor as sole administrator. Doubt has, however, been cast on this decision by the Court of Appeal in *In the Estate of White* (*h*), and it seems that a sole grant cannot, after January 1, 1926, be made to a creditor where there is a minority or a life interest; he must take a joint grant either with a trust corporation or with another creditor.

Preference of Creditors inter se.—Subject to what has just been said as to the necessity for a joint grant where there is a minority or life interest, where two or more creditors of the deceased apply for a grant, the Court may make the grant to any one of them in its discretion. A judgment creditor has been preferred, as being a creditor of a superior nature to all the rest (*i*); but the priority of specialty debts over debts by simple contract has been abolished by the Administration of Estates Act, 1869 (*k*). Other things being equal, the Court will grant administration to the creditor with the largest claim against the estate (*l*), or to the nominee of the majority in value of the creditors (*m*); and on this principle the Court has preferred, even to a judgment creditor, a simple contract creditor having a larger debt (*n*).

Where two or more creditors contend, Court has a discretion.

Judgment creditor preferred.

Specialty creditor.

Creditor for largest amount preferred, or nominee of majority in value of creditors.

But since a creditor has no right by the statute, and is entitled to the grant only by the practice of the Court, there can be no doubt that the Court may refuse to grant administration to him, if circumstances show that he is not a proper person, and may make a grant to another creditor in his stead (*o*).

Grant to a creditor refused if not proper person.

The practice where a creditor applies for a grant will be found in a later chapter (*p*).

Practice.

SUB-SECTION 6.—*Grant to the Crown.*

If the intestate was a bastard, and died before January 1, 1926, without lawful issue or widow him surviving, the Court will grant letters of administration of his *personal* estate (*q*) to the

Administration to an intestate bastard,

(*h*) (1927), 43 T. L. R. 729; *vide ante*, p. 276.

(*i*) *Carpenter* v. *Shelford* (1758), 2 Lee, 502.

(*k*) 32 & 33 Vict. c. 46. See now the Administration of Estates Act, 1925, s. 34.

(*l*) *Kearney* v. *Whitaker* (1756), 2 Lee, at p. 325.

(*m*) *Smithson* (1866), 15 L. T. 296.

(*n*) *Ernest* v. *Eustace* (1856), 1 Dea. & Sw. 271.

(*o*) *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 850.

(*p*) *Post*, pp. 462, 463.

(*q*) Not of *real* estate, for, as the Land Transfer Act, 1897, does not bind the Crown, the real estate vests in the King without a grant, whether in his right as Sovereign (*Hartley*, [1899] P. 40), or as Duke of Lancaster (*Best*, [1901] P. 333).

nominee of the Crown (*r*), who is entitled to the estate as *ultimus hæres* (*s*).

or other person without known kindred.

The nominee of the Crown is entitled to a grant in respect of the personal estate of an intestate who, though not a bastard, dies without known relation, widow, or husband : provided that his or her " next-of-kin (if any) and all persons having or pretending to have any interest in the personal estate " have been cited by advertisement as required by Rule 76, N. C. B.

Where bastard leaves a widow but no children.

Where a bastard or other person having no known relations dies intestate, leaving a widow but no children, subject to the right of the widow under the Intestates Estates Act, 1890, the Crown is entitled to a moiety of the estate (*t*).

Where bastard without children disposes of part of his property by will.

Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant " save and except " (*u*), or to a *cæterorum* grant (*x*), and the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will (*y*).

Treasury Solicitor Act, 1876.

Section 1. Treasury Solicitor constituted a corporation sole.

Section 2. Grant of administration to Solicitor of Treasury.

Grants of administration to nominees of the Crown are regulated by the Treasury Solicitor Act, 1876 (*z*), whereby the Treasury Solicitor is constituted a corporation sole (*a*), and it is provided, in effect, that where the Crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the Crown, and the Crown nominates for that purpose the Treasury Solicitor, the Court may grant such administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or to some person nominated by the Treasury Solicitor (*b*).

(*r*) *I.e.*, to the Solicitor to the Treasury, as nominee of the Sovereign as King; or, if the deceased died domiciled in the Duchy of Lancaster, to the Solicitor to the Duchy of Lancaster, as nominee of the Sovereign as Duke of Lancaster (*Dyke* v. *Walford* (1846), 5 Moo. P. C. 434); or, if the deceased died domiciled in the Duchy of Cornwall, to the Solicitor to the Duchy of Cornwall, as nominee of H.R.H. the Prince of Wales as Duke of Cornwall (*Solicitor of the Duchy of Cornwall* v. *Canning* (1880), 5 P. D. 114).

(*s*) *Jones* v. *Goodchild* (1729), 3 P. Wms. 33; *Rutherford* v. *Maule* (1832), 4 Hagg. 213; *Dyke* v. *Walford* (1846), 5 Moo. P. C. 434; and see *Bell* (1908), 52 Sol. Jo. 600.

(*t*) *Cave* v. *Roberts* (1836), 8 Sim. 214.

(*u*) *Vide post*, p. 400.

(*x*) *Vide post*, p. 399.

(*y*) *Rhoades* (1866), 1 P. & D. 119.

(*z*) 39 & 40 Vict. c. 18. See also Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), repealed as to deaths occurring after the commencement of that Act, by the Administration of Estates Act, 1925.

(*a*) 39 & 40 Vict. c. 18, s. 1.

(*b*) *Ibid.*, s. 2. The Treasury Solicitor may be nominated as administrator in a particular case or class of cases, or in all cases, and his nomination may be limited as the Sovereign may deem fit. The Treasury Solicitor may be authorised to nominate some other person to take out administration in any particular case or class of cases : *ibid.* By the Duchy of Lancaster Act, 1920 (10 & 11 Geo. 5, c. 51), similar provisions apply to the solicitor for the affairs of the Duchy of Lancaster.

The administration, when granted to the Treasury Solicitor, vests in the Treasury Solicitor for the time being, notwithstanding any change in the person who is Treasury Solicitor, without any further grant, subject to any limitation contained in the grant and to the power of the Court to revoke the administration (*c*).

The grant devolves to his successors in office.

Where administration is granted to the Treasury Solicitor (*d*), or to the Solicitor for the Duchy of Lancaster (*e*), he shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give, be subject, as regards the administration, to the liabilities and duties imposed by such bond.

Treasury Solicitor does not give bond, but is subject to liabilities and duties imposed by bond.

Where a deceased dies in Cornwall, intestate, and having no known relations, or a bastard without lawful issue, then, subject to the right of the husband or widow, if any, the Court will grant letters of administration to the Solicitor for the Duchy of Cornwall for the use of H.R.H. the Prince of Wales as Duke of Cornwall, without prejudice to the rights of the Crown (*f*).

Grant to Solicitor for Duchy of Cornwall.

Section 2.

PERSONS DYING AFTER 1925.

Earlier in this chapter (*g*), where the recent changes in the law applicable to persons dying intestate after December 31, 1925, were summarised, it was pointed out that, subject to certain exceptions (*h*), the Administration of Estates Act, 1925, drastically alters the law of the devolution of the beneficial interest in property on the death of the owner intestate on or after January 1, 1926, the same law being made to apply to real and personal estate without distinction. It is necessary here to consider these changes in greater detail.

Changes in the law in the case of persons dying intestate after 1925.

The provisions of the Administration of Estates Act, 1925, may be summarised as follows (*i*). On the death of a person

Summary of provisions of Administration of Estates Act, 1925.

(*c*) 39 & 40 Vict. c. 18, s. 2. This also applies to the Solicitor for the Duchy of Lancaster: Duchy of Lancaster Act, 1920, s. 3. But grants made to the Solicitor to the Duchy of Cornwall do not devolve on his successor in office, and a further grant would be necessary on the death of the particular grantee, if any estate remained to be administered.

(*d*) 39 & 40 Vict. c. 18, s. 2.

(*e*) Duchy of Lancaster Act, 1920 (10 & 11 Geo. 5, c. 51), s. 3.

(*f*) *Solicitor of Duchy of Cornwall* v. *Canning* (1880), 5 P. D. 114. The Duchy solicitor gives a bond without sureties, and the grant does not automatically devolve on his successors in office: *vide supra*, note (*c*).

(*g*) *Ante*, pp. 282 *et seq.*

(*h*) *Ante*, pp. 283 *et seq.*

(*i*) This summary is based on Underhill, The New Conveyancing, pp. 18—22.

intestate (*k*) on or after January 1, 1926 (*l*), the personal representative is to hold all real and personal estate (except the "personal chattels" mentioned later) upon trust to sell it, with full power to postpone the sale (*n*). After payment of funeral and administration expenses and debts (*o*):

Share of surviving spouse.

(1) If the intestate leaves a *spouse* (with or without issue) the whole of what the Act calls "the personal chattels" go to the surviving spouse (*p*), and in addition the surviving spouse takes £1,000 absolutely, whether the intestate leaves issue or not, in place of the £500 given to the widow only of an issueless intestate husband by the repealed Intestates' Estates Act, 1890 (*q*). If the deceased leaves issue, the income of half the residue, and if he or she leaves no issue, the whole income is to be held in trust for the surviving spouse during his or her life (*r*).

Subject to the rights of the surviving spouse, the residue is to be held upon what the Act calls "statutory trusts" (*s*).

Issue.

(2) Where the intestate leaves a *child or children* the statutory trusts are a trust for such of them living at the death of the intestate as shall attain twenty-one or marry earlier and the issue living at the intestate's death who shall attain twenty-one or marry of any child of the intestate who has predeceased the intestate, equally *per stirpes* (*t*).

Parents.

(3) If the statutory trusts in favour of the issue of the intestate fail by reason of there being no issue, or none who live to attain twenty-one or marry, the residue is held in trust for the intestate's *parents* equally, or the only survivor of them (*u*), or, failing them:

Brothers and sisters of whole blood.

(4) Then for such of the intestate's *brothers and sisters of the whole blood* living at his death who attain twenty-one or marry earlier, and the issue living at the intestate's death who attain twenty-one or marry of such of the intestate's brothers and sisters of the whole blood as predecease the intestate, equally *per stirpes* (*x*); and, failing them:

Brothers and sisters of half-blood.

(5) Then upon similar trusts for the intestate's *brothers and sisters of the half-blood* and their issue (*x*); and, failing them:

(*k*) Where the deceased leaves a will, section 33 of the Administration of Estates Act, 1925, has effect subject to the provisions of the will.
(*l*) Administration of Estates Act, 1925, s. 54.
(*n*) *Ibid.*, s. 33, sub-s. 1. (*o*) *Ibid.*, s. 33, sub-s. 2.
(*p*) *Ibid.*, s. 46, sub-s. 1 (i). The "personal chattels" are defined by section 55, sub-section 1 (x), and include all furniture and household and garden goods, animals, vehicles and other articles except those used for business purposes, and except money or securities for money.
(*q*) Administration of Estates Act, 1925, s. 46, sub-s. 1 (i).
(*r*) *Ibid.*, s. 46, sub-s. 1 (i). (*s*) *Ibid.*, s. 46, sub-s. 1 (i) (ii).
(*t*) *Ibid.*, s. 47, sub-s. 1.
(*u*) *Ibid.*, s. 46, sub-s. 1 (iii) (iv).
(*x*) *Ibid.*, ss. 46, sub-s. 1 (v), 47, sub-ss. 2, 3.

(6) Then for the intestate's *grandparents* or the survivor (*x*), and, failing them : Grandparents.

(7) Then for such of the intestate's *uncles and aunts of the whole blood* living at the intestate's death as attain twenty-one or marry earlier, and the issue who attain twenty-one or marry earlier *per stirpes* of such of them as predecease the intestate (*x*); and, failing them : Uncles and aunts of whole blood.

(8) Upon similar statutory trusts in favour of the intestate's *uncles and aunts of the half-blood* and their issue (*x*), and, failing them : Uncles and aunts of half-blood.

(9) For the intestate's surviving *husband or wife absolutely* (*x*); and, failing such surviving spouse : Surviving spouse absolutely.

(10) Then the residue goes as *bona vacantia* to the *Crown* or the Duchy of Lancaster or the Duchy of Cornwall (*z*). Crown.

Section 48 of the Act contains a provision enabling the life interest of a widow or widower of the deceased to be redeemed by a capital payment, so as to free the residue for distribution. Redemption of life interest of surviving spouse.

Where a person, being on January 1, 1926, a lunatic and of full age, dies intestate without having recovered his testamentary capacity, his real estate (other than chattels real) devolves on his heir-at-law, as if he had died before 1926 (*a*), but his personal estate (including chattels real), subject to any settlement by the Court under the Law of Property Act, 1925, s. 171, devolves in accordance with the foregoing provisions of the Administration of Estates Act, 1925. In making a grant in respect of the estate of such a person, the rights and interests of the heir-at-law are to be regarded equally with those of the person or persons entitled under section 46 of the Administration of Estates Act, 1925, and regard must be had to the rights (if any) of the surviving spouse as tenant by the curtesy or in right of dower. Real estate of lunatic.

The foregoing provisions as to the devolution of an intestate's estate are subject to the provisions of the Legitimacy Act, 1926, which does not, however, affect any rights under the intestacy of a person dying before the commencement of that Act, *i.e.*, January 1, 1927 (*b*). Where the parents of an illegitimate person marry or have married one another, either before or after the commencement of the Act, the marriage renders that person, if living, legitimate from the commencement of the Act, or from the date of the marriage, whichever last happens (*c*), provided that the father was at the date of the marriage domiciled in Provisions of Legitimacy Act, 1926, in the case of intestates dying after January 1, 1927. Legitimation by subsequent marriage of parents.

(*x*) Administration of Estates Act, 1925, ss. 46, sub-s. 1 (v), 47, sub-ss. 2, 3.
(*z*) *Ibid.*, s. 46, sub-s. 1 (vi).
(*a*) *Ibid.*, s. 51, sub-s. 2. *Vide ante*, p. 283.
(*b*) Legitimacy Act, 1926, s. 10, sub-s. 2, s. 12, sub-s. 2.
(*c*) *Ibid.*, s. 1, sub-s. 1.

England or Wales (*c*), or in a country (*d*) by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage (*e*); but nothing in the Act operates to legitimate a person whose father or mother was married to a third person when the illegitimate person was born (*f*).

Succession on intestacy of legitimated persons and their issue.

Subject to the provisions of the Act, a legitimated person and his or her spouse, children or more remote issue are entitled to take any interest in the estate of an intestate dying after the date of legitimation in like manner as if the legitimated person had been legitimate (*g*). And where a legitimated person or a child or remoter issue of a legitimated person dies intestate in respect of all or any of his or her real or personal property, the same persons are entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate (*h*).

Application of Act to illegitimate person dying before marriage of parents.

Moreover, the Act places the spouse and issue of an illegitimate person dying before the inter-marriage of his or her parents on the same footing as if the illegitimate person had died immediately after such inter-marriage, for, by section 5 of the Act, where an illegitimate person dies after the commencement of the Act and before the marriage of his or her parents leaving any spouse, children or remoter issue living at the date of such marriage, then, if that person would, if living at the time of the marriage of his or her parents, have become a legitimated person, the provisions of the Act with respect to the taking of interests in property by, or in succession to, the spouse, children and remoter issue of a legitimated person apply as if such person

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(*c*) Legitimacy Act, 1926, s. 1, sub-s. 1.

(*d*) "Country" includes Scotland and any other part of His Majesty's dominions, as well as a foreign country: *ibid.*, s. 8, sub-s. 3.

(*e*) *Ibid.*, s. 8. In that case the person is recognised in England and Wales as having been so legitimated from the commencement of the Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law: *ibid.*, s. 8, sub-s. 1; and the provisions of the Act apply to a person so recognised as having been legitimated as if he were a person legitimated by the Act: *ibid.*, s. 8, sub-s. 2. As to legitimation by foreign marriage apart from the provisions of the statute, see Dicey, Conflict of Laws (4th ed.), rr. 145, 146, pp. 530 *et seq.*, and pp. 902—905.

(*f*) Legitimacy Act, 1926, s. 1, sub-s. 2.

(*g*) *Ibid.*, s. 3, sub-s. 1. Where the right to any property, real or personal, depends on the relative seniority of the children, and these include a legitimated person, the legitimated person ranks as if born on the day on which he became legitimated by virtue of the Act, and if more than one person became legitimated at the same time, these rank as between themselves in order of seniority: *ibid.*, s. 3, sub-s. 2. The Act does not affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title: *ibid.*, s. 10, sub-s. 1, and, by section 3, sub-section 3, does not affect the devolution of property limited in such a way as to devolve (as nearly as the law permits) along with a dignity or title of honour.

(*h*) *Ibid.*, s. 4.

had been a legitimated person and the date of the marriage of his or her parents had been the date of legitimation.

Right of illegitimate child and mother of illegitimate child to succeed on intestacy of the other.

And by section 9 of the Act, where, after the commencement of the Act, the mother of an illegitimate child (such child not being a legitimated person) dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate (*i*). And in the converse case of an illegitimate child, not being a legitimated person, dying after the commencement of the Act intestate in respect of all or any of his real or personal property, his mother if surviving is entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent (*k*). But these provisions do not apply to or affect the right of any person to take by purchase or descent any entailed interest in real or personal property (*l*).

Persons to whom administration is to be granted.

In granting administration in the case of persons dying after January 1, 1926, the Court is to have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof; and where the deceased died wholly intestate, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person, administration is to be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make application for the purpose; and, as regards land settled previously to the death of the deceased, administration is to be granted to the trustees (if any) of the settlement, if willing to act (*m*). Administration is not to be granted to more than four persons in respect of the same property (*n*); and is to be granted either to a trust corporation (with or without an individual) or to not less than two individuals during the minority of any beneficiary or during the subsistence of a life interest (*n*). And if there is only one administrator (not being a trust corporation), the Court is empowered to appoint one or more additional administrators during a minority or life interest, and until the estate is fully administered (*o*).

(*i*) Legitimacy Act, 1926, s. 9, sub-s. 1.
(*k*) *Ibid.*, s. 9, sub-s. 2.
(*l*) *Ibid.*, s. 9, sub-s. 3. The Act does not affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title : *ibid.*, s. 10, sub-s. 1.
(*m*) Judicature (Consolidation) Act, 1925, s. 162.
(*n*) *Ibid.*, s. 160, sub-s. 1.
(*o*) *Ibid.*, s. 160, sub-s. 2.

Priority of right to administration.

Where the deceased died on or after January 1, 1926, wholly intestate, the priority of right to a grant of administration is as follows :—

1. Husband or wife.
2. Children, or other issue of deceased taking *per stirpes*.
3. Father or mother.
4. Brothers and sisters of the whole blood, or the issue of deceased brothers and sisters of the whole blood, taking *per stirpes*.
5. Brothers and sisters of the half-blood, or the issue of deceased brothers and sisters of the half-blood, taking *per stirpes*.
6. Grandparents.
7. Uncles and aunts of the whole blood, or the issue of deceased uncles and aunts of the whole blood, taking *per stirpes*.
8. Uncles and aunts of the half-blood, or the issue of deceased uncles and aunts of the half-blood, taking *per stirpes*.
9. The Crown.
10. Creditors (*p*).

Sub-section 1.—*Grant to surviving Spouse.*

Prior right of surviving spouse, whether husband or wife.

Where the intestate dies on or after January 1, 1926, the first in priority of right to a grant of administration to the intestate's estate is a surviving spouse, whether husband or wife (*q*). The surviving husband of a female intestate has no greater right to a grant than has the surviving wife of a male intestate; both are on exactly the same footing, and the grant of administration is subject to identical considerations.

When surviving spouse can take a sole grant.

A surviving spouse (whether husband or wife) can take a sole grant only in the following circumstances :

(1) Where the net value of the estate (not including personal chattels (*r*)) does not exceed £1,000 (*s*); or

(2) Where the intestate died without issue, parent, brother or sister of the whole blood or their issue, brother or sister of the half-blood or their issue, grandparent, uncle or aunt of the

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(*p*) Rule 120, N. C. B.

(*q*) *Ibid.*

(*r*) For the definition of " personal chattels " see Administration of Estates Act, 1925, s. 55, sub-s. 1 (x).

(*s*) In these circumstances the whole estate goes to the surviving spouse under section 46, sub-section 1 (i), of the Administration of Estates Act, 1925, and no minority or life interest arises under the intestacy, therefore section 160, sub-section 1, of the Judicature (Consolidation) Act, 1925, does not apply.

whole blood or their issue, or uncle or aunt of the half-blood or their issue, *i.e.*, without nearer relations than second cousins (*t*).

Where grant to trust corporation or joint grant is necessary.

In all other circumstances, as the surviving spouse is entitled to a life interest in the residuary estate (or in one half, if there are issue) (*u*), under the provisions of section 160, sub-section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, the administration is to be granted either to a trust corporation (*x*) (with or without an individual) or to not less than two individuals (*y*). The surviving spouse must therefore either consent to a grant being made to a trust corporation, or join with a trust corporation in taking the grant, or take a joint grant with one or more of the other persons interested in the residuary estate.

Joint grant to surviving spouse and other persons interested in residue.

The persons entitled to be joined with the surviving spouse are those next entitled to the grant, *e.g.*, the children of the intestate or other issue taking *per stirpes*. If it is sought to join with the surviving spouse a person not next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order for a joint grant (*z*).

Person next entitled a minor or infant.

If the person entitled to be joined with the surviving spouse is a minor or infant, of whom the surviving spouse is the statutory guardian, or has been duly elected or assigned as guardian, the surviving spouse may nominate some other person to be co-administrator of the estate (*a*); otherwise a guardian of the minor or infant must be appointed, and must join with the surviving spouse in the grant. Such a grant is not limited for the use and benefit of the minor or infant.

Form of grant where there is settled land.

Where there is land vested in the intestate which was settled previously to his or her death, the trustees of such settled land must be cleared off before a general grant can issue to the surviving spouse, whether solely or jointly with a trust corporation or another individual. Where the trustees of the settlement are not cleared off, the grant is made save and except the settled land (*b*).

(*t*) In these circumstances the surviving spouse is entitled to the whole residuary estate absolutely under section 46, sub-section 1 (v), of the Administration of Estates Act, 1925; and therefore no minority or life interest arises under the intestacy.

(*u*) Administration of Estates Act, 1925, s. 46, sub-s. 1 (i).

(*x*) For definition of a "trust corporation," *vide ante*, p. 206, note (*h*).

(*y*) Where there is a minority or a life interest, the Court has no power to appoint the surviving spouse as sole administrator or administratrix, even if the estate is insolvent, and all persons interested consent: *White* (1927), 43 T. L. R. 729 (C. A.).

(*z*) Rule 122, N. C. B.

(*a*) Direction of the Senior Registrar under Rule 122, N. C. B. As to the election and assignment of guardians, see *post*, pp. 363—369, 469—471.

(*b*) Rule 118, N. C. B. The rule says "the trustees *at the date of the death*," but all existing trustees of the settled land must be cleared off. The Judicature (Consolidation) Act, 1925, s. 162, sub-s. 1 (*b*), provides that adminis-

Surviving spouse passed over.

If the surviving spouse renounces, or is cited to take administration and fails to do so, administration may be granted to the other persons interested in the residuary estate of the intestate, in the manner presently discussed (*c*). And since under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, surviving spouse has no statutory priority over the other persons interested in the residuary estate of the deceased, the surviving spouse of an intestate dying on or after January 1, 1926, may be passed over in favour of the other persons interested in the residuary estate, in circumstances which would justify the Court in passing over the husband or widow of an intestate who died before January 1, 1926; *e.g.*, where there has never been a valid marriage, or the marriage has been dissolved during the lifetime of the parties, or the surviving spouse has parted with all his or her interest in the intestate's estate, or material objections exist to his or her appointment as administrator. These matters are discussed with reference to the decided cases in the previous section of this chapter (*d*).

Personal representatives of the surviving spouse.

Where the spouse of the intestate survives the intestate, but dies without having taken administration, a grant may be made to the personal representatives of the surviving spouse where the latter had an absolute interest in the intestate's estate, *i.e.*, where the net value of the estate (not including personal chattels) does not exceed £1,000; or where the intestate died without nearer relations than second cousins (*e*). In all other circumstances, as the surviving spouse had only a life interest, his or her representatives have, as such, no title to a grant.

Grant to person having *spes successionis*, where spouse absolutely entitled.

Where the surviving spouse is absolutely entitled to the estate of the intestate by reason of its net value not exceeding £1,000, or because the intestate left no nearer relations than second cousins, then on the renunciation and with the consent of the surviving spouse, a grant may be made to the child or grandchild of the surviving spouse as having indirectly a *spes successionis* to the property of the deceased (*f*).

Grant where intestate was a lunatic with real estate.

In making a grant in respect of the estate of a lunatic who has died on or after January 1, 1926, intestate and of full age without recovering his testamentary capacity, regard must be had to the fact that his real estate, other than chattels real and subject to dower or curtesy, if any, devolves on his heir-at-law,

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tration shall, as regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement if willing to act. And see *ante*, Chapter VIII, "Special Personal Representatives in Respect of Settled Land."

(*c*) *Infra*, sub-section 2, pp. 323 *et seq.*

(*d*) *Supra*, Section 1, sub-sections 1, 2, pp. 287 *et seq.*

(*e*) *Vide supra*, p. 320.

(*f*) Cf. *supra*, p. 307.

as if he had died before 1926 (*g*), and the rights and interests of the heir-at-law are to be regarded equally with those of the surviving spouse and other persons interested in the residuary estate under section 46 of the Administration of Estates Act, 1925.

Sub-section 2.—*Grant to Kindred.*

To whom administration is granted where no surviving spouse, or where surviving spouse renounces.

Where the intestate dies on or after January 1, 1926, leaving no surviving spouse, or where the surviving spouse renounces, or fails to appear to a citation to accept or refuse a grant, or dies without having taken administration to the intestate's estate (*h*), administration will be granted to some one or more of the kindred of the intestate interested in the intestate's residuary estate under the provisions of sections 46 and 47 of the Administration of Estates Act, 1925 (*i*), unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person (*k*).

Kindred of intestate entitled to administration.

The kindred of the intestate interested in the residuary estate of the intestate (hereafter referred to as "the kindred entitled to share in the estate") in the order of their priority of right to a grant of administration, are (*l*) :—

(1) Children or other issue of the intestate taking *per stirpes* (*m*);

(*g*) Administration of Estates Act, 1925, s. 51, sub-s. 2, *vide ante*, p. 283.

(*h*) If the net value of the estate (excluding personal chattels) does not exceed £1,000, or where the surviving spouse is absolutely entitled to the estate by reason of there being no nearer relations than second cousins, the representatives of the surviving spouse would be preferred, see *ante*, p. 322, and in such circumstances, on the renunciation and consent of the surviving spouse, a grant might be made to her issue as having *spes successionis*, *ante*, p. 322. The rights of the kindred of the intestate entitled to share in his estate under the statutes to take a joint grant with the surviving spouse are discussed in the previous sub-section.

(*i*) These provisions are summarised *ante*, pp. 315 *et seq.*

(*k*) Judicature (Consolidation) Act, 1925, s. 162. For the circumstances in which the Court will pass over the kindred interested in the intestate's residuary estate, *vide post*, Chapter XV, "Grants under Discretionary Powers."

(*l*) Rule 120, N. C. B.

(*m*) The issue of the intestate entitled to share in the estate under the provisions of sections 46 and 47 of the Administration of Estates Act, 1925, are the children or child of the intestate, living at the death of the intestate [this includes a child *en ventre sa mère* at the death : section 55, sub-section 2], and all the issue living at the death of the intestate of any child of the intestate who predeceases the intestate, such issue taking through all degrees, according to their stocks, in equal shares if more than one, the share which their parents would have taken if living at the death of the intestate, but not any issue of the intestate whose parent is living at the death of the intestate, and so is capable of taking : *ibid.*, s. 47, sub-s. 1 (i). No child or other issue of the intestate attains an absolutely vested interest in the intestate's estate unless and until he or she attains twenty-one years or marries under that age : *ibid.*; and if no child or other issue of the intestate attains that age or marries under it, the estate devolves as if the intestate had died without leaving issue living at the death of the intestate : *ibid.*, s. 47, sub-s. 2. These considerations do

(2) Father or mother (*n*).

(3) Brothers and sisters of the whole blood, or the issue of deceased brothers and sisters of the whole blood, taking *per stirpes* (*o*).

(4) Brothers and sisters of the half-blood, or the issue of deceased brothers and sisters of the half-blood, taking *per stirpes* (*p*).

(5) Grandparents (*q*).

(6) Uncles and aunts of the whole blood, or the issue of deceased uncles and aunts of the whole blood, taking *per stirpes* (*r*).

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not, however, prevent a grant from being made on behalf of a minor or infant, where he or she is interested in the intestate's estate contingently on attaining twenty-one years or marrying, and no reference is made in such a grant to the fact that the minor or infant has not attained an absolutely vested interest: President's Direction; *vide post*, p. 891. But a grant will not be made to the guardian of a minor or infant unless all persons of full age equally entitled with the minor or infant have first been "cleared off"; and this applies even if the minor has acquired an absolutely vested interest by marrying under the age of twenty-one years: *vide post*, p. 364. As to the right of illegitimate children, who have been legitimated by the marriage of their parents, to share with legitimate children, *vide infra*, p. 325; and as to the right of an illegitimate child to success on the intestacy of the mother, *infra*, p. 326.

(*n*) If the intestate leaves no issue, but both parents, then subject to the interests of a surviving spouse, the father and mother share the estate equally; if only one parent survives the intestate, then, subject as before, that parent takes the whole: Administration of Estates Act, 1925, s. 46, sub-s. 1 (iii) (iv). Where both parents survive, administration will be granted to one or both of them. If only one survives, and a second administrator is required because of the life interest of a surviving spouse who has renounced, the surviving parent would join with a more remote relation (*vide infra*, p. 328). On the death of an only surviving parent, there being no surviving spouse or issue of the intestate, the grant will be made to the representatives of the surviving parent. So, if both parents survive the intestate and die without taking administration, a grant will be made to the representatives of either of them, if the intestate left no issue or spouse. As to the right of the mother of an illegitimate child to succeed on the intestacy of the child, *vide infra*, p. 326.

(*o*) In this class are the brothers and sisters of the whole blood living (or *en ventre sa mère*) at the death of the intestate, and all the issue living (or *en ventre sa mère*) at the death of the intestate of any brother or sister of the whole blood who predeceases the intestate, such issue taking through all degrees, according to their stocks, the share which their parent would have taken if living at the death of the intestate, but not the issue of a brother or sister of the whole blood who is living at the death of the intestate, and so capable of taking: Administration of Estates Act, 1925, s. 46, sub-s. 1 (v), s. 47, sub-ss. 1 (i), 3, s. 55, sub-s. 2. None of such brothers or sisters or their issue acquires an absolutely vested interest in the intestate's estate unless and until he or she attains twenty-one years or marries, but the same considerations apply to grants on behalf of minors or infants as in the case of children or other issue of the intestate: *supra*, note (*m*).

(*p*) Substituting "of the half-blood" for "of the whole blood," note (*o*), *supra*, applies to this class.

(*q*) See Administration of Estates Act, 1925, s. 46, sub-s. 1 (v). The observations in note (*n*), *supra*, *mutatis mutandis*, apply to this class, but the interest of the grandparents only arises if the intestate died without issue or parent, brother or sister of the whole or half-blood, or their issue.

(*r*) In this class are uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate) living (or *en ventre sa mère*) at the death of the intestate, and all the issue living (or *en ventre sa mère*) at the death of the intestate of any uncle or aunt of the whole blood who predeceases the intestate, such issue taking through all degrees, according to

(7) Uncles and aunts of the half-blood, or the issue of deceased uncles and aunts of the half-blood, taking *per stirpes* (*s*).

Equal rights of members of these classes *inter se*.

Every member of each of the foregoing classes has an equal title to the grant of administration, whatever his degree of relationship to the intestate (*t*); thus a child and a grandchild (being the issue of a child of the intestate who predeceased the intestate) are equally entitled to the grant, and so are a brother of the whole blood and the issue of a sister of the whole blood who predeceased the intestate. But as between themselves, the classes are exclusive, so that no member of any one class has any title to be appointed administrator if there are members of another and earlier class in existence (*u*); *e.g.*, a father or mother of the intestate has no title to the grant where there are children or other issue of the intestate taking *per stirpes*; and a brother of the half-blood has no title if there are issue of a deceased sister of the whole blood. And the rights of the members of all the classes are subject to the right of the surviving spouse of the intestate (*x*).

Rights of legitimated persons and their issue.

Subject to the provisions of the Legitimacy Act, 1926 (*y*), a legitimated person and his or her spouse, children or remoter issue are entitled to take any interest in the estate of an intestate dying after the date of legitimation (*z*) in like manner as if the legitimated person had been born legitimate (*a*). And

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stocks, the share which their parent would have taken if living at the death of the intestate; but not the issue of an uncle or aunt of the whole blood who is living at the death of the intestate, and so capable of taking: Administration of Estates Act, 1925, s. 46, sub-s. 1 (v), s. 47, sub-ss. 1 (i), 3, s. 55, sub-s. 2. None of such uncles or aunts or their issue attains an absolutely vested interest in the intestate's estate unless and until he or she attains twenty-one years or marries, but the same considerations apply to grants on behalf of minors or infants as in the case of children or other issue of the intestate: *supra*, note (*m*).

(*s*) Substituting "of the half-blood" for "of the whole blood," note (*r*), *supra*, applies to this class.

(*t*) As to the preference *inter se* of members of the same class where there is a contest for administration, see *infra*, p. 330.

(*u*) Where the grant must be made to two persons, and there is only one member of the class entitled, members of the next class are entitled to be joined as co-administrators: *vide infra*, p. 328.

(*x*) See the preceding sub-section, *supra*, pp. 320—323.

(*y*) *Vide supra*, pp. 317—319.

(*z*) *I.e.*, the date of the marriage of the illegitimate person's parents, or, if the marriage took place before the commencement of the Act, *i.e.*, January 1, 1927, then the date of the commencement of the Act: Legitimacy Act, 1926, s. 1, sub-s. 1. As to the date on which persons legitimated by extraneous law are recognised as having been so legitimated, *vide ibid.*, s. 8, and *supra*, p. 318. Where the illegitimate person dies before the marriage of his or her parents, his spouse, children, or remoter issue, if living at the time of such marriage, have the same rights as if the illegitimate person had died immediately after the marriage: *ibid.*, s. 5. And see *supra*, pp. 317—319, where the provisions of the Act are fully stated.

(*a*) Legitimacy Act, 1926, s. 3, sub-s. 1. Where anything turns on the relative seniority of children, legitimated children rank as if born on the day of their legitimation, and if more than one child became legitimated at the same time, then as between themselves such legitimated children rank in order of seniority: *ibid.*, s. 3, sub-s. 2.

Succession on intestacy of legitimated persons and their issue.

where a legitimated person or a child or remoter issue of a legitimated person dies intestate in respect of all or any part of his or her real or personal property, the same persons are entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate (*b*). But the Act does not affect any rights under the intestacy of a person dying before the commencement of the Act, *i.e.*, January 1, 1927 (*c*).

Effect of these provisions on right to administration.

The effect of these provisions, in the case of persons dying intestate on and after January 1, 1927, is to place legitimated kindred and the kindred of legitimated persons on the same footing, so far as the right to a grant of administration is concerned, as legitimate kindred and the kindred of legitimate persons, subject to this, that in considering the relative seniority of the children of any person, legitimated children rank with legitimate children as if born on the day they became legitimated, and, as between themselves, in order of seniority.

Right of illegitimate child and mother of illegitimate child on intestacy of the other.

Moreover, where the mother of an illegitimate child (such child not having been legitimated under the provisions of the Act) dies intestate after the commencement of the Act, then if the mother does not leave any legitimate issue, but not otherwise, the illegitimate child, or, if he is dead, his issue, is entitled to the grant of administration to his mother's estate, subject to the right of a surviving spouse of the mother, if any (*d*). And in the converse case, where an illegitimate child, not being a legitimated person, dies intestate after the commencement of the Act, his mother, if surviving, has the same right to a grant of administration to his estate as if the child had been born legitimate and she had been the only surviving parent (*e*).

Where grant must be made to trust corporation or not less than two grantees.

By section 160, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, administration is not to be granted to more than four persons in respect of the same property, and administration shall, if there is a minority or if a life interest arises under the intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals. Aud by sub-s. 2, if there is only one personal representative (not being a trust corporation), then, during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, the Court may, on the application of any person interested or of the guardian, committee or receiver of any such person, appoint one or more

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(*b*) Legitimacy Act, 1926, s. 4.
(*c*) *Ibid.*, s. 10, sub-s. 2; s. 12, sub-s. 2.
(*d*) Legitimacy Act, 1926, s. 9, sub-s. 1 : *vide supra*, p. 319.
(*e*) *Ibid.*, s. 9, sub-s. 2. *Vide supra*, p. 319.

personal representatives in addition to the original personal representative (*f*).

Circumstances in which a life interest arises under intestacy.

A life interest can arise under an intestacy, where the intestate died on or after January 1, 1926, only where the spouse of the intestate survives the intestate, and then only if the net value of the estate (not including personal assets) exceeds £1,000 and there are kindred of the intestate nearer than second cousins. Moreover, where a surviving husband or wife is entitled to a life interest in any part of the intestate's estate, the personal representative may purchase or redeem such life interest (while it is in possession) by paying the capital value thereof to the tenant for life or the persons deriving title under him or her, and thereupon the residuary estate may be dealt with or distributed free from such life interest (*g*), and administration may be granted to a single grantee, if there is no minority (*h*). Where then, a life interest arises under the intestacy, and also where any of the kindred of the intestate entitled to share in the estate are under the age of twenty-one years (*i*), the grant cannot be made to a single grantee (*k*), but must be made either (i) to a trust corporation alone (*l*), or (ii) to a trust corporation with one of the kindred of the intestate entitled to share in the estate (*m*), or (iii) to two or more of the kindred entitled to share in the estate, not exceeding four in number (*n*).

(*f*) For the practice under this sub-section, see Rule 115, N. C. B.

(*g*) Administration of Estates Act, 1925, s. 48.

(*h*) As the redemption of the life interest is to be made by the personal representative, this provision could not affect an original grant, but only a grant of administration *de bonis non*. Where it is alleged by an applicant for a grant to a single grantee that a life interest has been cleared off by redemption, the registrar must be satisfied before making such grant that the whole life interest of the person in question, whether at present ascertainable or not, has been redeemed. Failing this, the grant must be made to two persons, whatever the amount of the estate: President's Direction. The allegation of redemption of a life interest must be proved by affidavit. An acknowledgment, by the person having the life interest, of the redemption must be lodged: Decision of Senior Registrar.

(*i*) Though an infant who marries under twenty-one attains an absolutely vested interest in the estate, and can give valid receipts for the income of the infant's share or interest, until such an infant attains twenty-one years there would seem still to be a "minority" under section 160 of the Judicature (Consolidation) Act, 1925.

(*k*) The Court has no power, even if the estate is insolvent or there are other special circumstances, to grant administration to a single administrator during a minority or life interest: *White* (1927), 43 T. L. R. 729 (C. A.); see *ante*, p. 276.

(*l*) For definition of "trust corporation," see *ante*, p. 206, note (*h*). To act alone, the corporation must be duly authorised to apply for the grant by the persons entitled thereto: Rule 111, N. C. B. A grant to a trust corporation, made by reason of a minority or life interest, is limited "until further representation be granted": President's Direction.

(*m*) One of the kindred of full age; but if all of full age are cleared off, the guardian of the minor might join with the corporation by nominating the corporation as co-administrator: *vide post*, p. 364.

(*n*) Judicature (Consolidation) Act, 1925, s. 160.

Joint grants. How co-administrators are selected:

Where the grant must be made to two persons, the following considerations apply in selecting the co-administrators:

(1) Where all the kindred entitled are of full age.

(1) Where all the kindred entitled are of full age, the grant will be made to any two or more of them, not exceeding four in number.

Illustration 1.—The intestate (I) leaves a widow (W) who renounces, two sons of full age (S_1 and S_2) and a grandson of full age (G), the son of a daughter of I who predeceased him. The grant will be made to $S_1 + S_2$, $S_1 + G$, $S_2 + G$, or to $S_1 + S_2 + G$.

(2) Where of kindred entitled some are of full age and others are minors.

(2) Where some of the kindred entitled are of full age and some are minors, the co-administrators will be two of the kindred of full age; the guardian of the minors is not entitled to be joined as co-administrator with one of the kindred of full age unless all other kindred of full age are cleared off.

Illustration 2.—The circumstances are as in Illustration 1, but G is a minor. The grant will be made to $S_1 + S_2$. If S_2 renounces, the grant will be made to S_1 + guardian of G, but not otherwise.

(3) Only two kindred entitled, and one a minor.

(3) Where only two of the kindred of the intestate are entitled and one is a minor, the grant will be made to the kindred of full age together with the guardian of the minor.

Illustration 3.—The intestate (I) leaves no surviving spouse, one son (S) of full age, and a grandson (G), the son of a daughter of I who predeceased him. G is a minor. The grant will be made to S + guardian of G (*o*).

(4) Where only one person entitled, and that person of full age.

(4) If there is only one person of the class primarily entitled to take the grant, and that person is of full age, one or more members of the class of persons next entitled must be joined with that person. If it is sought to join with the person primarily entitled to the grant a person not next entitled, all persons entitled in priority to the last-mentioned person must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*oo*). If the sole member of the class next entitled is a minor, a joint grant may be made to the person primarily entitled and the guardian of the minor. Such grants are not limited for the use and benefit of the minor. If the person primarily entitled is also the next-of-kin of the minor next entitled, such person may, if he is the statutory guardian or has been duly elected (or in the case of an infant, assigned) as guardian, nominate any other fit and proper person to be co-administrator of the estate (*p*).

Illustration 4*a*.—The intestate (I) leaves a widow (W) who

(*o*) If S is the nearest-of-kin and guardian of G, the grant may be made to S + nominee of S. (*oo*) Rule 122, N. C. B.

(*p*) Registrar's decision, under Rule 122, N. C. B.; see *post*, p. 364.

renounces, no issue or mother, a father (F), a brother (B), and an uncle of the whole blood (U). B is of full age. The grant will be made to F + B. If it is desired to join F and U, B must be cleared off by renunciation or by a registrar's order.

Illustration 4*b*.—The facts are as in 4*a*, but B is a minor. F, as the surviving parent of B, is his statutory guardian, and as such can nominate a co-administrator.

Illustration 4*c*.—The intestate (I) leaves a widow (W) who renounces, an only child (C) of full age and a nephew (N) who is a minor, being the son of a deceased brother (B) of the intestate. N's mother (X) is alive, and is N's statutory guardian. There are no other relations of I. The grant will be made to C + X. The grant is not limited for the use and benefit of N.

(5) Only one person entitled and he a minor or infant.

(5) If there is only one person of the class primarily entitled to take the grant, and that person is a minor or infant, the following procedure is adopted. A guardian of the minor or infant is constituted in accordance with the usual practice (*q*), and as, for the purpose of the grant, a second guardian is required, the minor may elect any other of his kin, or the guardian duly constituted may nominate as his co-administrator some other person whose fitness he shows to the satisfaction of the registrar (*r*). The same principles apply to the assignment of guardians to an infant (*r*). The guardian duly constituted may nominate a trust corporation as co-administrator, and in that case the trust corporation may join in the grant (*r*). For where a grant must be made to two persons, it is immaterial that they both represent the interest of a single individual, whether as guardians, attorneys or otherwise (*s*).

Joint grants where no minority or life interest.

Joint grants may similarly be made where there is no minority or life interest, and the provisions of section 160 of the Judicature Act, 1925, do not apply. But in such cases, the Court will not force a joint administration on unwilling parties, and the persons to be joined as administrators must consent (*t*). In the absence of such consent, the Court will grant administration to one of the claimants in accordance with the rules presently stated. Where it is sought to join with a person entitled to the grant a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*u*).

Selection of administrators where there is a

The kindred entitled to share in the intestate's estate are all equally entitled to the grant of administration, and where

(*q*) See *post*, pp. 363 *et seq.*
(*r*) President's Direction, No. 11, *post*, p. 888.
(*s*) President's Direction, No. 7, *post*, p. 888.
(*t*) *Vide supra*, pp. 299, 300.
(*u*) Rule 122, N. C. B. See *post*, p. 451, note (*d*).

contest for the grant amongst those entitled.

two or more of them contend for the grant, the selection of the administrator or administrators is left to the discretion of the Court (*x*). In the exercise of its discretion, the Court is guided by the same principles as formerly applied where two or more of the intestate's next-of-kin contended for the grant (*y*), but there are certain considerations arising where the intestate died on or after January 1, 1926, which require special mention. Amongst the kindred of the intestate entitled to the grant there may now be persons of different degrees of relationship to the intestate, and unless there is material objection on the one hand or reason for preference on the other, the nearer relation will be preferred to one more remote; thus a child, for example, will be preferred to a grandchild, or a brother to a nephew (*z*). And relations of the whole blood have now a statutory priority over relations of the half-blood (*a*). Where the intestate died on or after January 1, 1927, and legitimate and legitimated children contend between themselves for the grant, it may be material in considering their relative seniority, to apply the provisions of section 3, sub-section 2 of the Legitimacy Act, 1926 (*b*).

Grant where there is settled land.

Where there is land vested in the intestate which was settled previously to his or her death, the trustees of such settled land must be cleared off before a general grant can be made to the kindred of the intestate. Where the trustees have not been cleared off, the grant is made "save and except" the settled land (*c*).

Grant where intestate was a lunatic with real estate.

In making a grant in respect of the estate of a lunatic who has died on or after January 1, 1926, intestate and of full age without recovering his testamentary capacity, regard must be had to the fact that his real estate, other than chattels real, devolves on his heir-at-law (*d*), and the rights and interests of the heir-at-law must be considered equally with those of the person or persons entitled under section 46 of the Administration of Estates Act, 1925 (*e*).

Grant to personal representatives of deceased kindred.

Where all the kindred entitled to share in the intestate's estate die without taking administration, the grant may be made to the personal representatives of one or more of them (*f*). But

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(*x*) See Judicature (Consolidation) Act, 1925, s. 162.

(*y*) *Vide supra*, pp. 301 *et seq.*, where these principles are very fully considered.

(*z*) See Rule 121, N. C. B.

(*a*) Administration of Estates Act, 1925, s. 46.

(*b*) *Vide supra*, p. 318. Under this sub-section, a legitimated child might have to be considered as junior to a legitimate child born after the legitimated child.

(*c*) Rule 118, N. C. B. *Vide supra*, p. 321, note (*b*).

(*d*) Administration of Estates Act, 1925, s. 51, sub-s. 2. *Vide ante*, p. 283.

(*e*) President's Direction, No. 12, *post*, p. 889.

(*f*) As to the necessity for co-administrators all joining in the grant, *vide supra*, p. 304.

live interests are preferred to dead interests (*g*), and therefore all living persons entitled to share in the intestate's estate must be cleared off before a grant will be made to the legal personal representatives of one of his kindred. Moreover, it must be borne in mind that none of the intestate's kindred attains a vested interest in the estate unless he or she attains twenty-one years or marries under that age (*h*), and unless a vested interest has been attained, his or her personal representatives have no title to the grant.

Grants to persons having a derivative interest,

If the personal representative of a person solely entitled to the estate refuses to take out a grant to the estate of the original intestate, a grant may be made to a person having an indirect or derivative interest in the intestate's estate, as being the next-of-kin or residuary legatee of the person solely entitled (*i*).

or *spes successionis*.

And on the renunciation and consent of the sole party interested in and entitled to represent the estate of the deceased person, the grant may be made to the child of that party, as having a *spes successionis* to the property of the deceased (*k*).

Sub-section 3.—*Grant to the Crown.*

Right of Crown to estate of intestate dying on or after January 1, 1926, without spouse or kindred.

In default of any person taking an absolute interest under the provisions of section 46 of the Administration of Estates Act, 1925 (*l*), the residuary estate of an intestate who dies on or after January 1, 1926, belongs to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as *bona vacantia*, and in lieu of any right of escheat (*m*). The Crown or the Duchy or the Duke, out of the property devolving on them respectively, may provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision (*n*).

Administration to intestate bastard,

If the intestate was a bastard, and died on or after January 1, 1926, and before January 1, 1927, without lawful issue (*o*) or

(*g*) Rule 121, N. C. B.
(*h*) Administration of Estates Act, 1925, s. 47.
(*i*) *Vide ante*, p. 307.
(*k*) *Vide ante*, p. 307.
(*l*) *Vide ante*, pp. 315 *et seq.*
(*m*) Administration of Estates Act, 1925, s. 46, sub-s. 1 (vi).
(*n*) *Ibid.*
(*o*) If the intestate leaves issue, but none attains an absolutely vested interest in the estate by attaining twenty-one years or marrying under that age, the estate devolves as if the intestate had died without leaving issue living at the death of the intestate: Administration of Estates Act, 1925, s. 47, sub-s. 2.

spouse (*p*), or, not being a legitimated person under the provisions of the Legitimacy Act, 1926 (*q*), died on or after January 1, 1927, without lawful or legitimated issue (*r*), spouse (*s*), or mother (*t*), the Court will grant administration of *all* the intestate's estate, both real (*u*) and personal, to the Treasury solicitor, as nominee of the Crown, or to the solicitor for the affairs of the Duchy of Cornwall or of the Duchy of Lancaster, as the case may be (*x*).

or other persons dying intestate after January 1, 1926, without known person entitled to share in estate.

The Treasury solicitor, as nominee of the Crown, or the solicitor for the affairs of the Duchy of Lancaster or for the Duchy of Cornwall, as the case may be, is also entitled to a grant in respect of the real and personal estate of an intestate who, though not a bastard, dies on or after January 1, 1926, leaving no known person entitled to share in his or her estate (*y*); provided that " all persons having, or pretending to have a right to share in the estate " have been cited by advertisement as required by Rule 76, N. C. B.

Where such persons dispose of part of their property by will.

Where a bastard or other person dying without known person entitled to share in his or her estate makes a will disposing of part only of his or her property, the legatees have a right to a grant of administration with the will annexed limited to the property disposed of by the will, and the Crown has a right to a grant " save and except " that property, or to a *cæterorum* grant (*z*).

(*p*) If the intestate leaves a surviving spouse, no right to a grant can accrue to the Crown, for in default of kindred entitled to share in the estate, the surviving spouse takes the whole under section 46, sub-section 1 (v) of the Administration of Estates Act, 1925.

(*q*) *Vide ante*, pp. 317 *et seq.*

(*r*) *Vide supra*, note (*o*).

(*s*) *Vide supra*, note (*p*).

(*t*) As to the right of an illegitimate child and the mother of an illegitimate child to succeed on intestacy of the other, see section 9 of the Legitimacy Act, 1926, *supra*, p. 319.

(*u*) The grant is no longer, as in cases where the intestate died before January 1, 1926 (*vide supra*, p. 313, note (*q*)), limited to the personal estate, for the provisions of the Administration of Estates Act, 1925, bind the Crown and the Duchy of Lancaster and the Duke of Cornwall for the time being as respects the estates of persons dying after the commencement of the Act: Administration of Estates Act, 1925, s. 57. But as, by section 51, sub-section 2 of the Act, where a person being on January 1, 1926, a lunatic and of full age, dies intestate without having recovered his testamentary capacity, his real estate (other than chattels real) devolves under the former law, *semble*, such real estate will vest in the Crown without letters of administration, and should be excluded from the grant.

(*x*) Cf. *supra*, pp. 313 *et seq.*

(*y*) *I.e.*, no surviving spouse and no relation nearer than a second cousin. But if the intestate died on or after January 1, 1927, regard must be had to sections 3, 4 and 5 of the Legitimacy Act, 1926, as to the succession on intestacy of legitimated persons and their issue: *vide supra*, p. 318; and to section 9 of that Act, as to the right of an illegitimate child to succeed to his or her mother, where there are no legitimate children: *vide supra*, p. 319.

(*z*) *Vide supra*, p. 314.

In other respects grants to the nominee of the Crown, etc., in the case of persons dying intestate on or after January 1, 1926, are governed by the same considerations as apply to such grants where the intestate died before that date (*a*).

Former practice applicable in other respects.

Sub-section 4.—*Grant to Creditors.*

In the case of a person dying intestate on or after January 1, 1926, the grant may be made to a creditor of the intestate if all the persons entitled to share in the intestate's estate, including the representatives of any of such persons who have died subsequently to the intestate, have renounced, or have been cited to accept or refuse the grant and have failed to appear to the citation (*b*). If the intestate left no known person entitled to share in his or her estate, the grant may be made to a creditor provided that " all persons having or pretending to have a right to share in the estate " have been cited by advertisement, and such citation has been served on the King's Proctor or upon the solicitor for the Duchy of Lancaster or upon the solicitor of the Duchy of Cornwall, as prescribed by Rule 76, N. C. B., and the proctor or solicitor acquiesces in the grant being so made.

Creditor entitled to grant, if none of the persons entitled to share in the estate will take administration.

If, by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to do so, the Court may grant administration to a creditor without requiring the citation or renunciations of persons entitled to share in the intestate's estate, or may even pass over such persons in favour of a creditor (*c*).

Discretionary power of the Court to prefer a creditor to person entitled to grant.

Necessity for Joint Grant.—The effect on grants to creditors made on or after January 1, 1926, of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1926, has been considered earlier in this chapter (*d*). That section provides that administration shall be granted either to a trust corporation, with or without an individual, or to not less than two individuals, if there is a minority or if a life interest arises under the intestate. In such cases at least two creditors must join in the grant (*e*), or, if there is only one creditor, he may apply on

Effect of section 160 of Judicature (Consolidation) Act, 1925.

(*a*) *Vide supra*, pp. 313 *et seq.* Nothing in section 167 of the Judicature (Consolidation) Act, 1925, requires the Treasury solicitor or the solicitor for the affairs of the Duchy of Lancaster, when applying for or obtaining administration for the use and benefit of His Majesty, to give an administration bond : *ibid.*, s. 167, sub-s. 6.

(*b*) Cf. *supra*, p. 308.

(*c*) Judicature (Consolidation) Act, 1925, s. 162. Cf. *supra*, p. 308, note (*u*), and see *post*, pp. 412 *et seq.*

(*d*) *Supra*, p. 312.

(*e*) Where there is a minority or life interest, the Court has probably no power to appoint a creditor as sole administrator even if the estate is insolvent and the circumstances render that course convenient : see the observations of

summons for a registrar's order for a joint grant with a trust corporation. Where there is no minority or life interest, and therefore no necessity for a joint grant, the Court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon (*f*).

The position of a creditor who applies for administration, the rules for determining who is a creditor, and the preference of creditors *inter se* are matters which have received full consideration earlier in this chapter (*g*). The practice where a creditor applies for a grant will be found in a later chapter (*h*).

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the Master of the Rolls and Scrutton and Sargent, L.JJ., in *White* (1927), 43 T. L. R. 729, on the President's decision in *Herbert*, [1927] P. 109, and *vide ante*, pp. 276, 312.

(*f*) Cf. *supra*, p. 312.

(*g*) *Supra*, pp. 308—313.

(*h*) *Post*, pp. 462, 463.

CHAPTER XII.

ADMINISTRATION CUM TESTAMENTO ANNEXO.

Administration *cum testamento annexo.*

When granted.

WHERE the deceased has left a valid will, but has appointed no executor, the Court will appoint some person to administer his estate in accordance with the provisions of his will, by a grant to such person of letters of administration *cum testamento annexo*, or, in English phrase, " with the will annexed."

Besides the case where no executor has been appointed, either in express terms or according to the tenor of the will, administration with the will annexed is granted where the appointment of executor fails for one of the following causes :—

(i) Where the executor has died in the lifetime of the testator or after his death, without having proved the will (*a*).

(ii) Where the executor has renounced, or has failed to enter an appearance to a citation to accept or refuse probate (*b*).

(iii) Where the executor is a minor, a lunatic, or resident without the jurisdiction, in which cases administration *cum testamento annexo* is granted to another for the use and benefit of the executor until his disability ceases (*c*).

(iv) Where the testator died before January 1, 1926, and the Court, in the exercise of the discretion conferred on it by section 73 of the Court of Probate Act, 1857, passes over an executor who was resident out of the United Kingdom at the testator's death (*d*).

(v) Where the will of a person who dies domiciled abroad, which appoints an executor, is admitted to probate as a valid exercise of a power of appointment, but is not duly executed in accordance with the law of the testator's domicil at death (*e*).

(*a*) Adminstration with the will annexed is also granted where the executor, having proved the will, dies intestate, leaving part of the estate unadministered; but as this is a species of grant *de bonis non*, it is treated under that head : *vide post*, p. 352.

(*b*) The Court will not grant administration *cum testamento annexo* with the consent of the executor, but only on the executor's renunciation of probate, or after citation has been served on him, upon his non-appearance within the prescribed time : *Garrard* v. *Garrard* (1871), 2 P. & D. 238. A person entitled to probate as executor will not, as a general rule, be allowed to take administration with the will annexed : *Bullock* (1845), 1 Rob. 275; *Richardson* (1859), 1 S. & T. 515; *Morrison* (1861), 2 S. & T. 129; *Terry* (June 12, 1884).

(*c*) *Vide post*, Chapter XIV, s. 1, sub-ss. 1, 2, 3; s. 3, sub-s. 3.

(*d*) *Vide post*, pp. 402—404.

(*e*) *Vide ante*, p. 34.

(vi) Where the will of a foreigner domiciled abroad contains the appointment of an executor, but the powers granted by the law of the country of domicil to the person so appointed fall short of the powers of an executor according to English law (*f*).

(vii) Where the appointment of executor is to take effect at a given period after the death of the testator and no executor is appointed to act in the meantime (*g*).

(viii) Where a corporation aggregate, other than a "trust corporation" (*h*), is appointed executor, administration with the will annexed for the use and benefit of the corporation is granted to its syndic or attorney (*i*).

In what ways the office of administrator *cum testamento annexo* differs from that of executor.

The office of administrator *cum testamento annexo* differs but little from that of executor (*k*); he is, however, obliged to give bond with security for the due discharge of his duties, an obligation from which an executor, as the person appointed by the testator himself, is exempt. And it must be borne in mind that, though the executor of an executor represents the original testator, the executor of an administrator *cum testamento annexo* does not (*l*). The will to which the administration is annexed is proved in the same way as one of which probate is granted to an executor.

Who is appointed administrator *cum testamento annexo.*

Stat. 21 Hen. 8, c. 5.

The statute 21 Hen. 8, c. 5, s. 2, enjoined the Ordinary, where the executors named in any testament refused to prove the said testament, to grant the administration of the goods of the testator to the widow, or to the next-of-kin, or to both, as by the discretion of the said Ordinary should be thought good.

Extensive construction of the statute.

Nevertheless, it was repeatedly laid down that the principle and object of the statute was to vest the right to administration in the person who was possessed of the beneficial interest in the estate, and therefore where the next-of-kin or widow had no interest in the property, he or she was by the spirit, though contrary to the letter, of the statute, excluded, and the administration granted to the person who had the interest in the estate (*m*); the rule being that the right to the administration followed the right to the property (*n*). And since this para-

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(*f*) *Vide ante*, p. 23.

(*g*) *Graysbrook* v. *Fox* (1565), 1 Plowd., at pp. 279, 281.

(*h*) Probate or administration is no longer granted to a syndic or nominee on behalf of a "trust corporation": Judicature (Consolidation) Act, 1925, s. 161, *vide ante*, p. 206. For definition of "trust corporation," *vide ante*, p. 206, note (*h*). A foreign trust corporation can, however, appoint an attorney, and an English trust corporation can apply as attorney: President's Direction.

(*i*) *Hunt*, [1896] P. 288; and see *Darke* (1859), 1 Sw. & Tr. 516.

(*k*) 2 Black. Comm. 503; 4 Burn. E. L. 370 (9th ed.).

(*l*) *Vide ante*, p. 224.

(*m*) 2 Hagg. App. 149; *West* v. *Willby* (1820), 3 Phill., at p. 381; *Wetdrill* v. *Wright* (1814), 2 Phill., at p. 248; *Martindale* (1858), 1 S. & T. 8; *Pine* (1867), 1 P. & D. 388; *Homan* (1883), 9 P. D. 61. *Vide ante*, p. 303.

(*n*) *Gill* (1828), 1 Hagg. 341.

mount principle was held to prevail even in a case where the executor appointed by will renounced, where the statute expressly enjoined the Ordinary to grant administration to the widow or next-of-kin, *a fortiori* was that the case in the many instances which were not within the statute, where the Ordinary was left to the exercise of his own discretion in appointing an administrator *cum testamento annexo*, and where no person had such a legal right to preference as could be enforced at common law (*o*).

Residuary legatee preferred to next-of-kin.

Accordingly, in all cases where a grant of administration *cum testamento annexo* became necessary, the residuary legatee, if the residue was disposed of by the will, was, on the ground of his interest, preferred to the next-of-kin (*p*). "The residuum being disposed of to another," said the Court in *Thomas* v. *Butler* (*q*), "to what purpose should the next-of-kin have administration, when no benefit can accrue to him by it? And it is reasonable that he should have the management of the estate, who is to have what remains of it after the debts and legacies paid."

By Land Transfer Act, 1897, where assets include real estate, rights and interests of persons interested in real estate to be regarded.

The Land Transfer Act, 1897, s. 2, sub-s. 3, provided: "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to a grant with the next-of-kin." It follows that where the deceased died on or since January 1, 1898, and before January 1, 1926, the residuary devisee is equally entitled to a grant of administration *cum testamento annexo* with the residuary legatee, the heir-at-law equally with the next-of-kin, and a devisee equally with a legatee.

Repeal of stat. 21, Hen. 8, c. 5, as regards deaths after 1925.

As was pointed out in the preceding chapter (*r*), the statute 21 Hen. 8, c. 5, is repealed by the Administration of Estates Act, 1925 (*s*), but that repeal does not affect cases where the death occurred before January 1, 1926 (*t*); and Part I of the Land Transfer Act, 1897, is now replaced by Part I of

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(*o*) *Rex* v. *Bettesworth* (1740), 2 Str. 956; *Ewing* (1881), 6 P. D., at p. 24.

(*p*) 2 Hagg. App. 149; *Isted* v. *Stanley* (1580), 3 Dyer, 372; *Day* v. *Chatfield* (1683), 1 Vern. 200; *Gill* (1828), 1 Hagg. 341; *Atkinson* v. *Barnard* (1815), 2 Phill., at p. 317.

(*q*) (1672), 1 Ventr., at p. 219.

(*r*) *Ante*, p. 282.

(*s*) Administration of Estates Act, 1925, ss. 56, 58, sub-s. 2, and Second Schedule.

(*t*) *Ibid.* It is provided by sub-section 2 of section 162 of the Judicature (Consolidation) Act, 1925, that the High Court in granting administration [including administration with the will annexed: section 175, sub-section 1] in the case of persons dying at any time before that date shall act in accordance with the principles and rules in accordance with which it would have acted if that Act had not passed.

the Administration of Estates Act, 1925 (*u*). And by section 166 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*w*), it is provided : " Subject to the provisions of any enactment relating to special executors in the case of settled land (*x*), administration with the will annexed shall continue to be granted in every case where such a grant was customary before the commencement of this Act, and in such case the will of the deceased shall be performed and observed in like manner as if probate thereof had been granted to an executor."

Discretion of the Court as to persons to whom administration (with will) is to be granted.

By section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*y*), which applies only in the case of persons dying on or after January 1, 1926, the date of the commencement of the Act (*z*) : " In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and any such administration may be limited in any way the Court thinks fit " (*a*). With the repeal of 21 Hen. 8, c. 5, no one has a statutory right to be appointed administrator with the will annexed, for although the rights of all persons interested in the estate of the deceased person, or the proceeds of sale thereof, are to be regarded, section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, contains no direction that administration with the will annexed must be granted to such persons, and the provision that administration with the will annexed may be granted to a devisee or legatee is permissive and not peremptory. The appointment

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(*u*) Part I of the Land Transfer Act, 1897, is repealed by the Law of Property Act, 1922, and re-enacted in an amended form by that Act. The new provisions as amended by the Law of Property Act, 1924, are incorporated in the Administration of Estates Act. 1925, some sections of which, however, have since been transferred to the Judicature (Consolidation) Act, 1925 : *vide ante*, Chapter I, pp. 14 *et seq.*

(*w*) This replaces section 19 of the Administration of Estates Act, 1925.

(*x*) *Vide ante*, Chapter VIII, pp. 232 *et seq.*

(*y*) This replaces section 10 of the Administration of Estates Act, 1925.

(*z*) Judicature (Consolidation) Act, 1925, s. 162, sub-s. 2, s. 227, sub-s. 2.

(*a*) *Vide ante*, Chapter VIII, pp. 232 *et seq.* In every oath to lead a grant of administration with the will annexed, where the deceased died on or after January 1, 1926, the deponent must swear to the best of his knowledge, information and belief, whether there is land vested in the deceased which was settled previously to his death and not by his will; and the trustees of such settled land must be cleared off by renunciation or citation before a general grant will issue; or the person entitled to a full grant may take a grant " save and except " the settled land without clearing off the trustees : Rule 118, N. C. B. If a grant limited to the settled land has already been made to the trustees of the settlement, administration with the will annexed of the rest of the estate may be granted to the person entitled to a full grant.

of an administrator with the will annexed is therefore in the discretion of the Court, which doubtless has power, if by reason of special circumstances the Court thinks it expedient, to grant such administration to some person other than those interested in the residuary estate of the deceased (*b*).

Priority of right to grant.

Where the deceased died on or after January 1, 1926, leaving a will, the priority of right to a grant of probate or administration with the will annexed is as follows (*c*) :—

(1) Executors (*d*).

(2) Residuary legatees or devisees in trust.

(3) Residuary legatees or devisees for life (*e*).

(4) Ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy,

(5) The legal personal representatives of persons indicated in (4).

(6) Legatees or devisees (*e*), or creditors.

(7) Contingent residuary legatees or devisees, or contingent legatees or devisees, or persons, having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate.

(8) The Crown.

Provisions as to number of personal representatives

By section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, which applies to grants made on or after January 1, 1926, whether the testator died before or after that date (*f*), administration with the will annexed (*g*) is not to be granted to more than four persons in respect of the same property, and if there is a minority or if a life interest arises under the

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(*b*) It is for this reason, it is submitted, that the special provisions of section 73 of the Court of Probate Act, 1857, with regard to this species of grant are not reproduced in section 162 of the Judicature (Consolidation) Act, 1925. The similar provisions of section 73 with regard to administration on intestacy are reproduced, but this is necessary, as section 162 directs that this species of administration *shall* be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make application for the purpose, unless by reason of the insolvency of the estate, etc., the Court thinks it expedient to grant administration to some other person. No such express provision is required with regard to administration with the will annexed, which is already in the discretion of the Court. And see *post*, Chapter XV, pp. 413 *et seq.*

(*c*) Rule 119, N. C. B.

(*d*) Except in cases where there are beneficiaries who are minors or infants or where life interests are created by the will, the fact that an executor is an infant does not in itself necessitate a grant to two persons : President's Direction.

(*e*) A residuary legatee or devisee for life, or a legatee or devisee for life, can no longer take a grant alone : President's Direction.

(*f*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 3, s. 227, sub-s. 2. *Vide ante*, pp. 275—277.

(*g*) " Administration " in section 160, includes administration with the will annexed : Judicature (Consolidation) Act, 1925, s. 175.

will, such administration is to be granted either to a trust corporation, with or without an individual, or to not less than two individuals (*h*). Where, then, any life interest arises, either under the provisions of the will, or as a result of partial intestacy (unless such life interest has been cleared off by redemption (*i*)), and also where any of the persons entitled to share in the estate are under the age of twenty-one years (*k*), the grant cannot be made to a single grantee (*l*), but must be made either (i) to a trust corporation alone (*m*), or (ii) to a trust corporation with one of the persons entitled to the grant of administration with the will annexed, or (iii) to two or more of the persons entitled to the grant of administration with the will annexed, not exceeding four in number.

How co-administrators are selected where a joint grant is necessary.

Where the grant must be made to two persons, the co-administrators are selected on principles similar to those fully discussed in the preceding chapter with reference to the selection of co-administrators on intestacy (*n*). Where a grant must be made to two persons, it is immaterial that they represent the interest of a single individual, whether as guardians, attorneys, or otherwise (*o*); but where it is sought to join, with a person entitled to the grant, a person not equally or next entitled, all persons with a prior right must be cleared off either by renunciation, or citation, or by a registrar's order on summons for a joint grant (*p*).

The principles and rules of practice set out in the following sections, except where otherwise stated, apply whether the testator died before or after January 1, 1926.

(*h*) *Vide ante*, Chapter X, pp. 275 *et seq*; and for definition of "trust corporation," *vide ante*, p. 206, note (*h*).

(*i*) Where it is alleged by an applicant for a grant to a single grantee that a life interest has been cleared off by redemption, the registrar must be satisfied before making such grant that the whole life interest of the person in question, whether at present ascertainable or not, has been redeemed; failing which, the grant must be made to two persons, whatever the amount of the estate: President's Direction. The allegation of redemption of a life interest must be proved by affidavit, and an acknowledgment, by the person having the life interest, of the redemption, must be lodged: Registrar's decision.

(*k*) As to the minority of an executor, *vide supra*, p. 339, note (*d*).

(*l*) It seems that, even if the estate is insolvent, the Court has no power to grant administration with the will annexed to a single administrator during a minority or life interest (section 160, sub-section 1), for the proviso in section 162, sub-section 1, of the Judicature (Consolidation) Act, 1925, which was considered in *Herbert*, [1926] P. 109, to have modified the provisions of section 160, sub-section 1, of that Act, only applies where the deceased died wholly intestate; and see *ante*, p. 276.

(*m*) For definition of "trust corporation," see *ante*, p. 206, note (*h*). To act alone, the corporation must be duly authorised to apply for the grant by the persons entitled thereto: Rule 111, N. C. B. Cf. *ante*, p. 327, note (*l*).

(*n*) *Ante*, pp. 328 *et seq.*

(*o*) President's Direction.

(*p*) Rule 122, N. C. B.

Section 1.

GRANT TO RESIDUARY LEGATEE OR DEVISEE.

Where residue is disposed of.

Where the residue is disposed of by the will (*q*), administration *cum testamento annexo* is granted to the universal (*r*)

(*q*) As to what form of disposition will suffice to constitute the beneficiary residuary legatee or devisee, see the following cases, in which the words were held to constitute a sufficient disposition of the residue—" If there is money left unemployed, I desire it may be given in charity " : *Legge* v. *Asgill* (1822), 1 Turn. & Russ. 265, n. : " I think there will be something left after all funeral expenses, etc., being paid, to give W B towards equipping him to any profession . . . " : *Leighton* v. *Baillie* (1834), 3 M. & K. 267. " Whatever remains of money " : *Dowson* v. *Gaskoin* (1837), 2 Keen, 14. " I guess there will be sufficient in my bankers' hands to defray my debts, which I hereby desire E M to do, and keep the residue for her own use . . . " : *Boys* v. *Morgan* (1838), 9 Sim. 289. " All that may remain of my money after my lawful debts and legacies are paid " : *Rogers* v. *Thomas* (1838), 2 Keen, 8; *Re Egan*, [1899] 1 Ch. 688. " All my property," followed by an enumeration of properties which did not include the whole estate : *Goodyar* (1858), 1 S. & T. 127. " Household furniture, goods, ready money, debts and securities " : *Avison* v. *Simpson* (1858), Johns. 43. " Everything of every kind that I have now or may have at the time of my decease in my apartments at A or elsewhere " : *Scarborough* (1861), 30 L. J. P. 85. " All the remainder of money, goods and debts due to me " : *Bloomfield* (1862), 31 L. J. P. 119. " All other things " : *Cadge* (1868), 1 P. & D. 543. " All other chattels " : *Sharman* (1869), 1 P. & D. 661. " After these legacies and my doctor's bills and funeral expenses are paid, I leave to my sister without any power or control of her husband," without stating what was left to the sister : *Re Bassett's Estate* (1872), L. R. 14 Eq. 54. A gift of " all my property to A for life, and then to my legal heirs," held sufficient to constitute the heir residuary legatee : *Dixon* (1878), 4 P. D. 81. " All the rest of my money, however invested " : *Re Pringle* (1881), 17 Ch. D. 819. " The whole residue of money, except," etc. : *White* (1882), 7 P. D. 65. " One half of the money of which I am possessed to A, and the remainder equally between B and C " : *Re Cadogan* (1884), 25 Ch. D. 154. " The residue of my money " : *Re Smith* (1889), 42 Ch. D. 302. " All my furniture, pictures and other effects " : *Jupp*, [1891] P. 300. " The rest of my money " : *Bramley*, [1902] P. 106. " Any little money left " : *Re Douglas*, [1905] 1 Ch. 279. As to the construction of the word " money," see Williams on Executors (11th ed.), pp. 940 *et seq*, and as to restricting " goods," " chattels," and other general words, when coupled with other words of a limited signification to things *ejusdem generis*, see *ibid.*, pp. 935 *et seq*. The following bequests have been held *not* to constitute the donee residuary legatee—" In case there is any money remaining, I should wish it to be given in private charity " : *Ommaney* v. *Butcher* (1823), 1 Turn. & Russ. 260. " Whatever may remain to my account after payment of my debts and pecuniary legacies " : *Hastings* v. *Hane* (1833), 6 Sim. 67. " Three or four thousand pounds or whatever remaining sum or sums " : *Wrench* v. *Jutting* (1841), 3 Beav. 521. " The residue of my things " : *Ludlow* (1858), 1 S. & T. 29. " I beg that the remainder of my money and effects may be expended in purchasing a suitable present fqr my godson D " : *Borton* v. *Dunbar* (1861), 2 Giff. 221. " Whatever money remains at my agents, also any money that may result from the sale of my effects " : *O'Loughlin* (1870), 2 P. & D. 102. " Such money, stocks, funds or other securities, not hereby specially devised, as I may die possessed of " : *Aston* (1881), 6 P. D. 203. A gift of " all my property to A and B, and in case of the demise of either, to the survivor for life," held to give A and B a life interest only, and the residue not disposed of : *Watson* v. *Watson* (1881), 7 P. D. 10. " The money I have and am entitled to now and at any future time " : *Re Taylor*, [1922] 1 Ch. 569; [1923] 1 Ch. 99, C. A.

(*r*) The universal legatee and devisee is not, as such, entitled to a grant of probate as executor according to the tenor : *Oliphant* (1860), 1 S. & T. 525; nor has the rule been altered by the Land Transfer Act, 1897 : *Pryse*, [1904] P. 301. But where the universal legatee had been appointed executrix under

Where residue is disposed of, administration *cum testamento annexo* granted to residuary legatee or devisee,

or residuary legatee (*s*). Since the Land Transfer Act, 1897, the title of a residuary devisee to a grant is equal to that of a residuary legatee (*t*).

even if no prospect of there being any residue.

It is said that the residuary legatee, even where there is no prospect of any residue, is entitled to the administration in preference to the next-of-kin (*u*), and to specific legatees (*x*), for the following reasons :—First, the residuary legatee is the testator's choice; he is the next person in the testator's election to the executors (*y*). Secondly, an allegation that there is no residue should not be allowed, for that might be offered in every case, and involve delay and expense in deciding (*z*).

Sed quære.

But in *In the Goods of Wilde* (*a*), where, on an application for a grant of administration *de bonis non*, it appeared that the residuary legatee resident abroad had had notice by letter, and had no beneficial interest, there being no residue, it was held that the grant might be made to a specific legatee, without requiring the residuary legatee to be cited or to renounce. And in *In the Goods of Pool* (*b*), where, owing to the amount of an annuity given to the widow being left blank, it was uncertain whether the gift of the residue had any force and effect, administration was granted to the widow in preference to the persons named residuary legatees in the will.

Residuary legatee in trust.

A residuary legatee in trust is entitled to administration *cum testamento annexo* (*c*), and, as will appear, is usually preferred to others who are beneficially entitled to the residue.

Preference *inter se* of residuary legatees and devisees.

Where several are interested in the residue, the Court may grant the administration to any one (*d*) or more of them in its discretion (*e*).

1. Residuary legatee and devisee in trust preferred.

The ordinary practice is to grant administration with the will annexed to the residuary legatee and devisee *in trust*, if any (*f*).

Grant to trustee substituted by

Where the residuary legatee and devisee in trust has, under the will, power to appoint a trustee in his stead, the grant may

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an earlier will, administration with a later will annexed was granted to her, on her giving her personal bond, without being required to find sureties : *Allen*, [1893] P. 184.

(*s*) *Vide ante*, pp. 336, 337.

(*t*) *Ante*, p. 337.

(*u*) *Thomas* v. *Butler* (1672), 1 Ventr. 217.

(*x*) *Atkinson* v. *Barnard* (1815), 2 Phill. 316.

(*y*) *Atkinson* v. *Barnard* (1815), 2 Phill., at pp. 317, 318.

(*z*) *Thomas* v. *Butler* (1672), 1 Ventr., at p. 218; *Atkinson* v. *Barnard* (1815), 2 Phill., at p. 317.

(*a*) (1887), 13 P. D. 1.

(*b*) (1866), 1 P. & D. 206.

(*c*) *Hutchinson* v. *Lambert* (1825), 3 Add. 27. The three decisions of Sir George Lee to the contrary must, it is submitted, be regarded as overruled. They are : *Coussmaker* v. *Chamberlayne* (1755), 2 Lee, 243; *Boddicott* v. *Dalzeel* (1756), *ibid.* 294; *Fawkener* v. *Jordan* (1756), *ibid.* 327; see Wms. on Exors. (11th ed.), p. 379, note (*o*).

(*d*) But there cannot be a grant to a single administrator where a minority or life interest arises under the will : *vide supra*, pp. 339, 340.

(*e*) *Taylor* v. *Shore* (1670), T. Jones, 161.

(*f*) *Hutchinson* v. *Lambert* (1825), 3 Add. 27; and Rule 119, N. C. B. See *Stainton* (1871), 2 P. & D. 212.

be made to the trustee so nominated by the residuary legatee and devisee in trust, on the renunciation of the latter (*g*).

1. Grant to residuary legatee or devisee in trust.

Where there is no residuary legatee or devisee in trust, or where the residuary legatee and devisee in trust renounces, or has been cited to accept a grant, and has not appeared, the grant is made to the person or persons who have the beneficial interest in the residuary estate under the will (*h*).

2. Grant to beneficial residuary legatee or devisee for life.

The residuary legatee or devisee for life is preferred to the person who is to take the beneficial interest in the residue upon his or her death (*i*); but a residuary legatee or devisee for life can no longer take a grant alone, for *ex necessitate* if there is a life tenant, the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, apply (*k*), and the grant must be made either to a trust corporation alone (with the consent of the life tenant or life tenants), or to a trust corporation jointly with one of the life tenants, or there must be a joint grant to two or more of the life tenants (if more than one), or to the life tenant (if only one) together with one or more of the ultimate residuary legatees or devisees (*l*).

3. Grant to "substituted" residuary legatee or devisee.

If the residuary legatee or devisee for life die or renounce, or be cited to accept a grant and enter no appearance, the grant is made to the person who is to take the beneficial interest in the residue upon his or her death (*m*); *i.e.*, to the "substituted" residuary legatee or devisee.

Where there is a lapse of a share of the residue.

If the residue is given to two persons, and the share of one

(*g*) *Cresswell* v. *Cresswell* (1824), 2 Add. 342. But not until the trust properties are actually vested in the substituted trustee, unless all persons beneficially interested in the trust property consent: *ibid.*; but see *Woodfall* v. *Arbuthnot* (1873), 3 P. & D. 108, where a grant was made to trustees substituted by the Court of Chancery for the residuary legatee in trust under the will, although there had been no actual assignment to them of the trust estate, which vested in them by operation of statute. The deed of nomination must be produced when the grant is applied for: Tristram & Coote (16th ed.), p. 93.

(*h*) *Hutchinson* v. *Lambert* (1825), 3 Add. 27; *Bigg* v. *Keen* (1752), 1 Lee, 124; *Pryse*, [1904] P. 301, Rule 119, N. C. B. Where a testatrix bequeathed the residue of her property to A B "to be disposed of as she shall think fit at her discretion for the benefit of the Roman Catholic Convent of St. Edward," A B having died in the lifetime of the testatrix, administration (will) was granted to the Reverend Mother of the convent as residuary legatee: *M'Auliffe*, [1895] P. 290. See *Walsh* v. *Gladstone* (1843), 1 Phillips, 290.

(*i*) *Brown* v. *Nicholls* (1851), 2 Rob. 399. But the Court will depart from this rule when, were it followed, a question of construction of the will would, in effect, be determined; and will in these circumstances make such grant as will leave the question open: *ibid.* The Court may, however, in a proper case, construe the will for the purpose of determining the character of the applicant's interest: see *Lupton*, [1905] P. 321, and the cases cited *supra*, p. 341, note (*q*); and *vide ante*, p. 6.

(*k*) President's Direction. For the provisions of section 160 of the Judicature (Consolidation) Act, 1925, *vide supra*, p. 339.

(*l*) The grantees must not exceed four in number: *vide supra*, p. 339.

(*m*) Whether under the original will, or as appointees under a power of appointment conferred by the will: *Martindale* (1858), 1 S. & T. 9; *Pine* (1867), 1 P. & D. 388.

of them has lapsed to the person entitled to share in the estate on intestacy, the grant is made either to the remaining residuary legatee or devisee, or to the person entitled to the grant in the event of intestacy, according to priority of application (*n*).

Where one takes a portion of the residue absolutely and another a life interest in the remaining portion.

If there be a residuary legatee or devisee who takes one portion of the residue absolutely, and another who takes a life interest in the remaining portion of the residue, both are equally entitled to the grant, but, having regard to the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, neither can now take the grant alone.

Contingent residuary legatees and devisees.

By Rule 119 N. C. B., where the testator died on or after January 1, 1926, contingent residuary legatees or devisees are postponed, so far as their priority of right to a grant of administration with the will annexed is concerned, to ultimate residuary legatees or devisees, and, where the residue is not wholly disposed of, to the persons entitled upon an intestacy, and also to the legal personal representatives of the persons indicated above, and to legatees and devisees, or creditors. Therefore, if the residue is given to the testator's children, but is not to vest in them until they attain the age of twenty-one years, and none has attained that age at the time of the application for the grant, administration with the will annexed, in cases where the testator died on or after January 1, 1926, is granted to the persons who will take the residue in the event of the death of all the children before attaining the age of twenty-one years; for in such circumstances there is no present disposition of the residue (*nn*).

Where several persons equally interested :

Where there are several persons equally interested in the residue, and no minority or life interest arises under the will, the grant is made to the one who first applies, without the consent of or notice to the others (*o*).

(*n*) See Rule 119, N. C. B.

(*nn*) This appears to be the practice in the registry. Before 1926 a contingent interest was not recognised, and in the case under discussion, the grant was made to the next-of-kin; after 1926, a contingent interest is recognised by Rule 119 N. C. B., but it comes last, and therefore it appears to be considered that the next-of-kin are still entitled to the grant in priority to the contingent residuary legatees. But this appears to disregard the fact that the interest of the next-of-kin in the case under discussion is also contingent, and it is submitted that of the two contingent interests, that of the residuary legatees should be preferred. This would be consonant with the practice on intestacy, where the guardians of minor children are preferred to the persons who would take if all the children were to die under twenty-one, although by sections 46 and 47 of the Administration of Estates Act, 1925, such children do not take a vested interest until they attain twenty-one or marry.

(*o*) Where, of four residuary legatees, one was the testator's next-of-kin and the other three were minors, the Court granted administration (will) to the next-of-kin, in spite of the fact that he had unsuccessfully opposed the will, in preference to the guardian of the three minor residuary legatees, on the ground that there was in fact no residue and the next-of-kin had a larger interest in the specific legacies than the minors : *Sawbridge* v. *Hill* (1871), 2 P. & D. 219.

Residuary devisee equally entitled with residuary legatee.

Residuary legatees and residuary devisees are, since the Land Transfer Act, 1897, equally entitled to a grant (*p*).

Where there is a residuary devisee in trust, he should be cleared off (*i.e.*, renounce or be cited) before a grant is made to the residuary legatee, and where there is a residuary legatee in trust, he should be cleared off before a grant is made to a residuary devisee (*p*).

Residuary devisee (or legatee) to be cleared off before grant to next-of-kin (or heir).

If there be no executor or residuary legatee, a grant is not made to the person who would have been entitled to the grant had the deceased died intestate, without clearing off the residuary devisee; and where the testator died before January 1, 1926, and there is no executor or residuary devisee, a grant is not made to the heir-at-law without clearing off the residuary legatee (*q*).

Next-of-kin also residuary legatee.

If the same person be both next-of-kin and residuary legatee, the grant will, it seems, be made to him in preference to other residuary legatees (*r*), but the residuary devisee must be cleared off.

Joint grant to two or more residuary legatees:

In trust.

Where there were several residuary legatees in trust, it was formerly the practice of the Court to grant administration to them jointly, and not to one or some of them, unless the other or others renounced. The present practice is stated to be to grant the administration to one of them, if he applies alone, without requiring the renunciation of the others.

Beneficial residuary legatees.

A joint grant may be made to two or more residuary legatees, or to a residuary legatee for life and the person who is to take the residue beneficially upon his death; but if others are interested in the residue a joint grant will not, except where a minority or life interest arises under the will (*s*), be made unless they are of full age, and consent (*t*). And where it is sought to join with a person entitled to a grant a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by citation, or by a registrar's order on summons for a joint grant (*u*).

Representative of residuary legatee preferred to persons entitled on intestacy or specific legatees.

Grant to Representative of Residuary Legatee or Devisee.— Where the person beneficially entitled to the residuary estate dies, having acquired a vested interest either through having survived the testator or under section 33 of the Wills Act, 1837, his legal personal representative is entitled to the grant in

(*p*) Additional Instructions to the Officers of the Probate Registries under the Land Transfer Act, 1897, Nos. 2, 3; and *vide supra*, pp. 337, 338.

(*q*) *Ibid.*, No. 5.

(*r*) *Linthwaite* v. *Galloway* (1757), 2 Lee, 414; see *Sawbridge* v. *Hill* (1871), 2 P. & D. 219; *supra*, note (*o*).

(*s*) As to joint grants where a minority or life interest arises under the will, *vide supra*, pp. 339, 340.

(*t*) Cf. *ante*, pp. 293, 294.

(*u*) Rule 122, N. C. B.

preference to the persons entitled upon an intestacy (*x*), or to legatees (*y*).

Secus, representative of residuary legatee or devisee in trust.

But the personal representative of a residuary legatee or devisee *in trust* is not entitled to a grant, for he has no beneficial interest in the residue (*z*).

All living persons interested in the residue renounce or are cited.

A grant will not be made to the representative of a deceased residuary legatee without clearing off all living persons who are interested in the residue, including the residuary devisee, if any (*a*).

Where share of residue has lapsed.

And where a share of the residue has lapsed, the representative of the residuary legatee of the unlapsed share is not entitled to a grant unless the persons entitled to the lapsed share are cleared off.

Assignee of residuary legatee.

On the principle that the right to administration follows the right to the property, grants of administration with the will annexed have been made, on the renunciation of the residuary legatee, to the person to whom the residuary legatee had assigned the whole of his right and interest in the residuary estate (*b*).

Grant to next-of-kin of universal legatee and devisee on his renunciation and consent.

On a somewhat similar principle, where the whole estate is left to an individual, on the renunciation and consent of that individual, a grant may be made to his child, as having a *spes successionis* to the property (*c*); but this principle does not apply on the renunciation of a residuary (as distinguished from a universal) legatee and devisee.

Section 2.

GRANT TO PERSONS ENTITLED UPON INTESTACY.

Where the residuary legatees and devisees renounce.

Where the Residue is disposed of.—If the will disposes of the residue, but all persons interested therein under the will renounce, the grant is made to the persons who would have been entitled to a grant had the deceased died wholly intestate (*d*).

(*x*) *Wetdrill* v. *Wright* (1814), 2 Phill. 243; *Jones* v. *Beytagh* (1821), 3 Phill. 635; Rule 119, N. C. B. The representative of a residuary legatee *for life* is not entitled to a grant: *Wetdrill* v. *Wright*, *loc. cit.*; *Thomas* v. *Baker* (1753), 1 Lee, 341; *Ditchfield* (1870), 2 P. & D. 152. But a grant was made to such a person under exceptional circumstances: *Jackson*, [1892] P. 257.

(*y*) *Thirlwall* (1848), 6 N. C. 44; *Isted* v. *Stanley* (1580), 3 Dyer, 372; *Richardson* v. *Seise* (1700), 12 Mod. 306; *Rous* v. *Noble* (1691), 2 Vern. 249; Rule 119, N. C. B.

(*z*) *Hutchinson* v. *Lambert* (1825), 3 Add. 27; *Coussmaker* v. *Chamberlayne* (1755), 2 Lee, 243.

(*a*) See Rule 121, N. C. B. (live interests preferred to dead interests).

(*b*) *Pine* (1867), 1 P. & D. 388; cf. *ante*, p. 311; and see *Mayhew* v. *Newstead* (1837), 1 Curt. 593.

(*c*) *Vide ante*, pp. 307, 308; *Hinckley* (1828), 1 Hagg. 477.

(*d*) In the case of testators dying before January 1, 1926, the grant is so made under the statute of 21 Hen. 8, c. 5, which enjoins the Ordinary, where the executors named in any testament refuse to prove it, to grant the administration to the widow or to the next-of-kin. *Vide supra*, pp. 336, 337, and see

But these persons, where they have no interest in the property, may be excluded, and the grant made to one who has an interest, *e.g.*, a legatee or creditor (*e*).

Grant where residue not disposed of, or residuary bequest or devise fails.

Where the Residue is not disposed of.—If the residue is not disposed of by will, or the residuary bequest totally fails, administration with the will annexed is granted to the persons who would have been entitled to the grant had the deceased died intestate (*f*). In such a case there is an intestacy as to the residuary estate, and those who would take on an intestacy are entitled to a grant of administration *cum testamento annexo*, in accordance with the rules set forth in the preceding chapter.

Where the testator died before January 1, 1926, the order is as follows : (1) the widow (*g*) or husband (*h*); (2) the testator's next-of-kin (*i*) or heir-at-law (if there is real estate); (3) persons entitled in distribution; (4) representatives (*k*) of the widow, next-of-kin, or persons entitled in distribution (*l*).

Where the testator died on or after January 1, 1926, the grant is made to the persons entitled on intestacy in accordance

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4 Burn, E. L., p. 370 (9th ed.); *West* v. *Willby* (1820), 3 Phill., at p. 381. The statute 21 Hen. 8, c. 5, is repealed by the Administration of Estates Act, 1925, so far as applies to deaths occurring after the commencement of that Act : *vide supra*, p. 337; and where the deceased died on or after January 1, 1926, and the residue is disposed of, persons having no interest in the estate who would have been entitled to a grant had the deceased died wholly intestate are, by Rule 119, N. C. B., postponed to the residuary legatees and devisees and their representatives, and also to legatees, devisees and creditors, and rank with contingent residuary legatees or devisees, and contingent legatees or devisees.

(*e*) *Furlonger* v. *Cox* (1811), cit. 3 Phill. 381; *Mayhew* v. *Newstead* (1837), 1 Curt. 593; and *vide post*, p. 348. Where the residue is disposed of, and the testator died before January 1, 1926, the practice is to make the grant indifferently to the next-of-kin or a specific legatee, according to priority of application, provided, of course, that the executors and residuary legatees have renounced or been cited : *vide post*, p. 348; but where the testator died on or after January 1, 1926, the persons entitled in priority under Rule 119, N. C. B., must also be cleared off : *vide supra*, note (*d*).

(*f*) *Kooystra* v. *Buyskes* (1821), 3 Phill. 531; Rule 119, N. C. B.

(*g*) In a contest for administration (will) the Court preferred the next-of-kin to the widow, as it appeared that the former, as legatee, had a larger interest : *Homan* (1884), 9 P. D. 61.

(*h*) A husband has, since the Married Women's Property Act, 1882, a right to a grant of administration with the will of his deceased wife annexed by virtue of his *jus mariti* only in cases of partial intestacy of the wife, when he has an interest in the estate, *i.e.*, his right is now on the same footing as the right of her next-of-kin. Administration (will) to the estate of a married woman is now granted on the same principles as obtain in the cases of men —the administrator with the will takes a general grant, which covers all the testatrix's estate which vests in her personal representative, whether disposed of by the will or not : *vide ante*, p. 81.

(*i*) A legatee preferred to the next-of-kin, who was of great age : *Hinckley* (1828), 1 Hagg. 477.

(*k*) Representatives of next-of-kin granted administration (will) after citation of residuary legatee : *Ley*, [1892] P. 6. But as a rule, where the residue is disposed of, representatives of next-of-kin, etc., are not entitled to a grant.

(*l*) Where there were no known relatives of the testator, and no residuary legatee was appointed, the Court, under special circumstances, granted administration (will) to a stranger : *Jackson*, [1892] P. 257.

with the principles and rules discussed in section 2 of the preceding chapter (*m*).

Partial lapse of residue.

Where there has been a partial failure of the residuary bequest, the persons who would have been entitled to a grant had the deceased died wholly intestate are equally entitled to a grant with the persons interested in the unlapsed residue of the personalty, the residuary devisee, if there is real estate, being first cleared off (*n*).

SECTION 3.

GRANT TO LEGATEE OR DEVISEE.

On renunciation of residuary legatee and devisee, grant to legatee or devisee.

Where the Residue is disposed of.—Where the residue is disposed of by the will, after renunciation or citation of the residuary legatee and devisee, the grant may be made to a legatee or devisee. It was formerly the practice to require notice to be given to the next-of-kin (*o*).

Residue not disposed of:

Grant to legatee on renunciation or citation of all persons interested on intestacy.

Limited grant to legatee.

Where the Residue is not disposed of.—If the residue has lapsed, or is not disposed of in the will, the grant will be made to a legatee or devisee, on the renunciation or citation of all persons interested in the estate in the event of intestacy (*p*). A grant limited to the amount of his legacy will not, as a general rule, be made to a legatee, for the Court prefers to make a general grant after citation of the persons interested on intestacy (*q*).

SECTION 4.

GRANT TO CREDITOR.

Residue disposed of.

Where the residue is disposed of by will, the grant may be made to a creditor, on the renunciation or after citation of the executor, the residuary legatee, and residuary devisee.

(*m*) Where any person dies leaving a will effectively disposing of part of his property, Part IV of the Administration of Estates Act, 1925, has effect as respects the part of his property not so disposed of, subject to the provisions contained in the will and subject to the modifications contained in section 49 of that Act.

(*n*) See Rule 119, N. C. B.

(*o*) *Kooystra* v. *Buyskes* (1821), 3 Phill. 531. But the present practice where the testator died before January 1, 1926, is to make the grant indifferently to the legatee or next-of-kin, according to priority of application: *vide ante*, p. 347, note (*e*); and where the testator died on or after that date, a legatee or devisee is, by Rule 119, N. C. B., entitled to the grant in priority to persons entitled upon intestacy.

(*p*) *Kooystra* v. *Buyskes* (1821), 3 Phill. 531; Rule 119, N. C. B.; see *Hinckley* (1828), 1 Hagg. 477. A legatee for life is usually preferred to a legatee substituted: *Brown* v. *Nicholls* (1851), 2 Rob. 399; but a legatee or devisee for life can no longer take a grant alone: President's Direction, and *vide supra*, p. 340.

(*q*) *Watts* (1860), 1 S. & T. 538. But see *Watson* (1858), 1 S. & T. 110; *Baldwin*, [1903] P. 61; *Hampson* (1865), 1 P. & D. 1. *Vide post*, pp. 387 *et seq.*

If the residue has lapsed, or is not disposed of by will, the grant is made to a creditor on the renunciation or after citation of the executor, and all persons interested in the estate in the event of intestacy (*r*). Residue not disposed of, or lapsed.

The principle upon which a grant is made to a creditor has been fully discussed in the preceding chapter, where a statement of what persons are regarded as creditors will be found (*s*).

Where the testator has died a bankrupt, the Court may grant administration with the will annexed to his trustee in bankruptcy, on the renunciation or citation of the executor, residuary legatee and devisee (*t*). Testator a bankrupt; grant to his trustee in bankruptcy.

So where the residuary legatee or devisee is a bankrupt, his trustee in bankruptcy is entitled to the grant, on the renunciation of the residuary legatee and devisee (*u*). Residuary legatee a bankrupt.

Section 5.

GRANT TO THE CROWN.

It was seen in the preceding chapter (*x*) that where a bastard or other person without known person entitled to share in his or her estate makes a will disposing of part only of his or her property, the legatees have a right to a grant of administration with the will annexed limited to the property disposed of by the will, and the Crown has a right to a grant "save and except" that property, or to a *cæterorum grant*. In such circumstances, where the legatees renounce, administration with the will annexed may be granted to the Crown (*y*).

Where the testator died before January 1, 1926, the Court has, under section 73 of the Court of Probate Act, 1857, special powers with reference to grants of administration *cum testamento annexo*. These powers are discussed in a later chapter (*z*). Section 73 of the Court of Probate Act, 1857.

(*r*) *Kooystra* v. *Buyskes* (1821), 3 Phill. 531; *Snape* v. *Webb* (1757), 2 Lee, 411. Unless the next-of-kin has no interest in the property, a creditor cannot be allowed to contest the right of administration: *vide ante*, p. 309; and see *Furlonger* v. *Cox* (1811), cit. 3 Phill., at p. 381. A residuary legatee, who had renounced, was allowed to retract his renunciation and claim the administration in preference to a creditor, although the estate was alleged to be insolvent: *Waters* (1850), 2 Rob. 142. A husband may take administration (will) as creditor, although he has signed a renunciation executed by his wife as residuary legatee: *Biggs* (1868), 1 P. & D. 595.

(*s*) *Vide ante*, pp. 309 *et seq.*

(*t*) Cf. *ante*, p. 311.

(*u*) *Vide ante*, p. 311; *Mayhew* v. *Newstead* (1837), 1 Curt. 593.

(*x*) *Vide ante*, pp. 314, 332.

(*y*) See Rule 119, N. C. B.

(*z*) *Post*, Chap. XV, pp. 401 *et seq.*

CHAPTER XIII.

GRANTS OF ADMINISTRATION DE BONIS NON.

Administration *de bonis non*,

HITHERTO the subject has been confined to cases of original grants of administration. It now becomes necessary to consider the principles which guide the Court in cases where the person whom it has constituted personal representative of the deceased dies without having fully administered the deceased's estate. It will hereafter appear that, in such an event, there are cases in which the office of personal representative to the deceased devolves without the necessity of any further grant. But there are cases in which, on the death of the personal representative of the deceased without having fully administered, it is necessary for the Court to commit administration afresh of the estate of the deceased not administered by the former personal representative. Such a grant is called a grant of administration *de bonis non administratis*, or, as the phrase is usually abbreviated, *de bonis non*.

with the will annexed,

Administration *de bonis non* may be granted on the death of an executor or administrator with the will annexed. The administration is then a species of administration with the will annexed; to give the full description, it is a grant of administration *cum testamento annexo de bonis non administratis*. To avoid the tedious repetition of this ponderous phrase, the term may be abbreviated: administration (will) *de bonis non*.

on intestacy.

Or administration *de bonis non* may be granted on the death of the administrator of an intestate; the administration is then a species of administration on intestacy.

These two species of grants *de bonis non* will be dealt with separately. There are, however, certain preliminary observations which apply to both.

The right to administration follows the right to the property.

There has already been occasion to point out that the Court has always strongly held that the right to the administration is transmissible, and almost universally accompanies the right to the property (*a*). Where, therefore, the Court has a discretion, it is the settled practice to grant the administration, whether original or *de bonis non*, to the person who is possessed of the beneficial interest in the estate. But in all that regards the obligation of the statutes on the Court, in the grant of

Administration *de bonis non* granted to the person entitled to the beneficial interest in the estate.

(*a*) *Ante*, pp. 303, 336, 337; and see 2 Hagg. App., at p. 149.

administration no distinction exists between an original and a *de bonis non* administration; in other words, where a person would have had a statutable right to an original administration, he has the same right to a *de bonis non* grant (*b*).

The statutes and rules with regard to original grants of administration equally apply to grants of administration *de bonis non*.

Indeed it does not seem possible, either in principle or reason, to distinguish between the first and any subsequent grant, in this or in any other respect (*c*). To state fully the rules which guide the Court in granting administration *de bonis non*, therefore, would be to repeat the two preceding chapters. This is not considered necessary, but in the succeeding sections an attempt will be made to state shortly when the necessity for a grant *de bonis non* arises, and to emphasise such of the rules previously laid down which are of special importance in connection with this species of grant.

Section 1.

GRANTS DE BONIS NON ON THE DEATH OF AN EXECUTOR OR ADMINISTRATOR WITH THE WILL.

Administration (will) *de bonis non*: when not necessary on death of executor.

When granted.—Where the sole executor appointed by the testator renounces probate or dies *before* proving the will, the grant is of original administration with the will annexed, and not *de bonis non*, even though the executor may have intermeddled with the estate (*d*).

If several executors are appointed, and one dies without having proved the will, the other or others are entitled to probate, and no grant of administration is necessary. And where one of several executors dies after probate has been granted, his office survives to his co-executors who have proved the will (*e*).

Where the sole executor, or the sole survivor of the executors who have proved the will, dies after probate, having made a will appointing his own executor who proves his will, the entire representation of the original testator is transmitted to the last-named executor, without the necessity of any fresh grant (*f*).

(*b*) 2 Hagg. App. 157; *Kindleside* v. *Cleaver* (1745), 1 Hagg. 345; 2 Hagg. App. 169; *Walton* v. *Jacobson* (1765), 1 Hagg. 346.

(*c*) 2 Hagg. App. 157.

(*d*) *Wankford* v. *Wankford* (1700), 1 Salk. 299, at p. 308; Bac. Abr. Exors. B 2. The executor of an executor who dies without proving his will does not represent the original testator: *vide ante*, p. 222.

(*e*) *Ante*, p. 222.

(*f*) *Vide ante*, pp. 220 *et seq.*, where this subject is fully discussed. But if the original testator died abroad, or in the colonies, and his executor proves the will there, and then dies, having appointed his own executor, who proves the latter will in England, the last-named executor does not represent the original testator, and administration (will) *de bonis non* must be taken out: *Twyford* v. *Trail* (1834), 7 Sim. 92; *Gaynor* (1869), 1 P. & D. 723.

When necessary on the death of an executor.

But where such sole executor, or sole surviving executor, dies after probate, intestate, or leaving a will which contains no appointment of executors, no interest is transmissible to his administrator; and if the estate of the original testator has not been fully administered, administration (will) *de bonis non* becomes necessary.

Thus administration (will) *de bonis non* is granted on the death of an executor only—

1. Where the sole acting executor dies after probate, leaving part of the estate unadministered, and without having appointed an executor who proves his will; or

2. Where the survivor of the acting executors dies under similar circumstances; or

3. Where the remote sole acting executor to whom the representation of the estate of the original testator has been transmitted *per catenam* dies, after probate, leaving part of the estate of the original testator unadministered, and without having appointed an executor who proves his will.

4. Where the survivor of the remote acting executors to whom the representation of the estate of the original testator has been transmitted *per catenam* dies under similar circumstances.

Administration (will) *de bonis non* on death of administrator with the will.

Where, of several co-administrators with the will, one dies, his office survives to the surviving co-administrators, and no fresh grant is necessary (*g*).

But where the sole or sole surviving administrator with the will dies, leaving part of the estate unadministered, the Court must grant administration (will) *de bonis non* to another, for an administrator cannot transmit his office either to his executor or administrator (*h*).

To whom administration (will) *de bonis non* is granted.

To whom granted.—Where administration (will) *de bonis non* becomes necessary, the grant is made to the residuary legatee or devisee, or his representative (*i*), and on their renun-

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(*g*) Com. Dig. Administrator B 7 : *Eyre* v. *Shaftesbury* (1722), 2 P. Wms., at p. 121; *Jacomb* v. *Harwood* (1751), 2 Ves. Sen., at p. 268; *Adams* v. *Buckland* (1705), 2 Vern. 514; *Hudson* v. *Hudson* (1735), Cas. t. Talb. 127.

(*h*) Bac. Abr. Exors. B 2. *Vide ante*, p. 224, note (*z*).

(*i*) *Vide post*, p. 355. And for a case of a grant to an assignee of the residuary legatee, see *Campion*, [1900] P. 13. See also *Morgan* v. *Stephens*, [1917] P. 59, where the testator gave all his property to his wife "during her widowhood," and after her death directed that the property should belong and be made over to the child or children "issue of our marriage"; should, however, the widow remarry, "then the whole of my property shall at once be made over legally to the offspring of our marriage, and if they are minors the whole to be under trusteeship"; also, should the issue of the marriage "die out," then on the remarriage of the widow, the testator directed that the property should be made over to "the legal next-of-kin and heirs descendants of my

ciation to the persons who would be entitled to a grant had the deceased died intestate, or to a legatee or creditor (*k*), in accordance with the rules which govern original grants of administration with the will annexed.

Representative of bare executor has no right.

The representative of a bare executor has no right to a grant *de bonis non*, but where the executor was also beneficial residuary legatee, his representative is, in accordance with the principles already laid down, entitled to the grant (*l*).

Grant to legatee.

The Court has, under special circumstances, granted administration (will) *de bonis non* to a legatee without requiring the citation of the representatives of the residuary legatee (*m*).

Original grant to creditor or legatee.

Where the original grant was made to a creditor or legatee, who dies without having satisfied his debt or legacy, administration *de bonis non* may be granted to his representative, or to another creditor or legatee.

Persons entitled to the original grant, who have been cited and have failed to appear, may, on the death of the original administrator, come in and claim administration *de bonis non* (*n*). Therefore, where the original grant was made to a creditor or legatee after *citation* of the residuary legatee and devisee, these persons or their representatives must again be cited before administration *de bonis non* is granted to the representative of the original administrator, or to another creditor or legatee (*o*).

Persons entitled in priority to creditor or legatee must again be cited.

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family." No appointment of executor or trustee was made, and the widow, after taking administration (will) died without marrying again. In a contest for administration (will) *de bonis non* between one of the testator's next-of-kin and the representatives of the only child of the testator, who survived him but died in the lifetime of the widow, it was held that the latter only took an interest contingent on being alive at the time of the death or remarriage of the testator's widow, and that his representatives had therefore no title to the grant.

(*k*) *Vide post*, p. 355.

(*l*) *Vide ante*, p. 345. In *Ditchfield* (1870), 2 P. & D. 152, administration (will) *de bonis non* was granted to the limited representative of the residuary legatee.

(*m*) *E.g.*, where the estate had been administered except as to one legacy: *King* (1883), 8 P. D. 162; and where it appeared that the residuary legatee had no beneficial interest, and had received notice of the application: *Wilde* (1887), 13 P. D. 1. And the Court may grant administration *de bonis non* limited to the amount of the legacy, without requiring the representative of the residuary legatee to be cited: *Steadman* (1828), 2 Hagg. 59; *Biou* (1843), 3 Curt. 739; *Watson* (1858), 1 S. & T. 110; *Agnese*, [1900] P. 60, where a limited grant was made to the trustee in bankruptcy of a *cestui que trust*; but such grants are unusual. As a general rule the Court prefers to make a general grant after citation: see *Watts* (1860), 1 S. & T. 538; *Somerset* (1867), 1 P. & D. 350. *Vide post*, pp. 387 *et seq.*

(*n*) *Skeffington* v. *White* (1828), 1 Hagg. at pp. 702, 703. *Vide post*, p. 496.

(*o*) If the residuary legatee or devisee has actually renounced his right to the original grant, no further citation is necessary; but the representative of a deceased renunciant is not bound by the renunciation and must be cited: *vide post*, p. 496.

SECTION 2.

GRANT DE BONIS NON ON THE DEATH OF AN ADMINISTRATOR ON INTESTACY.

Administration *de bonis non* on intestacy: when necessary.

Where of several co-administrators on intestacy one dies, his office survives to his co-administrators, and no fresh grant is necessary (*p*).

But where the sole, or sole surviving administrator dies, leaving part of the estate unadministered, the Court must grant administration *de bonis non* to another, for an administrator cannot transmit his office either to his executor or administrator (*q*).

Grants *de bonis non* are made in accordance with same rules as govern original grants.

To whom granted.—Where a grant *de bonis non* becomes necessary, the Court is governed in all respects by the same rules as apply to original grants.

Where intestate died before 1926, Court only bound to grant administration to those who were next-of-kin at time of intestate's death.

But it must be borne in mind in cases where the deceased died *before* January 1, 1926, and the statutes of Edward III and Henry VIII still apply, that the Court is bound only to grant the administration to such person as is next-of-kin at the intestate's death, and not to one who is not entitled to the beneficial interest in the effects, though, by the death of intermediate persons, he may have become next-of-kin at the time when the grant is required (*r*).

Therefore, where the deceased died before January 1, 1926, administration *de bonis non* is granted to the representatives of the next-of-kin at the time of the death, in preference to the next-of-kin at the time of the grant; for the reason that the former are possessed of the beneficial interest in the intestate's effects, and this interest, under the Statutes of Distribution, vests in the distributees immediately on the intestate's death, and is consequently transmitted to their representatives. Accordingly, while, on the one hand, it has always been held that a person who was next-of-kin at the time of the death is, under the statutes, entitled to the *de bonis non* grant in preference to the representative of the original administrator, or to the representative of any other next-of-kin at the time of the death, it is, on the other hand, the established practice and course of office, that if all who were next-of-kin at the death

(*p*) Com. Dig. Administrator B 7; *Eyre* v. *Shaftesbury* (1722), 2 P. Wms. at p. 121; *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. at p. 268; *Adams* v. *Buckland* (1705), 2 Vern. 514; *Hudson* v. *Hudson* (1735), Cas. t. Talb. 127.

(*q*) Bac. Abr. Exors. B 2. Where the grant has been made to the solicitor for the Treasury it vests in his successors in office without the necessity of any further grant: *vide ante*, p. 315.

(*r*) 2 Hagg. App. 150; *Savage* v. *Blythe* (1796), 2 Hagg. App. 150; *Almes* v. *Almes* (1796), 2 Hagg. App. 155.

are dead, then the representative of such next-of-kin, being entitled to the beneficial interest, is also entitled to the administration *de bonis non*; with this limitation, however, that a person originally entitled in distribution is preferred to the representative of the next-of-kin (*s*).

Live interests preferred to dead interests.

Upon the making of a grant, whether the intestate died before or after January 1, 1926, live interests will be preferred to dead interests of the same degree, and, in the case of conflicting claims, the nearer interest will be preferred to the more remote, unless the registrar otherwise directs (*t*).

Grant to representatives of deceased child, where intestate died after 1925.

Where the intestate died on or after January 1, 1926, administration *de bonis non* will not be granted to the representatives of a deceased child or other issue of the intestate unless that child or issue has attained a vested interest under section 47 of the Administration of Estates Act, 1925, *i.e.*, has attained the age of twenty-one years or married under that age (*u*).

Grant of administration *de bonis non* to nominee of the Duchy of Lancaster.

Where an intestate had died leaving no known relations, and his estate had been partly administered by his widow, the Court granted administration *de bonis non* to the nominee of the Duchy of Lancaster (*x*).

Original grant to creditor—grant *de bonis non* to his representative or to another creditor.

Where a creditor administrator dies leaving his debt still unsatisfied, his representative (*y*) or another creditor may take administration *de bonis non*. But the persons entitled to the grant in priority to the creditor, even though they have been cited and failed to appear on the occasion of the original grant, may come in and claim the grant *de bonis non* on the death of the creditor administrator (*z*). Accordingly, where the original grant was made to a creditor after citation of the next-of-kin, such persons must again be cited before administration *de bonis non* is granted to the representative of the original administrator or to another creditor (*a*).

(*s*) 2 Hagg. App. 156, 157; *Savage* v. *Blythe* (1796), 2 Hagg. App. 150; *Almes* v. *Almes* (1796), 2 Hagg. App. 155. The discretion of the Court is, however, very large. It has held itself not obliged to make the grant to the largest interest: *Cardale* v. *Harvey* (1752), 1 Lee, 177. A person *originally* in distribution is preferred to the representative of the next-of-kin on the ground that a direct interest is preferred to a derivative: *Middleton* (1828), 2 Hagg. 60; *Stables* (1831), 3 Hagg. 560. But the rule is not absolute, and may be departed from in the discretion of the Court: *Carr* (1867), 1 P. & D. 291; *Kinchella*, [1894] P. 264.

(*t*) Rule 121, N. C. B.

(*u*) *Vide ante*, p. 323; and see Administration of Estates Act, 1925, s. 47, sub-s. 2.

(*x*) *Avard* (1886), 11 P. D. 75.

(*y*) Persons entitled to represent the original administrator must be appointed his personal representatives before they are entitled to the grant *de bonis non*: *Fairland* v. *Percy* (1875), 3 P. & D. 217; *Risdon* (1869), 1 P. & D. 637.

(*z*) *Skeffington* v. *White* (1828), 1 Hagg. at pp. 702, 703. *Vide post*, p. 496.

(*a*) If the persons entitled in priority have *renounced* their right, no further citation is necessary, but the representatives of a deceased renunciant must be cited: *post*, p. 496.

If the intestate died before January 1, 1926, and all who were next-of-kin at the death of the intestate are dead, and a creditor who has obtained administration has died leaving goods unadministered, no administration *de bonis non* will be granted without citing those who are next-of-kin at the time when the grant is required (*b*).

(*b*) *Skeffington* v. *White* (1829), 2 Hagg. 626 (judgment of the Delegates reversing the decision of Sir John Nicholl at 1 Hagg. 699). See *Sowerby* (1841), 2 Curt. 852; 4 Burn, E. L. 373, 374, 9th ed.

CHAPTER XIV.

LIMITED ADMINISTRATIONS.

In what ways administration may be limited.

THE administrations which have formed the subject of discussion in the three preceding chapters extend to the whole estate of the deceased and endure until the death of the grantee. There are, however, other forms of administration which are limited either in respect of the time for which they endure, or of the property to which they extend, or of the purposes for which they may be exercised.

Limited administration not granted unless every person entitled to a general grant has consented or been cited.

With regard to these limited administrations two rules have been framed, which, though not absolutely binding upon the Court, are followed strictly in the majority of instances: First, limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear (*a*); secondly, that save as is in the Administration of Estates Act, 1925, expressly provided with regard to settled land (*b*), no person entitled to a general grant of administration will be permitted to take a limited grant, except under the direction of the Judge (*c*).

These administrations, not being within the statutes, are in the discretion of the Court.

These temporary administrations, though not within the statutes of Edward III and Henry VIII, were held to be within the equity of those statutes for the ease and convenience of the subject (*d*); since they were not within the statutes, the Court was, and still is, left to its discretion in the choice of an administrator, and need not grant them to the next-of-kin (*e*), but

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(*a*) Rule 29, N. C. B.

(*b*) See *ante*, Chapter VIII, "Special Representatives in Respect of Settled Land."

(*c*) Rule 30, N. C. B. For a case in which the rule was departed from see *Von Brentano*, [1911] P. 173, where a testator, domiciled abroad, left an English will dealing exclusively with realty in England and appointing English executors, and left also a foreign will, appointing a foreign executor and dealing with all the rest of his estate, including personalty in England. The Court granted to the English executors probate of the English will, limited to the realty in England, and made a *cæterorum* grant to the foreign executor.

(*d*) *Walker* v. *Woollaston* (1731), 2 P. Wms. at p. 589. And, further, as to the power of the Court to make these grants, see *Davis* v. *Chanter* (1848), 2 Phillips, at p. 550; *Maclean* v. *Dawson* (1859), 1 S. & T. at pp. 431, 432; and the judgment of Phillimore, L.J., in *Hewson* v. *Shelley*, [1914] 2 Ch. 13, at pp. 37 *et seq.*

(*e*) 4 Burn, E. L. 375 (9th ed.), citing *Briers* v. *Goddard* (1615), Hob. 250; *Thomas* v. *Butler* (1673), 1 Ventr. 219.

as will appear, the discretion of the Court is exercised in accordance with settled rules of practice.

Whether section 160 of the Judicature (Consolidation) Act, 1925, applies to all limited administrations.

With regard to these limited administrations in cases where the testator or intestate died on or after January 1, 1926, when the repeal of the statutes of Edward III and Henry VIII contained in the Administration of Estates Act, 1925, takes effect, the relevant statutory provisions will be noted under the appropriate heads. There is, however, one general question which requires consideration in this place, namely, whether the provision in section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, that administration shall, if there is a minority or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals, applies to all limited administrations (*f*). By section 175 of the Act, "administration" includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether for general, special or limited purposes, and on a strict interpretation of the section, its provisions would appear to apply, not only to grants to attorneys for the use of persons abroad, or grants for the use of minors or lunatics, and other cases where the special administrator is merely a substitute for the person entitled to the general grant, but also to grants of administration *pendente lite* and *ad colligenda bona* and to other grants for limited or special purposes—*e.g.*, even to a grant to a legatee limited to his legacy—where it would appear merely irksome to appoint two administrators. This is a point which until the present has not been argued, but it is submitted that section 160 of the Act of 1925, though peremptory in form, was not intended to deprive the Court of its discretion in granting these special administrations, which though recognised by successive statutes, are not the creatures of any statute, and that the Court has power, in a proper case, to grant a limited administration to a single administrator, even though a minority or life interest arises under the will or intestacy (*g*).

(*f*) This section applies to grants made after the date of the commencement of the Act, *i.e.*, January 1, 1926, whether the testator or intestate died before or after that date.

(*g*) The sections of the Judicature (Consolidation) Act, 1925, which deal with limited administrations are section 155 (power to grant representation of real and personal estate separately or together), section 160 (provisions as to the number of personal representatives), section 162 (discretion of the Court as to persons to whom administration is to be granted), section 163 (administration *pendente lite*), section 164 (grant of special administration where personal representative is abroad), and section 165 (administration during minority of executor). It would seem that the statute does not deal (except inferentially) with a number of the special administrations which the Court has been accustomed to grant from time immemorial, and as was pointed out by Phillimore,

SECTION 1.

ADMINISTRATIONS LIMITED IN RESPECT OF THE TIME FOR WHICH THEY ENDURE.

Administrations which, though extending to the whole property of the deceased, are limited as to time.

First as to administrations limited in respect of the time for which they endure, *i.e.*, those which, though extending to the whole of the estate of the deceased, are to terminate at the expiration of a certain time, or on the happening of some event other than the death of the grantee.

Grants for the use and benefit *jus habentium*.

The necessity for grants of this description arises chiefly in cases where the person entitled to the grant of administration is precluded from acting personally, by reason of his residence out of the jurisdiction, his minority, lunacy, or other disability. In such cases the Court will grant administration to another for the use and benefit of the person entitled to the grant, limited until such time as his disability ceases.

Of this kind are the limited grants dealt with in the four succeeding sub-sections. They are sometimes known as grants for the use and benefit *jus habentium*.

SUB-SECTION 1.—*Administration to an Attorney for the Use of Persons Abroad.*

Sole executor or person solely entitled to administration (will) resident

Where the sole executor, or the person solely entitled to a grant of administration with the will annexed, is resident out of the jurisdiction of the Court (*h*) at the time of the testator's

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L.J., in *Hewson* v. *Shelley*, [1914] 2 Ch. at p. 40, the power of the Court to grant these administrations, though recognised by statutes, was not established by any statute, but by decisions. May it not be that section 160, though purporting to deal with all limited administrations, is intended to cover only those in which the whole estate is committed to an administrator for general administration? Must there be two administrators limited to take proceedings in Chancery, if one of the beneficiaries is a minor? These questions may be indicated, but in the present state of the authorities, cannot be answered; but it is not the practice, at the time of going to press, to insist upon a joint administration in all cases of limited administrations where there is a minority or life interest. The effect of the decision of the Court of Appeal in *White* (1927), 43 T. L. R. 729, in which doubt was cast on *Herbert*, [1926] P. 109, is, however, to weaken the argument that the Court retains a discretion to appoint a single administrator in such circumstances, and it may be that such a discretion can only be conferred, if at all, by an amending Act.

(*h*) Where the person solely entitled to a grant is resident in this country, and able to take it himself, the Court will not decree it to his attorney for his use and benefit: *Burch* (1861), 2 S. & T. 139. The person entitled should take a general grant, and then should authorise an attorney to act for him in administering the estate: *Hale*, (1874), 3 P. & D. at p. 209; *Goldsborough* (1859), 1 S. & T. at p. 297. Administration may be granted to an attorney who is himself resident out of the jurisdiction, if the sureties to the bond are resident within the jurisdiction: *Leeson* (1859), 1 S. & T. 463; and the rule that the sureties must be resident within the jurisdiction may be relaxed in a proper case: *Reed* (1864), 3 S. & T. 439, and *vide*, *post*, p. 457. But if the principal and attorney reside in the same place out of the jurisdiction, the Court will not make a grant to the attorney: Direction of Sir John Dodson, 1857.

abroad: grant to his attorney, for his use and benefit.

death, administration with the will annexed for his use and benefit may be granted to his attorney, acting under a power of attorney, limited until he shall himself apply for and obtain probate or administration with the will annexed, as the case may be (*i*).

Grant to attorney of one of several executors.

To attorney of all the executors.

A similar grant may be made to the attorney of one of two executors, who are both resident abroad, for the use and benefit of that executor, limited until such time as he or the other executor shall duly apply for and obtain probate (*k*); or to the attorney of all the absent executors, for their use and benefit, similarly limited.

Joint grant to two attorneys of two absent executors.

Where two executors, resident abroad, have appointed separate attorneys, a joint grant may be made to the two attorneys, for the use and benefit of the executors during their joint lives, limited until such time as either executor shall duly apply for and obtain probate (*l*).

On grant to attorney of executor of executor, chain of representation not broken.

It is said that a will proved by the attorney of an executor is the same thing as if actually proved by the executor himself, and therefore where a grant has been made to the attorney of an executor, and the executor dies, having appointed executors who prove his will, the chain of representation is not broken (*m*).

Attorney of executor can take a sole grant, though there is a minority or life interest.

The provisions of section 160 of the Supreme Court of Judicature Act, 1925, which provides that administration shall, if there is a minority or if a life interest arises under the will, be granted either to a trust corporation, with or without an individual, or to not less than two individuals, are not deemed to apply where administration with the will annexed is granted to the attorney of an executor, and such an attorney can take a sole grant, although a minority or life interest arises under the will.

Administration to attorney does not expire automatically on executor's return from abroad,

The administration so granted does not expire automatically on the executor's return from abroad. Formerly it was necessary for him to take out process against the administrator to show cause why it should not be revoked (*n*). But now all such grants *durante absentia* to attorneys are limited "for the use and

(*i*) See Rule 32, N. C. B.; *Clare* v. *Hedges* (1695), 1 Lutw. 342, cited 2 P. Wms. at p. 579; *Slaughter* v. *May* (1705), 1 Salk. 42; *Barker*, [1891] P. 251; *Hewson* v. *Shelley*, [1914] 2 Ch. 13, 44. All grants to attorneys are expressed to be for the use and benefit of the person entitled: *Cassidy* (1832), 4 Hagg. 360; *Anstruther* v. *Chalmer* (1826), 2 Sim. at p. 5; but these words do not exclude the claim of other persons to share in the personal estate: *Anstruther* v. *Chalmer* (1826), 2 Sim. at p. 5; and the attorney administrator is liable to be sued in respect of the estate by the parties beneficially interested in it: *Chambers* v. *Bicknell* (1843), 2 Hare, 536; *Re Dewell* (1858), 4 Drew. 269, at p. 272; *Re Rendell*, [1901] 1 Ch. 230. As to the further limitation until the person entitled shall duly apply for and obtain a grant, see *Cassidy* (1832), 4 Hagg. 360; as to its effect, see *Re Rendell*, [1901] 1 Ch. 230, and the cases above cited.

(*k*) See *Black* (1887), 13 P. D. 5.

(*l*) *Pipon* v. *Wallis* (1753), 1 Lee, 402.

(*m*) *Bayard* (1849), 1 Rob. 768; *Murguia* (1884), 9 P. D. 236; and see *post*, p. 468.

(*n*) *Pipon* v. *Wallis* (1753), 1 Lee, 402.

benefit of —— resident at ——, and until the executor (or party entitled to administration) shall duly apply for and obtain probate (or administration)" (*o*). Where the executor himself desires probate, the Court is bound to grant it to him (*p*), and the grant to the attorney is thereupon declared to have ceased and expired (*q*).

but ceases on executor applying for and obtaining probate.

A grant of this description may be made to the attorney of the person entitled to a grant of administration with the will annexed, *e.g.*, to the attorney of the sole residuary legatee, or one of several residuary legatees, without notice to the other residuary legatees, all of whom are resident abroad.

Grant to attorney of person entitled to administration with will annexed,

Administration, similarly limited, may be granted to the attorney of the person entitled to administration on intestacy, provided that the latter is resident out of this country (*r*).

or on intestacy.

So administration may be granted to the attorney of all the persons entitled to administration on intestacy, provided all such persons are resident abroad, for their use and benefit, until they themselves shall apply for a grant; or to the attorney of one of several of the persons entitled to administration on intestacy, without notice to the others; but a joint grant will not be made to two attorneys appointed separately by two of the persons entitled to administration. A grant may be made to the attorneys of the guardian of minors, for the use and benefit of the minors until one of them attains twenty-one, or the guardian himself applies.

To attorney of all of the persons entitled to administration or of one of them.

Attorneys of guardian of minors.

In the case of grants made after January 1, 1926, whether the testator or intestate died before or after that date, a grant will not be made to a single attorney of the person entitled to administration with the will annexed or an intestacy if there is a minority or if a life interest arises under the will or intestacy; but under the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, that person must constitute as his or her attorneys either a trust corporation (*s*) with or without an individual, or not less than two individuals (*t*).

Where there is a minority or life interest grant not made to single attorney of person entitled to administration.

(*o*) *Cassidy* (1832), 4 Hagg. 360.

(*p*) *Pipon* v. *Wallis* (1753), 1 Lee, 402.

(*q*) *Cassidy* (1832), 4 Hagg. 360; *Webb* v. *Kirby* (1856), 7 De G. M. & G. at p. 381.

(*r*) It is said that if the effects are under £20, such administration may be granted whether he is so resident or not: Toller, 108; but see *Burch* (1861), 2 S. & T. 139; and see Rule 32, N. C. B.

(*s*) For definition of "trust corporation" see *ante*, p. 206. A grant to a trust corporation, made by reason of a minority or life interest, is limited "until further administration be granted": President's Direction. A foreign trust corporation can appoint an attorney, and an English trust corporation can apply as attorney: President's Direction.

(*t*) Where a grant must be made to two persons, it is immaterial that they represent the interest of a single individual, whether as guardians, attorneys, or otherwise.

Formal power of attorney under seal not required.

General power of attorney sufficient.

Where power of attorney contains power of substitution, grant to substitute.

Where constituent entitled to general grant, limited grant not made to attorney, unless as an indulgence where the power of attorney is limited.

The Power of Attorney.—It is not essential that there should be a formal power of attorney under seal. A memorandum (*u*), or letter (*x*) in the handwriting of the person entitled to the grant has been accepted as sufficient. The applicant need not be constituted attorney for the express purpose of taking the grant; a general power of attorney executed before the death of the testator has been held sufficiently wide to justify the Court in making the grant (*y*). If the power of attorney contains a power of substitution, and the attorney exercises it, the grant may be made to the substitute (*z*).

Where a person is authorised by a simple power of attorney to take out administration, the Court will decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. Where the power is for a general grant, a limited grant will not be made (*a*). But where the power of attorney is limited to the administration of a specific part of the estate, on good reasons being shown, the grant may be limited accordingly. The general rule, however, would seem to be that if the constituent is entitled to a general grant, his attorney should take a grant of the whole estate.

Attorney must take usual administrator's oath and execute bond.

An attorney must take the usual administrator's oath and subscribe to the usual conditions of the administration bond (*b*).

It should be noticed that the person entitled to a grant may in all cases himself take out administration, and then appoint an attorney to act on his behalf (*c*).

Termination of office.

Administration to attorney ceases on constituent taking grant.

Termination of Office.—This species of administration, being limited until the executor or party entitled to administration shall duly apply for and obtain a grant, does not expire automatically on the constituent's return from abroad, but ceases upon a grant being made to him (*d*).

Death of constituent.

The power of such an administrator is wholly determined by the death of the constituent (*e*), and administration *de bonis non* must be taken out, unless the constituent was an executor and has appointed an executor who proves his will (*f*).

Death of attorney administrator.

If the attorney administrator dies during the lifetime of his

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(*u*) *Elderton* (1832), 4 Hagg. 210.
(*x*) *Ormond* (1828), 1 Hagg. 145.
(*y*) *Barker*, [1891] P. 251; and see *Lucas* v. *Lucas* (1729), 2 Lee, 576; but see *Reitz* (1831), 3 Hagg. 766.
(*z*) *Palliser* v. *Ord* (1724), Bunbury's Exch. Rep. 166.
(*a*) *Per* Sir C. Cresswell, *Goldsborough* (1859), 1 S. & T. 295, at p. 297.
(*b*) *Goldsborough* (1859), 1 S. & T. 295.
(*c*) *Goldsborough* (1859), 1 S. & T. 295; *Hale* (1874), 3 P. & D. at p. 209.
(*d*) *Pipon* v. *Wallis* (1753), 1 Lee, 402; *Cassidy* (1882), 4 Hagg. 360. *Vide post*, p. 385.
(*e*) *Webb* v. *Kirby* (1856), 7 De G. M. & G. 376.
(*f*) *Suwerkrop* v. *Day* (1838), 8 A. & E. 624; *Bayard* (1849), 1 Rob. 768; *Murguia* (1884), 9 P. D. 236.

principal, the administration ceases, and a cessate grant is made, after notice to the principal (*g*).

SUB-SECTION 2.—*Administration* durante minore ætate.

If the sole executor is a minor (*h*), administration *durante minore ætate*, as it is called, is granted to his guardian for his use and benefit until he shall attain the age of twenty-one years (*i*). Sole executor a minor.

A similar grant will be made where there are several executors, all of whom are minors; in such a case, he that first comes of age may prove the will, and the administration ceases (*k*). But where there are divers executors, and one of them is under age, no administration *durante minore ætate* ought to be granted, unless all of full age renounce, for those of full age may prove the will (*l*). And where one executor is abroad, and the other executors are minors, the Court will not grant administration for the use and benefit of the minor executors, unless the absent executor renounces or except in special circumstances under the discretionary powers of the Court. All the executors minors. Several executors, one under age. Several executors, some minors, others of full age but abroad.

Except in cases where there are beneficiaries who are minors or infants or where life interests are created by the will, the fact that an executor is a minor or infant does not of itself necessitate a grant to a trust corporation or to not less than two individuals Mere fact that executor is a minor does not necessitate grant to two individuals.

(*g*) *Barton*, [1898] P. 11. *Vide post*, p. 385.

(*h*) Formerly an infant was considered capable of acting as executor on attaining the age of seventeen: Godolph., Part II, c. 9, s. 2; Swinb., Part V, s. 1, pl. 6; but the Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6, enacted: "Where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him." And section 7 provided that the administrator so appointed shall have the same powers as an administrator *durante minore ætate* of the next-of-kin. The Administration of Estates Act, 1798, is repealed by the Administration of Estates Act, 1925, s. 56, and Sched. II, but only so far as applies to deaths occurring after the commencement of that Act, *i.e.*, January 1, 1926, and section 6 of the earlier Act is now replaced by section 165 of the Judicature (Consolidation) Act, 1925, which provides: "(1) Where an infant is sole executor of a will, administration with the will annexed shall be granted to his guardian, or to such other person as the Court thinks fit, until the infant attains the age of twenty-one years, and on his attaining that age, and not before, probate of the will may be granted to him. (2) Where a testator by his will appoints an infant to be an executor, the appointment shall not operate to transfer any interest in the property of the deceased to the infant or to constitute him a personal representative for any purpose unless and until probate is granted to him under this section."

(*i*) A minor, even if entitled to the grant and competent to take it by the law of the testator's or intestate's domicil, cannot, it seems, be appointed administrator in England: *H.R.H. the Duchess d'Orléans* (1859), 1 S. & T. 253; *Meatyard*, [1903] P. at p. 129; though in an early case such a grant was made: *Countess da Cunha* (1828), 1 Hagg. 237.

(*k*) 4 Burn, E. L. 385 (9th ed.).

(*l*) *Pigot and Gascoigne's Case* (1572), cit. Brownl. 46; *Foxwist* v. *Tremain* (1670), 1 Mod. 47; but see Bac. Abr. Exors. B. 1.

under section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*m*).

Sole person entitled to administration or administration (will) a minor, administration *durante minoritate* granted to his guardian.

Where the person solely entitled to administration on intestacy or with the will annexed is a minor, administration (or administration with the will annexed) will be granted to his guardian for his use and benefit until he attains the age of twenty-one. And where there are several persons so entitled, some of whom are minors and some of full age, although it is the practice to grant administration to those of full age in preference to the guardian of the minors, yet the guardian of the minors may be preferred, if the interest of the minors preponderates over that of the majors (*n*).

Several persons entitled, some minors, some of full age.

Subject to this exception, the guardian of minors is not entitled to a grant for their use and benefit without clearing off all persons of full age equally entitled with such minors whether as interested in real or personal estate (*o*). But where the deceased died intestate before January 1, 1926, the guardian of an infant heir-at-law is entitled to a grant in priority to the representative of a deceased husband.

Guardian of infant heir-at-law.

Administration *durante minoritate* cannot be granted to a single individual where the person entitled to administer is a minor or infant.

Where the person entitled to administration on intestacy or with the will annexed is a minor or infant, and administration *durante minoritate* is granted for his use and benefit on or after January 1, 1926, the grant cannot be made to a single individual whether the testator or intestate died before or after that date, for from the nature of the administration it must follow that a minority arises under the will or intestacy, and by section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, the administration must be granted either to a trust corporation, with or without an individual (*p*), or to not less than two individuals. Where, for the purpose of a grant, a second guardian is required, the minor may elect any other of his kin, or the guardian duly constituted may nominate as his co-administrator some other person whose fitness he shows by a filed statement, unless in either case a registrar otherwise directs (*q*). The same principles apply to the assignment of guardians to infants (*q*).

Nomination of co-administrator.

(*m*) President's Direction, December, 1925.

(*n*) *Cartwright's Case* (1678), 1 Freem. 258; *Burgess* (1863), 4 S. & T. 188; *Sawbridge* v. *Hill* (1871), 2 P. & D. 219; *Cooke* (1859), 1 S. & T. 267.

(*o*) Additional instructions under the Land Transfer Act, 1897, No. 13.

(*p*) For definition of "trust corporation" *vide ante*, p. 206. A trust corporation may be elected as a guardian, provided all the next-of-kin have renounced their right, and have consented to the appointment of the proposed corporation. A trust corporation nominated by the guardian duly elected or assigned may join in the application for a grant; such nomination must be signed by the guardian in the presence of a witness and filed with the papers to lead the grant: President's Direction, December, 1925.

(*q*) President's Direction, December, 1925.

To whom granted.—The Court has a discretionary power to grant administration *durante minore ætate* to such person as it shall think fit (*r*). For this kind of administration has frequently been held not to be within the statutes (*s*), and no one has such a right to the grant as could have been enforced at common law (*t*).

The grant is in the discretion of the Court.

In the exercise of its discretion, the Court grants administration *durante minore ætate* to the guardian of the minor or infant, appointed in accordance with certain well-recognised rules.

The grant is made to the guardian of the minor or infant.

With regard to the appointment of guardian, a distinction exists between minors (persons over seven but less than twenty-one years of age) and infants (children less than seven years old) (*u*).

The minor himself nominates his guardian, who then is admitted in that character by the Court (*x*), but to an infant a guardian must be assigned by order of one of the registrars, unless he has a statutory or testamentary guardian or a guardian appointed by the Court of Chancery (*y*).

Minors elect their guardian.

Guardian is assigned to infants.

It must not, however, be supposed that a minor is free to elect whom he pleases to be his guardian for the purpose of taking a grant *durante minore ætate*. The next-of-kin of the minor has, by the practice of the Court, a preferential right to be appointed guardian for this purpose; and the minor is under an obligation to elect him, unless, indeed, the next-of-kin renounces his right (*z*). Even if the next-of kin renounces, the minor will usually be required to elect his next nearest relative as guardian. But where there are several next of-kin, the minor may elect any one of them to be his guardian, and the Court, although not bound by his choice, will usually grant the administration to the guardian so elected (*a*).

Minor must elect his next-of-kin, unless good ground of objection is shown, or the next-of-kin renounces.

Where there are several next-of-kin.

The father, as next-of-kin and natural guardian of the minor or infant, was considered to be entitled to be elected or assigned as his guardian for the purpose of taking administration *durante minore ætate* in preference to all others; but the Court might pass him over for good cause shown (*b*).

The parents, where both survive.

(*r*) *West* v. *Willby* (1820), 3 Phill. 374, at p. 379; *Quick* v. *Quick* (1864), 33 L. J. P. 177. This discretionary power was recognised by the Administration of Estates Act, 1798, s. 6; *vide ante*, p. 363, note (*h*).

(*s*) *West* v. *Willby* (1820), *loc. cit.*; *R.* v. *Bettesworth* (1734), 2 Str. 956.

(*t*) *Smith's Case* (1731), 2 Strange, 892.

(*u*) Toller, 100.

(*x*) *Rich* v. *Chamberlayne* (1752), 1 Lee, 134; Rule 33, N. C. B.

(*y*) Rule 34, N. C. B.

(*z*) The Court may, in its discretion, pass over the next-of-kin : *vide post*, pp. 367 *et seq.*; and if ground of objection exists, the minor is not obliged to elect his next-of-kin, but may elect a more distant relation or a stranger : *ibid.*

(*a*) *Vide post*, p. 368; and see *Quick* v. *Quick* (1864), 33 L. J. P. 177.

(*b*) *Lovell* v. *Cox* (1818), cit. 3 Phill. 379; *Hay* (1865), 1 P. & D. 51; see *Weir* (1862), 2 S. & T. 451; *Stephenson* (1866), 1 P. & D. 287. *Vide post*,

But, by section 1 of the Guardianship of Infants Act, 1925 (*c*), which amends the provisions of the Guardianship of Infants Act, 1886 (*d*), it is now provided that where in any proceeding in any Court the administration of any property belonging to or held in trust for an infant is in question, the Court shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such administration is superior to that of the mother, or the claim of the mother is superior to that of the father. Therefore where both parents are living, either or both may now be appointed as guardian or guardians, but as neither is statutory guardian in such a case, an election or assignment is necessary before either or both of them can act.

The surviving parent.

By the Guardianship of Infants Acts, 1886 and 1925, the surviving parent is constituted statutory guardian either alone or jointly with the guardian appointed by the deceased parent, and no election or assignment of the surviving parent as guardian to take or to renounce a grant is necessary (*e*).

Statutory guardians.

If neither parent survives, the persons entitled to act as guardians are the guardians (if any) appointed under the provisions of the Guardianship of Infants Acts, 1886 and 1925 (*f*).

Guardian appointed by Chancery Division.

Failing statutory guardians, if guardians of the estate of the minor have been appointed by the Chancery Division, administration *durante minore ætate* will be granted to them (*g*).

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p. 368. If the father was dead, and had appointed a guardian of the minor or infant by deed or will under 12 Car. 2, c. 24, the guardian so appointed was entitled to the grant: *Morris* (1862), 2 S. & T. 360. See *Parnell* (1872), 2 P. & D. 379, where it was held that the statute sanctioned the father in giving authority to a surviving guardian to nominate a guardian in the place of one who had died.

(*c*) 15 & 16 Geo. 5, c. 45. The Act came into operation on October 1, 1925. See section 11, sub-section 3.

(*d*) 49 & 50 Vict. c. 27.

(*e*) The Guardianship of Infants Act, 1925, provides that, on the death of the father of an infant, the mother if surviving shall be guardian of such infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may if it thinks fit appoint a guardian to act jointly with the mother: section 4, sub-section 1. Section 4, sub-section 2, contains similar provisions, *mutatis mutandis*, on the death of the mother of an infant, in respect of the surviving father. And by section 5 the father and mother of an infant may by deed or will appoint any person to be guardian of the infant after his or her death, and the guardian so appointed is to act jointly with the mother or father, as the case may be, so long as the mother or the father remains alive, unless objection is made and determined, as provided by section 5, sub-section 4. Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly: section 5, sub-section 5.

(*f*) *Vide supra*, note (*e*).

(*g*) See Rule 34, N. C. B.; but see *Brotherton* v. *Harris* (1755), 2 Lee, 131.

Guardian appointed by Scotch, Irish, or foreign Court.

Administration *durante minore ætate* may be granted to the guardians appointed by a foreign Court (*h*), or by the Courts of Scotland or Ireland (*i*).

Minor a married woman.

Where the minor is a married woman, her husband, if of full age, has a right to be elected her guardian for the purpose of taking the grant, for her use and benefit, during her minority (*k*).

If there be no father, mother, statutory guardian, etc., next-of-kin of minor or infant entitled.

If there be neither father, mother, statutory guardian, nor guardian appointed by the Court of Chancery, the next-of-kin of the minor or infant is entitled to be appointed his guardian for the purpose of taking the grant for his use and benefit (*l*), and, as a general rule, the Court will not make the grant to another unless the next-of-kin has renounced his right, or has been cited and failed to appear (*m*).

Minor or infant a bastard, or without known relations.

If the minor or infant is a bastard, or without known relations, the solicitor to the Treasury, or of the Duchy of Lancaster, or of the Duchy of Cornwall (as the case may require) must be notified before a guardian is elected by the minor or assigned to the infant, and the decision of the solicitor not to raise objection must be filed. Notice to the Treasury Solicitor, etc., is not required, however, where the mother of a bastard is elected or assigned as the guardian of the bastard after January 1, 1927, for by section 9 of the Legitimacy Act, 1926, which came into operation on that date, a mother is entitled to succeed on the intestacy of her bastard child who dies after the commencement of the Act (*n*). The mother of a bastard is not, however, the statutory guardian of the bastard, and her election or assignment as guardian is therefore required.

Joint grants of administration *durante minore ætate.*

A joint grant may be made to two or more next-of-kin (not exceeding four), and, for good cause shown, a joint grant may be made to a next-of-kin and a more distant relative or stranger, or, on the renunciation of the next-of-kin, to a distant relative and a stranger (*o*).

The Court may pass over the next-of-kin, if unfit, and grant administration

The Court may, in its discretion, pass over the next-of-kin. For the Court will judge of the fitness of the person who seeks

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(*h*) *Sartoris* (1838), 1 Curt. 910.

(*i*) *Johnston* (1832), 4 Hagg. 182; *Jones* (1859), 28 L. J. P. 80. The order must be duly authenticated by the seal of the Court: *Jones, loc. cit. in notis.*

(*k*) Toller, 92. See *Countess da Cunha* (1828), 1 Hagg. 237; *sed vide ante*, p. 363; note (*i*).

(*l*) Toller, 100; *Ewing* (1828), 1 Hagg. 381.

(*m*) In a proper case the rule may be relaxed; see *Ewing* (1828), 1 Hagg. 381; *Widger* (1842), 3 Curt. 55; *Weir* (1862), 2 S. & T. 451; *Hagger* (1863), 3 S. & T. 65; *Burchmore* (1873), 3 P. & D. 139; *Gardiner* (1884), 9 P. D. 66; *Webb* (1888), 13 P. D. 71.

(*n*) *Vide ante*, p. 319.

(*o*) *Vide supra*, p. 364.

durante minoritate to others.

to be appointed guardian, and refuse to grant guardianship to an improper person (*p*) even though he be next-of-kin (*q*).

Father of minor passed over.

So the father of a minor executrix and residuary legatee was passed over, and administration granted to the trustees named in the will (*r*). And where the father of the minor was resident in New Zealand, and had been divorced from his wife, and had admitted in the divorce proceedings such recklessness and extravagance as unfitted him for an office of trust, the grant was made to the maternal grandmother, without citation of the father (*s*). Where the grandfather, to whom, as next-of-kin of the minors, the grant would naturally pass, was superannuated, being eighty years old, the grant was made to the uncle (*t*); and where, of the three next-of-kin of the minor, one was in India, another was not in independent circumstances, and the third renounced, the Court granted administration *durante minore ætate* to a stranger, elected by the minor as her guardian (*u*). In a case where an intestate left a widow and an infant son, and the widow took out administration, but soon after became lunatic, Sir George Lee, without revoking the administration granted to the widow, assigned, upon the renunciation of his grandmother, the infant's aunt to be his guardian, and granted administration to her for the use and benefit of the widow and infant during the incapacity of the widow, and until the infant should attain his majority, if the widow should not sooner recover her senses (*x*).

Next-of-kin of minor of great age; abroad; not in independent circumstances.

Grant made to stranger.

Administration for the use and benefit of lunatic widow and infant next-of-kin.

Court may disregard the election of the minor, if he elects an improper person.

As has been seen, where there are several next-of-kin, the minor may elect one or more of them to be his guardian; but the Court is not bound by his choice, and may refuse to grant administration to the persons so elected, if in the opinion of the Court they are improper persons (*y*). But if the minor is almost of full age, his choice will have great weight with the Court (*z*).

If next-of-kin renounce, grant to other persons.

If the next-of-kin renounce, the grant may be made to more distant relatives or to strangers (*a*).

(*p*) *Fawkener* v. *Jordan* (1756), 2 Lee, 327, at p. 330.

(*q*) *Quick* v. *Quick* (1864), 33 L. J. P. 177. The Court may, in its discretion, pass over the next-of-kin, even where no suggestion of impropriety is made against him: *Lovell* v. *Cox* (1818), cit. 3 Phill. 379; *Quick* v. *Quick*, *ubi supra*.

(*r*) *Lovell* v. *Cox* (1818), cit. 3 Phill. 379.

(*s*) *Hay* (1865), 1 P. & D. 51; *Weir* (1862), 2 S. & T. 451; *Stephenson* (1866), 1 P. & D. 287. In these, and the cases cited *infra*, the grant could no longer be made to a single individual (*vide ante*, p. 364), but the principle is unaffected.

(*t*) *Ewing* (1828), 1 Hagg. 381.

(*u*) *Gardiner* (1884), 9 P. D. 66. See *Burchmore* (1873), 3 P. & D. 139; *Webb* (1888), 13 P. D. 71.

(*x*) *Anon* (1754), 1 Lee, 625.

(*y*) *West* v. *Willby* (1820), 3 Phill. at p. 380.

(*z*) *Ibid.*

(*a*) See *Gardiner*, *supra*.

Administration *durante minore ætate* may be granted to creditors to the exclusion of the guardians of the minor, if the estate is insufficient to pay the debts (*b*). But the guardian of an infant, sole next-of-kin of an intestate, is entitled to take administration to his estate in preference to creditors, where the estate is solvent (*c*). In *In the Goods of Peck* (*d*), a creditor was appointed guardian to minors, who had no known relations, for the purpose of taking out administration to the estate of their father, who had died intestate and insolvent.

Administration *durante minoritate* granted to creditor.

Administration granted during the minority of one infant ceases on his attaining the age of twenty-one years (*f*), and probate or administration is granted to him if the estate has not been completely administered.

Administration *durante minoritate* ceases on infant attaining age of twenty-one years.

Administration granted during the minority of several infants determines upon the coming-of-age of any one of them; thus, if there are several infant executors, he who first attains the age of twenty-one proves the will (*g*).

If several infants.

Where, before January 1, 1926, administration has been granted to a single guardian, and that guardian dies during the minority of all the infants, the administration *durante minore ætate* ceases, and a second or *cessate* grant must be made. But in the case of grants made on or after January 1, 1926, administration *durante minore ætate* can no longer be granted to a single individual, except for the use and benefit of a minor executor (*h*), and where there are co-administrators, one of whom dies, the grant survives to the other, but application may be made for the appointment of a substituted administrator under section 160, sub-section 2, of the Supreme Court of Judicature (Consolidation) Act, 1925.

Death of guardian.

If the sole infant, or all the infants for whose use and benefit the administration has been granted, die under age, the grant to the guardians ceases, and administration *de bonis non* to the estate of the testator or intestate is taken out.

Death of infant.

(*b*) *West* v. *Willby* (1820), 3 Phill. at p. 380.
(*c*) *John* v. *Bradbury* (1866), 1 P. & D. 245.
(*d*) (1858), 1 S. & T. 141.
(*f*) The Court has refused to limit the grant "until the minor shall attain the age of twenty-one years and apply for and obtain a grant": *Loftus* (1864), 3 S. & T. 307. Although, under section 47 of the Administration of Estates Act, 1925, a minor who marries under the age of twenty-one years acquires a vested interest in the estate of an intestate, and can give valid receipts for the income, yet a grant to a guardian remains in force until the minor attains twenty-one years.
(*g*) 4 Burn, E. L. 385 (9th ed.).
(*h*) *Vide supra*, pp. 363, 364.

Sub-section 3.—*Administration for the Use and Benefit of a Lunatic.*

Administration for the use and benefit of a lunatic;

The subject turns to the third species of special administration for the use and benefit of the person entitled to the grant, namely, administration for the use and benefit of a lunatic, until such time as he shall become of sound mind. Such administration, sometimes called administration *durante corporis aut animi vitio* (*i*), is granted where the executor or person entitled to letters of administration is of unsound mind at the death of the deceased, or where the executor or administrator becomes of unsound mind after a grant has been made to him.

where executor or person entitled to administration is or becomes of unsound mind.

Practice of Ecclesiastical Courts,

It was the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so had not been found a lunatic by inquisition. When such a case occurred, the Ecclesiastical Court required affidavits, stating the fact of lunacy, and that no inquisition had been had and no committee appointed. The Court then granted administration to the next-of-kin of the lunatic pending the lunacy, and it required sureties in double the amount of the property, and such sureties to justify (*k*).

followed by Court of Probate, and Probate Division.

Reason for these grants.

Such was the practice of the Ecclesiastical Court, and that practice has been followed in all material respects by the Court of Probate and by theProbate Division, its successors. If such grants were not made, the property might not be administered at all or might be administered by a creditor; or the parties might be compelled, in cases where it is neither necessary nor expedient, to apply for commissions in lunacy, in order to get a committee appointed who might take the administration (*l*).

The right of the Court to grant this species of administration has been recognised in many early cases, particularly in *Hills* v. *Mills* (*m*) and the cases there cited.

1. *Where the executor or person entitled to administration is of unsound mind at the death of the testator or intestate.*

Where there are several executors, and one is a lunatic.

Two executors, one lunatic, the other abroad.

If there are several executors, and one of them is a lunatic, it would seem that no administration *durante animi vitio* ought to be granted, if others exist who are able and willing to prove the will (*n*). And where, of two executors, one is a lunatic and the other is abroad, administration may be granted to the

(*i*) Oughton, 1 Ord. Jud. 324, n.

(*k*) *Evelyn* (1833), 2 My. & K. at p. 4, where the Lord Chancellor laid down the practice from the communication made to him by Dr. Lushington.

(*l*) *Evelyn* (1833), 2 My. & K. at p. 4.

(*m*) (1686), 1 Salk. 36; and see *Evans* v. *Tyler* (1849), 2 Rob. 128; *Hewson* v. *Shelley*, [1914] 2 Ch. 13, 43.

(*n*) See *Hardstone* (1828), 1 Hagg. 487; and cf. *Pigot and Gascoigne's Case* (1572), cit. Brownl. 46, *ante*, p. 363.

attorney of the latter until the absent executor shall apply for probate, or the lunatic recover and obtain a grant.

Sole executor a lunatic.

Where the sole executor is a lunatic so found by inquisition, and there is a committee of his estate, administration with the will annexed is granted to the committee for the use and benefit of the lunatic until he shall become of sound mind (*o*).

Grant to committee of his estate.

Grant to person appointed under the Lunacy Act, 1890.

Where the lunatic is not so found by inquisition, but, under section 116 of the Lunacy Act, 1890 (*p*), a person has been appointed with general authority over the lunatic's property, such a person is treated as if he were a committee of the lunatic's estate; but if the person appointed under section 116 has conferred upon him only specified powers, falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to the grant (*q*).

To whom administration for the use of lunatic executor is granted where there is no committee.

Where there is no committee or person in the position of a committee, or where the committee renounces and consents, or is cited and fails to appear (*r*), administration with the will annexed is granted to the residuary legatee or devisee for the use and benefit of the lunatic executor until he shall become of sound mind (*s*). If the residuary legatee and devisee renounce, or the residue is not disposed by the will, the grant similarly limited is made to the person who would be entitled to a grant of administration to the estate of the lunatic executor in the event of his death intestate.

Where the person entitled to administration (will) is a lunatic.

Where there is no executor, and the person entitled to administration with the will annexed—*e.g.*, the residuary legatee—is a lunatic, administration with the will annexed is granted for his or her use and benefit to the committee of the lunatic's estate (*t*), or, failing a committee, to the person who would be entitled to administer the lunatic's estate in the event of his death intestate. But it must be noticed that a grant will not be made for the use of a lunatic unless all other persons equally

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(*o*) *Cooke*, [1895] P. at p. 69; *Phillips* (1824), 2 Add. at p. 336 *in notis*. The grant may be made to a Scottish curator, or the committee appointed by a foreign Court. With the consent of the committee of the estate of a lunatic executor, a grant for his use and benefit was made to the committee of his person, who was also sole next-of-kin of the lunatic: *Scarlett* (1872), 27 L. T. 215. If there are two committees, both must take the grant, or one must renounce: Tristram & Coote (16th ed.), 202.

(*p*) 53 & 54 Vict. c. 5. See also the Lunacy Act, 1908 (8 Edw. 7, c. 47), by which the powers of a quasi-committee are extended.

(*q*) *Cooke*, [1895] P. at p. 69. (*r*) *Milnes* (1826), 3 Add. 55.

(*s*) *Ibid.*; *Rodnall* v. *Webb* (1826), 3 Add. 56 *in notis*. Where an executor was *incapacitated through illness*, the Court made a grant of administration (will) to a residuary legatee for life for the use and benefit of the executor till his recovery: *Ponsonby*, [1895] P. 287; cf. *Knott*, [1920] 2 I. R. 397; and see *Crump* (1821), 3 Phill. 497.

(*t*) As to the position of a person appointed under section 116 of the Lunacy Act, 1890, *vide supra*.

entitled with the lunatic, whether as having an interest in real or personal estate, renounce or are cited and fail to appear (*u*).

Where the person solely entitled to administration (intestacy) is a lunatic.

Where the person solely entitled to a grant of administration on intestacy is a lunatic, administration for his or her use and benefit is granted to the lunatic's committee, or, in the absence of a committee, to the person who would be entitled to administer the lunatic's estate in the event of his death intestate (*x*). But, as above stated, a grant will not be made to a person for the use and benefit of a lunatic without clearing off all other persons equally entitled with the lunatic, whether as having an interest in real or personal estate (*y*).

Grant cannot be made to single grantee where minority or life interest arises.

Where the person primarily entitled to administration with the will annexed or on intestacy is a lunatic, and a minority or life interest arises under the will or intestacy, the grant for the use and benefit of the lunatic cannot be made to a single grantee, but under the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, must be made either to a trust corporation, with or without an individual, or to not less than two individuals (*z*).

Widow of intestate a lunatic; grant for her use and benefit;

If the widow of an intestate is a lunatic and there is a committee, the practice is to make the grant to the committee of the widow for her use and benefit, without requiring notice to be given to the other persons entitled to share in the real and personal estate of the intestate. The Court may, however, where such persons appear and show sufficient reason, pass over the widow altogether and commit the administration to them. But, unless good cause is shown, the committee of the widow is preferred, as the widow herself would be, to the other persons entitled to share in the real and personal estate of the intestate (*a*). Where there is no committee, the grant may be made to the next-of-kin of the widow for her use and benefit, or, if they desire it, the other persons entitled to share in the estate of the intestate may take an absolute grant in their own right and not for the widow's use and benefit. For the fact that the widow is a lunatic is sufficient cause for passing over the widow in favour of the other persons entitled to share in the intestate's estate (*b*).

or next-of-kin, etc., of intestate may take an absolute grant.

Grant to creditor or stranger.

Where the committee, and all the persons who would be entitled to administer the lunatic's estate in the event of his

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(*u*) Additional Instructions under the Land Transfer Act, 1897, No. 14.
(*x*) See *Cooke*, [1895] P. 68; *Phillips* (1824), 2 Add. 336, n.
(*y*) Additional Instructions under the Land Transfer Act, 1897, No. 14.
(*z*) For definition of "trust corporation" *vide ante*, p. 206; if a trust corporation applies for the grant, the consent of all persons entitled to the grant must be filed.
(*a*) *Alford* v. *Alford* (1857), 1 Dea. & Sw. 322.
(*b*) *Williams* (1830), 3 Hagg. 217.

death intestate, renounce, or have been cited and fail to appear, administration for the lunatic's use and benefit may be granted to a creditor (*c*) or to a stranger in blood (*d*). Thus administration with the will annexed *de bonis non* was granted to the executors of the deceased administratrix for the use and benefit of the testator's sole next-of-kin, who was a lunatic, and in this case the Court dispensed with citation of the lunatic's next-of-kin, who were thirty in number and resident in various places, some in America (*e*).

Special powers of the Court.

The Court has special powers under section 73 of the Court of Probate Act, 1857, and section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, in making grants of this description under special circumstances. The cases in which these powers have been exercised are collected in a subsequent chapter (*f*).

Where person primarily entitled to a grant is a lunatic, his next-of-kin must be cited before the grant is made to another.

It is important to notice that where the person primarily entitled to a grant of administration is a lunatic, before granting administration to a person with an inferior right, *e.g.*, a creditor, the Court requires citation, not only of the lunatic, but also of the next-of-kin of the lunatic, in order that they may take administration for his use and benefit if they think proper. If such next-of-kin are unknown, they must be advertised for (*g*).

2. *Where the executor or administrator becomes a lunatic after a grant has been made to him.*

Where the sole executor becomes a lunatic after probate granted.

Where a sole executor becomes a lunatic after probate has been granted to him, the Court will grant administration for his use and benefit to the committee of his estate until he shall become of sound mind (*h*).

Where there is no committee, or with the consent or after citation of the committee, administration with the will annexed for the use and benefit of the lunatic executor is granted to the residuary legatee or devisee under the will (*i*).

(*c*) *Penny* (1846), 1 Rob. 426. For cases in which administration has been granted to creditors of the lunatic under the Court's discretionary powers, *vide post*, p. 407.

(*d*) *Hastings* (1878), 4 P. D. 73; *Joseph* (1838), 1 Curt. 907.

(*e*) *Southmead* (1842), 3 Curt. 28.

(*f*) *Post*, p. 407.

(*g*) *Windeatt* v. *Sharland* (1871), 2 P. & D. 217. This rule may be relaxed in special circumstances under the Court's discretionary powers: *vide post*, p. 407.

(*h*) *Phillips* (1824), 2 Add. at p. 336 n. As to the position of a person appointed under section 116 of the Lunacy Act, 1890, *vide ante*, p. 371. In *Knott*, [1920] 2 Ir. R. 397, where an executor's bodily health disabled him from performing the duties of his office, the Court impounded the grant of probate, and granted administration for his use and benefit limited during the executor's incapacity.

(*i*) *Milnes* (1826), 3 Add. 55; *Rodnall* v. *Webb* (1826), 3 Add. 56 *in notis*; *Crump* (1821), 3 Phill. 497.

Where there are several executors, all of whom prove the will, and one subsequently becomes a lunatic.

Where of several executors, all of whom have proved the will, one subsequently becomes of unsound mind, the Court will, on the application of the others, revoke the grant and make a fresh grant of probate to the applicants, reserving power to the lunatic, in case he shall become of sound mind and apply, to join in the probate (*k*).

Where sole administrator becomes a lunatic.

Where the sole administrator, or administrator with the will, becomes a lunatic after a grant has been made to him, a grant for his use and benefit is made to his committee, or, failing him, to one who has an equal right with the administrator to the original grant, or, failing him, to the next-of-kin of the lunatic administrator (*l*).

Where administration granted to widow of intestate, who subsequently becomes a lunatic.

Where administration had been granted to the intestate's widow, who subsequently became insane, administration for the use and benefit of the widow during her lunacy was granted to a son of the intestate, the original grant being impounded in the registry, to be redelivered out in case of her recovery (*m*).

Practice in such a case where the next-of-kin is a minor.

Where an intestate left a widow and an infant son, and the widow took out administration, but subsequently became a lunatic, the Court, without revoking the administration granted to the widow, assigned the infant's aunt to be his guardian, and granted administration to her for the use and benefit of the widow and infant, during the incapacity of the widow and the minority of the infant, if the widow should not sooner recover her senses (*n*).

Where administration has been granted to next-of-kin who subsequently becomes a lunatic.

The practice as to administration where a grant has been made to a next-of-kin, and such next-of-kin becomes insane, is as follows (*o*) :—

First, where the lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic so long as he shall remain a lunatic. The first grant is not, in such case, impounded (*p*).

Secondly, where there is no committee and no person in the position of a committee (*q*), the grant is made to another of the next-of kin of the deceased for the use of the lunatic next-of-kin,

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(*k*) *Shaw*, [1905] P. 92; *Sowerby* (1891), 65 L. T. 764; *Marshall* (1836), 1 Curt. 297, where there were two executors, one of whom alone proved the will, and subsequently became lunatic; and see *Powell* (1895), unreported, cit. Tristram & Coote (16th ed.), p. 287, where a similar course was taken owing to the ill-health of one of three executors.

(*l*) *Vide ante*, p. 372.

(*m*) *Binckes* (1836), 1 Curt. 286.

(*n*) *Anon.* (1754), 1 Lee, 625.

(*o*) *Cooke*, [1895] P. at p. 69.

(*p*) For the position of a person appointed under section 116 of the Lunacy Act, 1890, *vide ante*, p. 371; *Cooke*, [1895] P. at p. 69; *Leese*, [1894] P. 160.

(*q*) *Vide ante*, p. 371.

so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded (*r*).

It is not the practice to inquire whether the lunatic is likely to recover, and, in the event of its appearing that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next-of-kin (*s*).

Thirdly, if there are no other next-of-kin of the intestate, the grant is made to the next-of-kin of the lunatic for his use and benefit (*t*).

Where one of several co-administrators becomes a lunatic.

Where administration, whether with the will annexed or on intestacy, has been granted to two or more administrators, and one of them subsequently becomes insane, on the application of the others the Court will revoke the original letters of administration, on their being brought into the registry, and will grant administration afresh to the sane administrator (*u*).

Termination of the administration.

Death of the administrator during the lifetime of the lunatic.

Where administration has been granted for the use and benefit of a lunatic, and the administrator dies in the lifetime of the lunatic, the administration ceases, and a *cessate* grant for the use and benefit of the lunatic is made. The continued insanity of the lunatic must be proved.

Thus where administration for the use and benefit of the intestate's widow, who was a lunatic, had been granted to a creditor on the renunciation of the testator's children, and the creditor died leaving goods unadministered, the widow surviving and still lunatic, the Court refused to grant administration *de bonis non* to a son of the deceased who had retracted his renunciation, but granted administration to him for the use and benefit of the widow during her lunacy, on his giving justifying security to double the amount of the unadministered estate (*x*).

Recovery of the lunatic.

If the lunatic, for whose use and benefit a grant has been made, recovers his senses, the grant for his use and benefit ceases, and a general grant is made to him. Satisfactory evidence of his recovery, on affidavit sworn by a medical man, must be adduced, and notice must be given to the temporary administrator. If the original grant has been impounded, it is delivered out to him under similar conditions.

Death of the lunatic in the lifetime of the administrator.

If the lunatic dies, the grant for his use and benefit ceases and expires, and administration *de bonis non* to the estate of the original deceased is granted, if it has not been completely administered.

(*r*) *Cooke*, [1895] P. at p. 69; *Binckes* (1836), 1 Curt. 286.
(*s*) *Cooke*, [1895] P. at p. 70.
(*t*) *Vide ante*, p. 372.
(*u*) *Phillips* (1824), 2 Add. 335; *Newton* (1843), 3 Curt. 428.
(*x*) *Penny* (1846), 1 Rob. 426.

Sub-section 4.—*Administration for the Use and Benefit of a Convict.*

Administration for the use and benefit of a convict.

Where the person entitled to the grant is a felon convict, administration for his use and benefit is granted to the person entrusted, under the provisions of the Forfeiture Act, 1870 (*y*), with the custody and management of his property, so long as such person shall continue to have such custody.

Sub-section 5.—*Administration* pendente lite.

Administration *pendente lite.*

Court of Probate Act, 1857, s. 70.

Section 70 of the Court of Probate Act, 1857 (*z*), enacted as follows: "Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction."

Receiver of real estate *pendente lite.*

Court of Probate Act, 1857, s. 71.

And by section 71 of the Act: "It shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid or any other person to be the receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any will of such deceased person by which the real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct." By section 21 of the Court of Probate Act, 1858, the Court might require security by bond from any receiver of the real estate so appointed.

These provisions replaced, in the case of persons dying after 1925, by the Judicature (Consolidation) Act, 1925, s. 163.

These provisions were repealed by the Administration of Estates Act, 1925 (*a*), so far as they apply to deaths occurring after the commencement of that Act, and in cases where the testator or intestate died on or since January 1, 1926, they are now replaced by section 163, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (*b*), which provides: "Where any legal proceedings touching the validity of the will of

(*y*) 33 & 34 Vict. c. 24. Under the Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2, sub-s. 1 (e), the Public Trustee may be appointed to be the administrator of the property of a convict under this Act.

(*z*) 20 & 21 Vict. c. 77, s. 70.

(*a*) 15 Geo. 5, c. 23, s. 56, and Sched. II.

(*b*) The provisions of section 21 of the Court of Probate Act, 1858, as to the bond to be taken from a receiver of real estate, are replaced by the general provisions of section 167 of the Judicature (Consolidation) Act, 1925.

a deceased person, or for obtaining, recalling or revoking any grant, are pending, the High Court may grant administration of the estate (*c*) of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction."

Power of the Prerogative Court to appoint an administrator *pendente lite*.

The power of the Prerogative Court to appoint an administrator *pendente lite* where there was a controversy concerning a right to administration, never seems to have been questioned (*d*), though formerly the Courts of common law held that administration pending a suit upon a will, where there was an executor, could not be granted (*e*). But in the case of *Walker* v. *Woollaston* (*f*) the whole Court, upon consideration, held that such administration was good. The Court of Probate, in addition to the powers which it derived from the Prerogative Court, had statutory power to appoint an administrator *pendente lite* conferred on it by the sections of the Court of Probate Act, 1857, above quoted (*g*).

Power of the Court of Probate.

Administrator *pendente lite*, when appointed.

It was not the practice of the Prerogative Court to grant administration *pendente lite*, unless by consent, or on proof that such a grant was necessary for the preservation of the property (*h*). Soon after the establishment of the Court of Probate, however, Sir J. P. Wilde, in a considered judgment (*i*), said : " The rule of the Court of Chancery appears to be, that wherever there is a *bona fide* suit pending, the Court will appoint a receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, and that I shall grant

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(*c*) By section 175, sub-section 1, of the Act, " estate " means real and personal estate, and " real estate " includes (a) chattels real and land in possession, remainder or reversion, and every interest in or over land to which the deceased person was entitled at the time of his death; and (b) real estate held upon trust or by way of mortgage, whether by demise or sub-demise, or of security, but not money to arise under a trust for sale of land, nor money secured or charged on land.

(*d*) *Frederick* v. *Hook* (1691), Carthew, 153, cited in *Walker* v. *Woollaston* (1731), 2 P. Wms. 576, at p. 585.

(*e*) *Maskeline* v. *Harrison* (1756), 2 Lee, 258; *Frederick* v. *Hook* (*ubi supra*); *Robin's Case* (1601), Moo. K. B. 636; *Smyth* v. *Smyth* (1684), 3 Keb. 54; and see *Hewson* v. *Shelley*, [1914] 2 Ch. 13, 43.

(*f*) (1731), 2 P. Wms. 576.

(*g*) *Tichborne* v. *Tichborne* (1869), 1 P. & D. 730, at p. 732.

(*h*) *Sutton* v. *Smith* (1753), 1 Lee, 207, at p. 209; *Maskeline* v. *Harrison*, (1756), 2 Lee, 258; *Northey* v. *Cock* (1822), 1 Add. 326, at p. 330; *Young* v. *Brown* (1827), 1 Hagg. 53; *Bellew* v. *Bellew* (1865), 4 S. & T. 58.

(*i*) *Bellew* v. *Bellew* (1865), 4 S. & T. 58, at p. 61.

administration *pendente lite* wherever the Court of Chancery would appoint a receiver."

In the Probate Division some necessity for the grant must be shown.

In the Probate Division, however, the appointment of an administrator *pendente lite* does not follow as a matter of course whenever litigation is pending. The applicant is required to show some necessity for the grant, *e.g.*, that it is necessary for the preservation of the estate, for receiving rents, payments of interest, or the dividends on shares as they become due, and that no fit and proper person is in a position to discharge these offices (*k*).

So where the deceased was in partnership with another, administration *pendente lite* was refused;

and where there was an executor willing to act.

Accordingly, when the deceased at the time of his death was in partnership with another person, the Court refused to grant administration *pendente lite* against the wish of the surviving partner, and stated that it would require very strong proof that he was dealing improperly with the property before it would accede to such an application (*l*). And where an executor, whose appointment was not in dispute, was willing to act, and was competent to discharge the functions of an administrator, the Court refused to grant administration *pendente lite* (*m*).

Administration *pendente lite* granted although receiver has been appointed by Court of Chancery.

Appointment of administrator *pendente lite* on application of person not a party to suit.

The Court will appoint an administrator *pendente lite*, if it is just and proper so to do, although a receiver may have been appointed by the Court of Chancery, in a suit pending between the same parties and affecting the same property as the suit in the Probate Division (*n*). The Court has power to appoint an administrator *pendente lite*, in contested testamentary and administration suits, on the application of a person who is not a party to such suit (*o*). Accordingly, in an administration suit, which was likely to be protracted, the Court appointed an administrator *pendente lite* at the instance of a creditor who was not a party to the suit; and the costs incurred by

(*k*) *Horrell* v. *Witts* (1866), 1 P. & D. 103.

(*l*) *Ibid.*

(*m*) *Mortimer* v. *Paull* (1870), 2 P. & D. 85. And see *Wright* v. *Rogers* (1870), 2 P. & D. 179, where, under special circumstances, administration pending suit was granted to the executors named in the will which was the subject of litigation, who were also the executors of an earlier will of the deceased. In *Graham* v. *Nicholson*, unreported, November 10, 1924, where there was litigation as to a codicil, and the validity of the will was not in dispute, the executors were allowed to take probate of the will in common form during the pendency of the action as to the validity of the codicil.

(*n*) *Tichborne* v. *Tichborne* (1869), 1 P. & D. 730. And see *Queen's Proctor* v. *Williams* (1862), 2 S. & T. 353, where the Court, on consent of the parties to the suit, appointed a person who had been made the receiver of the same estate in proceedings in Chancery, to be administrator *pendente lite*; *Cleaver*, [1905] P. 319. And see *Re Oakes*, [1917] 1 Ch. 230, where the fact that an action was pending in the Probate Division was held not to oust the jurisdiction of the Chancery Division to appoint a receiver. In *Barr* v. *Barr*, [1876] W. N. 44, such an application was transferred to the Probate Division, to avoid a multiplicity of proceedings; and see *Re Ivory* (1879), 10 Ch. D. 372. See further Wms. on Exors. (11th ed.), pp. 408, 409, and the cases there cited.

(*o*) *Tichborne* v. *Tichborne* (1869), 1 P. & D. 730.

the creditor in obtaining the appointment of an administrator *pendente lite* were allowed out of the estate (*p*).

Who is appointed administrator *pendente lite*.

Unless the parties have all agreed upon a nominee, the Court must be satisfied as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two, its most usual office upon such occasions, an administrator, that is, being proposed by each party (*q*).

As a general rule, the Court will not, unless all parties consent (*r*), place a litigant party in possession of the property by granting administration pending suit to him, but will grant it to some indifferent person to be selected by all the parties (*s*), or, if they cannot agree, by the registrar (*t*).

Semble, where a suit is pending touching the validity of a will of an executor, an administrator *pendente lite* of the estate of the original testator may be appointed.

It would seem to follow from the wording of section 70 of the Court of Probate Act, 1857, and the similar wording of section 163, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, that the power of the Court to appoint an administrator *pendente lite* of the estate of a deceased person, is confined to cases where a suit is pending touching the validity of *his* will, or for obtaining, recalling, or revoking probate of *his* will, or a grant of administration to *his* estate. Doubt has, however, been cast upon this assumption by the following cases, decided under the earlier statute.

A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her his universal legatee and sole executrix. She survived him, but did not take probate of his will nor re-execute her own. Litigation having arisen on the question whether the *wife's* executors were entitled to a limited or general grant of probate of her will, the Court appointed an administrator *pendente lite* to the estate of the *husband*, as well as one to the estate of the deceased (*u*). This case was followed by Butt, J., in a later case (*x*), where an application was made for the appointment of an administrator *pendente lite* of the estate of a husband under similar circumstances. It was argued that the Court had no power to make

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(*p*) *Tichborne* v. *Tichborne* (1869), 1 P. & D. 730; *Evans* (1890), 15 P. D. 215; *Cleaver*, [1905] P. 319.

(*q*) *Per* Sir John Nicholl in *Northey* v. *Cock* (1822), 1 Add. 326, at p. 329.

(*r*) *De Chatelain* v. *Pontigny* (1858), 1 S. & T. 34; but the rule is not absolute, and the Court will make such an appointment where circumstances make it clearly desirable: *Griffin* v. *Ackroyd*, [1925] P. 38.

(*s*) *Per* Sir John Nicholl in *Northey* v. *Cock* (1822), 1 Add. 326, at p. 330; *Young* v. *Brown* (1827), 1 Hagg. 53, at p. 54; *Stratton* v. *Ford* (1754), 2 Lee, 49. See also *Bond* v. *Bond* (1753), 1 Lee, 333, where the nominee of the son was preferred to the nominee of the wife, because his interest was certain and that of the wife uncertain.

(*t*) *Whittle* v. *Keats* (1866), 35 L. J. P. 54.

(*u*) *Dawes* (1870), 2 P. & D. 147.

(*x*) *Fawcett* (1889), 14 P. D. 152; followed in *Shorter* v. *Shorter*, [1911] P. 184.

such a grant under section 70 of the Court of Probate Act, 1857, as there was no *lis pendens* touching the will of the deceased person in respect of whose estate a grant was asked. The learned Judge said : " I am not altogether satisfied that when *In the Goods of Dawes* (*y*) was decided the attention of the Court was sufficiently drawn to the words of section 70, but I shall follow the precedent, though with doubt."

Receiver of real estate.

With regard to the appointment of a receiver of real estate, the language of section 71 of the Court of Probate Act, 1857, confined the authority to appoint such a receiver to cases in which a suit was pending touching the validity of any will of the deceased person by which his real estate was affected. Therefore under this section the Court refused to appoint a receiver where the only litigation pending had reference to the individual appointed executor, but the validity of the will was not questioned (*z*).

If deceased died since January 1, 1898, grant to administrator *pendente lite* extends to real estate, unless otherwise directed.

If, however, the deceased died on or since January 1, 1898, the date on which the Land Transfer Act, 1897, came into operation, the grant to the administrator *pendente lite* will usually, unless the order otherwise directs, include the real and personal estate, and it is only when the death occurred before that date, or when a separate appointment of a receiver is ordered, that a formal appointment of a receiver must be obtained to enable the real estate to be dealt with. Moreover, section 163, sub-section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, which applies where the deceased died on or since January 1, 1926, makes no provision for the appointment of a receiver of the real estate, for the reason that the Court is empowered by the sub-section to appoint an administrator of the estate of the deceased, both real and personal (*a*); and where an order for the appointment of an administrator *pendente lite* is drawn in respect of the estate of a person who died on or after January 1, 1926, it provides for the administration of the real and personal estate, unless the Judge otherwise directs (*b*).

Grant not made without notice to heir-at-law, if deceased died before 1926.

Where the deceased died before January 1, 1926, and the administration *pendente lite* is to extend to the real estate, or application is made for the appointment of a receiver of the real

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(*y*) (1870), 2 P. & D. 147.

(*z*) *Grant* v. *Grant* (1869), 1 P. & D. 654.

(*a*) See Judicature (Consolidation) Act, 1925, s. 175, sub-s. 1 : " Estate " means real and personal estate. No doubt, under section 155 of the Act, the administration could be severed, and a separate administrator *pendente lite* appointed of the real estate, provided the estate were not insolvent.

(*b*) President's Direction, December, 1925.

estate, the grant will not be made unless the heir-at-law has been served with notice, and is made a party to the application (*c*).

Powers and duties of administrators and receivers *pendente lite*.

An administrator *pendente lite* has all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and is subject to the immediate control of the Court, and acts under its direction (*d*).

Payment of legacy.

The Court has no power, except with consent of all interested parties, to authorise an administrator *pendente lite* to pay an annuity, by way of maintenance, to one of the residuary legatees, even though the latter is entitled to a large sum, both under the will and on an intestacy (*e*).

Direction of the Court to be obtained.

Should any dispute or difficulty arise in the administration, the direction of the Court must be obtained. This is done by summons before the Judge or a registrar. In an early case (*f*) Sir Cresswell Cresswell said : " I think that the debts should not be paid until they have passed before the registrar. The administrator *pendente lite* is, according to the terms of the decree appointing him, to administer the estate under the direction of the Court."

Payment of debts.

Administrator *pendente lite* ordered to sell property by Court of Chancery,

An administrator *pendente lite* having been appointed by the Court of Probate, a suit was instituted in the Court of Chancery to administer the estate, and an order made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate. The Court of Probate refused to interfere and to stop the sale so ordered by the Court of Chancery (*g*). Lord Penzance said (*h*) : " I cannot interfere with the details of an administrator's proceedings where a suit is pending in the Court of Chancery, and the administrator is acting under the direction of that Court."

Court of Probate will not interfere.

Administrator *pendente lite* appointee of the Court, not mere agent of the parties; but the Probate Division cannot stay proceedings

Administrators *pendente lite* are the appointees of the Court, and are not to be considered merely as the nominees or agents of the several parties on whose recommendation they are selected (*i*). But the fact that an administrator *pendente lite* is an officer of the Court does not confer upon a Judge of the

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(*c*) *Wiggins* v. *Hudson* (1899), 80 L. T. 296. And see *Purdey* v. *Field*, (1864), 3 S. & T. 576; but see *Mathew* v. *Tooze* (1908), 24 T. L. R. 465.

(*d*) Judicature (Consolidation) Act, 1925, s. 163, sub-s. 1. As to the powers of administrators *pendente lite* and receivers appointed under the Court of Probate Act, 1857, see sections 70 and 71 of that Act, *supra*, p. 376.

(*e*) *Whittle* v. *Keats* (1866), 35 L. J. P. 54. An administrator *pendente lite* was, under special circumstances, authorised to pay out of the estate a premium to a guarantee society which was willing to enter into a bond on his behalf : *Harver* (1889), 14 P. D. 81.

(*f*) *Charlton* v. *Hindmarsh* (1860), 1 S. & T. 519, at p. 520.

(*g*) *Tichborne* v. *Tichborne* (1870), 2 P. & D. 41.

(*h*) *Ibid.*, at p. 43.

(*i*) *Stanley* v. *Bernes* (1828), 1 Hagg. at p. 222.

against him in another Division.

Probate Division power to restrain or stay proceedings instituted against him in the Chancery Division (*k*).

No jurisdiction to appoint administrator or receiver *pendente lite* unless *lis pendens*.

The Court has no jurisdiction to appoint an administrator or receiver *pendente lite* before a writ of summons has been issued. Until a writ has been issued there is no *lis pendens;* a caveat, warning, and appearance thereto do not in themselves constitute a *lis pendens* (*l*).

Duties commence from date of appointment.

Termination.

Where appeal.

If no appeal, duties terminate with decree.

The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of (*m*). If there is no appeal, their functions terminate with the decree pronouncing in favour of a will with executors, and do not continue till the executors obtain a grant of probate (*n*). It would seem that the case is the same if there be no executors, for the functions of an administrator *pendente lite* terminate with the termination of the *lis*, though he may in some cases be right in retaining moneys received by him as administrator, until his accounts are brought in and passed (*o*).

At termination of *lis*, administrator or receiver *pendente lite* must pay over all he has received.

An administrator *pendente lite* is merely an officer of the Court, and holds the property only till the suit terminates; as soon as it is concluded he must pay over all that he has received in his character of administrator to the persons pronounced by the Court to be entitled (*p*).

Inventory and account.

The provisions with reference to the inventory and account to be filed by administrators and receivers *pendente lite* are dealt with in a later chapter (*q*).

Remuneration.

The Court may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court thinks fit (*r*).

(*k*) *Martin* v. *Toleman* (1897), 77 L. T. 138; *Re Toleman*, [1897] 1 Ch. 866.

(*l*) *Salter* v. *Salter*, [1896] P. 291.

(*m*) *Taylor* v. *Taylor* (1881), 6 P. D. 29. Section 22 of the Court of Probate Act, 1858 (now repealed so far as it applies to deaths after the commencement of that Act, by the Administration of Estates Act, 1925, s. 56 and Sched. II) enacted: "All the provisions contained in the 'Court of Probate Act,' [1857], respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act." And see *Wright* v. *Rogers* (1870), 2 P. & D. 179.

(*n*) *Wieland* v. *Bird*, [1894] P. 262.

(*o*) *Ibid.*

(*p*) *Graves* (1828), 1 Hagg. 313, at p. 315.

(*q*) *Post*, p. 606.

(*r*) Court of Probate Act, 1857, s. 72, replaced, as regards cases in which the death occurred on or after January 1, 1926, by the Judicature (Consolidation) Act, 1925, s. 163, sub-s. 2; and see *post*, p. 606.

SUB-SECTION 6.—*Other Administrations limited as to Time.*

Will lost and contents unknown: administration as on intestacy limited until original will found.

Where a will, in existence after the death of the testator, has been accidentally lost and its contents are totally unknown, administration as on intestacy may be granted (on justifying security) to the widow or next-of-kin, limited until the original will shall be found and brought into the registry (*s*).

Will and codicil, will not forthcoming and contents unknown.

And where there is a will and a codicil thereto, and the will is not forthcoming, and its contents are unknown, the Court, if not satisfied that the will was destroyed by the testator *animo revocandi*, may grant administration with the codicil annexed until the will is found (*t*).

Administration with copy, etc., of will annexed, limited until original will brought into registry.

As has been seen, where a will has been lost accidentally, and is proved never to have been revoked, probate may issue or administration with the will annexed may be granted of the will as contained in a copy or draft, or as proved by the declarations of the witnesses. In such a case the probate or administration with the will annexed is limited until the original will (or, in a case where the contents are proved by oral evidence, until the original will or a copy) shall be brought into the registry (*u*).

Administration limited until will transmitted to England.

Where the deceased, who died in England, informed his relations and friends, a day or two before his death, that he had made his will whilst in India, and that the same was then remaining there, Sir John Nicholl said: "The deceased cannot be sworn to have died intestate, having, according to his own declaration, left a will in India. An administration *pendente lite* is out of the question, as no suit in this Court . . . is pending. Nor can there be an administration as during absence out of the kingdom, or the minority of an executor, or the like, for *non constat* who the executor is, or even whether there be an executor. At the same time, an interval of considerable length must elapse before the deceased's will can be forwarded from India." Accordingly, under these circumstances, the Court granted administration to the deceased's agent limited for the purpose of receiving and investing the interest and dividends due, or to become due, on the deceased's stock, etc., and for otherwise protecting the property of the

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(*s*) *Campbell* (1829), 2 Hagg. 555; see *Hewson* v. *Shelley*, [1914] 2 Ch. at p. 44.

(*t*) *Greig* (1866), 1 P. & D. 73; *Clements*, [1892] P. 254. The doubt expressed by Sir J. P. Wilde in *Greig* as to whether a codicil can stand independently of the will is overruled. See the cases collected *ante*, p. 156, note (*o*).

(*u*) *Ante*, pp. 241, 269; *post*, p. 533.

deceased until the last will of the deceased or an authentic copy thereof should be transmitted to this country (*x*).

Probate of part of the testamentary papers, with power reserved to prove others when they arrive in England.

Under special circumstances the Court will grant probate of certain papers forming part of the will of the deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers or authentic copies thereof when they arrive, and on an undertaking on his part that he will do so (*y*).

Original will in India: probate of copy thereof incorporated by reference in codicil.

Where the original will was in India, and a testator prepared a copy thereof which he referred to in a codicil, stating that the codicil was a codicil to his last will, "of which I, along with this codicil thereto, execute a copy," probate was granted of the *copy* will as incorporated in the codicil (*z*).

Will in possession of person abroad:

So where the original will is in the possession of a person residing abroad who refuses or neglects to deliver it up, but a copy is in the possession of the executor, probate of the copy may be granted on proof that a better or more authentic copy does not exist in this country, and that it is necessary for the interests of the estate that probate be forthwith granted without waiting the arrival of the original will; the probate is limited until the original will or a more authentic copy shall be brought into and left in the principal probate registry (*a*). Administration with the will annexed similarly limited may be granted under similar circumstances.

probate of copy limited till original transmitted to England and brought in.

Residuary legatee during widowhood.

A residuary legatee appointed during widowhood must take a grant of administration with the will annexed limited during widowhood (*b*).

Sub-section 7.—*Second or* Cessate *Grants.*

Second or *cessate* grants.

When any of these grants of administration limited for a specified time or until the happening of a specified event have been made, the administration ceases and expires upon the efflux of the time or the happening of the event referred to in the original grant, and if the estate has not been fully administered, a fresh grant of administration must be made. These grants, which are known as second or *cessate* grants, are distinguished from grants *de bonis non* as being general in their terms, and applicable to the whole of the deceased's estate, but since

Granted on the expiration of administrations limited as to time.

(*x*) *Metcalfe* (1822), 1 Add. 343. As to the later development in this case, see *Howell* v. *Metcalfe* (1824), 2 Add. 348. And see *Brown* (1899), 80 L. T. 360; and the remarks of Phillimore, L.J. in *Hewson* v. *Shelley*, [1914] 2 Ch., at p. 44.

(*y*) *Robarts* (1873), 3 P. & D. 110.

(*z*) *Mercer* (1870), 2 P. & D. 91.

(*a*) Tristram & Coote (16th ed.), p. 184. But see *Brown* (1899), 80 L. T. 360.

(*b*) *Teed* (1850), 7 N. C. 384.

April 1, 1897, the practice has been to include only the amount of the unadministered estate in stating the amount of the estate in the oath, and the bond is given in respect of the unadministered estate alone (*c*).

Oath.
Bond.

Grants to the attorney of an absentee executor or person entitled to administration, being limited until the constituent shall duly apply for and obtain a grant, do not come to an end automatically on the return of the constituent from abroad, but cease and expire upon a *cessate* grant being made to him (*d*).

Grants to attorney cease on grant made to constituent,

Where administration has been granted to the attorney of one of two next-of-kin, both of whom reside out of the jurisdiction, and the administrator dies leaving the estate partly unadministered, the Court, upon proof of notice to the constituent, will make a *cessate* grant to the attorney of the other next-of-kin (*e*).

or on death of attorney,

The grant to the attorney administrator ceases and expires on the death of his constituent, but the form of the subsequent grant is *de bonis non* (*f*).

or on death of constituent.

Administration *durante minoritate* ceases when the minor attains the age of twenty-one, and *cessate* administration is granted to him if the estate has not been fully administered. Administration during the minority of several infants ceases upon one of them attaining his majority, and a *cessate* grant is made to him (*g*).

Administration *durante minoritate* ceases on minor attaining twenty-one.
Where several minors.

If all the minors die under age in the lifetime of the guardian, the administration determines, and a grant *de bonis non* is made (*h*).

Death of minors.

The effect of the death or recovery of a lunatic for whose use and benefit administration has been granted, is discussed in an earlier section (*i*).

Grants for the use and benefit of a lunatic.

An administration *pendente lite* ceases on the termination of the *lis*, *i.e.*, when the final decree is pronounced. If there is an appeal, the administration continues until the appeal is disposed of (*k*).

Administration *pendente lite*.

Administration limited to substantiate a suit in Chancery is not limited as to time, but as to purpose, and continues until the termination of the suit (*l*).

Administration *ad litem*.

(*c*) *Vide post*, pp. 475, 476.
(*d*) *Pipon* v. *Wallis* (1753), 1 Lee, 402; *Cassidy* (1882), 4 Hagg. 360. *Vide ante*, p. 362.
(*e*) *Barton*, [1898] P. 11.
(*f*) *Ante*, p. 362, and cases there cited.
(*g*) *Ante*, p. 369, where the effect of the death of a guardian during the minority of all the infants is also discussed.
(*h*) *Ante*, p. 369.
(*i*) *Ante*, p. 375.
(*k*) *Ante*, p. 382.
(*l*) *Vide post*, p. 392, *Brown* (1872), 2 P. & D. 455.

Administration limited until a will is brought in.

Administration limited until such time as the original will or a copy shall be brought into the registry, or transmitted to this country, ceases on the fulfilment of the contingency (*m*).

Section 2.

ADMINISTRATIONS LIMITED AS TO THE PROPERTY TO WHICH THEY EXTEND.

Sub-section 1.—*Administration limited to a Particular Subject.*

Administrations limited to a particular subject.

The administrations discussed in the preceding section extend to the whole property of the deceased, but terminate on the happening of a particular event. Other grants of administration are limited to a part of the deceased's estate, while general administration of the rest of the estate is committed to some other person. These form the subject of the present section.

Administration limited to settled land.

The most important of these limited administrations are those granted under the provisions of section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, and section 23 of the Administration of Estates Act, 1925, in respect of land settled previously to the death of the deceased, and not by his will. These, however, have been considered in an earlier chapter (*n*).

Power to grant administration of real and personal estate separately or together.

Section 155 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that administration of the real estate of a deceased person, or any part thereof, may be granted either separately or together with administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of a trust estate only, and a grant of administration to real estate may be limited in any way the Court thinks proper (*o*) : but it is provided that where the estate of the deceased is known to be insolvent, the grant of representation to the estate is not to be severed except as regards a trust estate.

Limited administrations not to be granted unless every person entitled to general grant

There has already been occasion to refer to the rules of practice (*p*) which lay down that limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge, and that save

(*m*) *Howell* v. *Metcalfe* (1824), 2 Add. 348.

(*n*) *Ante*, Chap. VIII, pp. 232 *et seq.*

(*o*) So may a grant of administration of personal estate; see section 162, sub-section 1 of the Act.

(*p*) Rules 29 and 30, N. C. B.; *vide ante*, p. 357; and see *Barker* (1837), 1 Curt. 592.

as in the Administration of Estates Act, 1925, is expressly provided with regard to settled land, no person entitled to a general grant of administration will be permitted to take a limited grant. It is now necessary to consider the application of these rules where administration is granted, not of the whole estate, but limited to some specific part of the property of the deceased.

renounces or consents.

Person entitled to general grant not permitted to take limited grant.

Where a party applying for administration has no direct interest in the estate of the deceased, but only as assignee of part of it, he cannot obtain a grant extending to the whole of the deceased's property, but, after citation of all persons entitled to the general grant, a grant of administration limited to the particular fund to which he is entitled may be made to him (*q*). It is not, however, the function of the Court to determine the rights of persons under an assignment; therefore, if a person comes to the Court having no general interest in the estate of the deceased, he must show clearly that he has a right to some particular sum or fund, otherwise a grant limited to that sum or fund will not be made to him; he can only obtain authority to assert his right in another Court (*r*).

Grant to assignee of part of the deceased's estate limited to the property to which he is entitled:

only made where the title of assignee is clear;

otherwise he is only entitled to a grant *ad litem*.

More difficult questions arise in cases where a legatee applies for a grant limited to the amount of his legacy. As has been seen, a legatee, on the renunciation or after citation of the executor and residuary legatee, or of the persons entitled on intestacy where the residue is not disposed of, is entitled to a general grant of administration with the will annexed (*s*). If the two rules set out above are to be strictly enforced, a limited grant could never be made to a legatee, for by the first rule he must, before applying for a limited grant, cite all persons entitled to a general grant, and when this has been done, the legatee himself becomes entitled to a general grant, and is precluded from taking a limited grant by the second of these two rules. It is necessary, therefore, to inquire how far these two rules admit of modification in practice.

Grant to legatee limited to amount of his legacy.

Effect of Rules 29 and 30, N.-C. B.

In practice these rules, in special circumstances, have been relaxed, first, by allowing a legatee to take a limited grant without citing those entitled to the general grant, and secondly, by allowing a legatee to take a limited grant after citation of those entitled to the general grant in priority to himself.

Rule 29, N.-C. B., relaxed, and limited grant made to legatee without citation of persons entitled to general grant.

Thus in *In the Goods of Watson* (*t*), where an application for administration with the will annexed was made by the sole

(*q*) *Dodgson* (1859), 1 S. & T. 259; *Burdett* (1876), 1 P. D. 427.
(*r*) *Burdon* v. *Morgan* (1872), 2 P. & D. 371, by means of a grant limited to take proceedings in Chancery; *vide post*, p. 392.
(*s*) *Ante*, p. 348. (*t*) (1858), S. & T. 110.

legatee on an affidavit that the testatrix died possessed of no other property than that specifically described in the will, Sir C. Cresswell said : " You must either cite the next-of-kin, or you may take administration limited to the property disposed of by the will." And in *In the Goods of Baldwin* (*u*) the Court followed that case, and, without requiring citation of the next-of-kin, made a limited grant of administration with the will annexed, under section 73 of the Court of Probate Act, 1857, to the sole beneficiary named in the will (*x*).

Rule 30, N.-C. B., relaxed, and limited grant made to legatee after citation of persons entitled to general grant.

Again, in *In the Goods of Biou* (*y*) administration with the will annexed, limited to the fund appropriated for the payment of the legacies, was granted to the joint nominees of two charitable institutions, who were legatees under the will. The parties entitled to a general grant had been cited, and had not appeared. The registrar took the objection that, according to the ordinary practice, there should be a general grant, but Sir H. Jenner Fust said : " It is not advisable to encumber these hospitals with a general grant."

But these grants are entirely exceptional, and will not be made unless some very strong reason be given.

But in *In the Goods of Watts* (*z*), where an application for a grant of administration (will) *de bonis non* to a substituted universal legatee, limited to £750 stock, to which she was solely entitled, was made on an affidavit that the parties entitled to a general grant were nine in number, and their citation would entail great expense, Sir C. Cresswell said : " If you were to cite the next-of-kin, and they were not to appear, you would be entitled to a general *de bonis* grant. It is very inconvenient having divers representatives for different parts of the property " ; and when his previous decision in *In the Goods of Watson* (*a*) was pointed out to him, the learned Judge continued : " In that case, if I recollect rightly, the party was miserably poor. These grants are entirely exceptional, and should not be made unless some very strong reason be given." The application was refused.

And, *semble*, the contention that a general grant would render the applicant liable to be harassed by the deceased's

Again, where the person entitled to the general grant of administration with the will annexed was also appointee by the same will to a fund of £2,000 in settlement, and the general estate of the testatrix, who died insolvent, did not amount to £5, Sir J. P. Wilde refused to make a grant to the appointee limited to the fund appointed, and although it was argued that

(*u*) [1903] P. 61.
(*x*) And see *Steadman* (1828), 2 Hagg. 59.
(*y*) (1843), 3 Curt. 739.
(*z*) (1860), 1 S. & T. 538.
(*a*) (1858), 1 S. & T. 110; *vide ante*, p. 387. But under section 73 of the Court of Probate Act, 1857, a grant limited to the amount of his legacy has been made to a sole legatee where the will disposes of no other property and appoints no executor : *Baldwin*, [1903] P. 61.

by taking a general grant the administrator rendered himself liable to be harassed with actions by the testatrix's creditors, the learned Judge considered that this ground was not sufficient to justify a departure from the general rule (*b*).

creditors is not a sufficient ground.

No inconvenience, however, can arise from having separate representatives for different parts of the estate when the property in respect of which the limited grant is applied for is property which the deceased held as a trustee (*c*). And therefore it has always been held, and with reason, that where all persons entitled to represent the deceased have been cited to take out representation to his estate, and have failed to do so, in respect of property which the deceased held as trustee, the Court may grant limited administration to the *cestui que trust*, or to another trustee, or to their nominee, for the purpose either of transferring the trust property into the names of new trustees appointed in the room of the deceased, or otherwise dealing with it for the benefit of those beneficially entitled thereto, or, if the trust property is a term of years (*d*), for the purpose of making an assignment of the trust term (*e*).

Grants limited to the property of which deceased was trustee.

Administration to *cestui que trust* or another trustee limited to trust property.

So the Court will grant letters of administration to a *cestui que trust* of a trust fund, limited to that fund, where the trustee in whose name the fund stands is dead and is without a personal representative, the parties entitled to represent the deceased trustee having first been cited (*f*). Where there are several parties interested in the trust fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trustent* assent to the grant extending to their respective interests (*g*).

Administration to *cestui que trust* of trust fund limited to that fund.

Where there are several *cestuis que trustent*.

(*b*) *Somerset* (1867), 1 P. & D. 350; but see *Prothero* (1876), 3 P. & D. 209.

(*c*) See *Prothero* (1876), 3 P. & D. 209.

(*d*) Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, on the death of a sole trustee or mortgagee, an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, vested in such trustee or mortgagee, devolved to and became vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him; and, accordingly they or he might exercise the like powers as one only of several joint personal representatives, or a single personal representative, or all the personal representatives together, to dispose of and otherwise deal with the same, as if the same were a chattel real. But the personal representative was not by this section created a trustee to perform the trusts of the instrument of trust, although the legal estate was vested in him. When there was no personal representative, a vesting order to assure the legal estate to the trustees of the trust instrument was necessary: *Re Williams' Trusts* (1887), 36 Ch. D. 231; Encyclopedia of the Laws of England (2nd ed.), tit. Executors, p. 566. Section 30 of the Conveyancing Act, 1881, is now repealed, and its provisions are replaced by sections 1—3 of the Administration of Estates Act, 1925.

(*e*) *Pegg* v. *Chamberlain* (1860), 1 S. & T. 527; *Powell* (1829), 3 Hagg. 195; *Crosley* v. *Archdeacon of Sudbury* (1815), 3 Hagg. 197; *Fowler* v. *Richards* (1828), 5 Russ. 39; *Keene* (1859), 1 S. & T. 265; *Butler*, [1898] P. 9; *Ratcliffe*, [1899] P. 110; *Agnese*, [1900] P. 60; *Berry*, [1907] 2 Ir. R. 209.

(*f*) *Pegg* v. *Chamberlain* (1860), 1 S. & T. 527; *Ratcliffe*, [1899] P. 110.

(*g*) *Pegg* v. *Chamberlain* (1860), 1 S. & T. 527.

Administration limited to trust term for the purpose of an assignment.

And where a term of years is vested in the deceased as a trustee, and those who are entitled to represent his estate have been cited and failed to appear (*h*), or his personal representatives are dead, a grant may be made to another trustee, or to the person in whom the beneficial interest in the term is vested, limited to the trust term and for the purpose of making an assignment (*i*). As a point of practice, it is not sufficient, in order to make out the title to a term of years, with a view to obtaining administration limited to that trust term, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the registry (*k*).

How title to trust term is to be made out.

And wherever there is a legal estate outstanding, the beneficial owner is entitled to a grant limited to that estate, if all persons entitled to represent the deceased renounce or are cited.

Administration to trustee in bankruptcy of beneficial owner limited to the legal interest in certain shares.

And, generally, it may be stated that whenever there is a legal interest outstanding, the beneficial owner or his representative is entitled to a grant limited to the property the legal estate in which was vested in the deceased at the time of his death, provided that all persons entitled to represent the deceased have been cited or renounce (*l*). In *In the Goods of Agnese* (*l*) A, being legal owner of certain shares, handed the certificates to C, who received the dividends as beneficial owner until he became bankrupt, after which the trustee in C's bankruptcy received such dividends as became payable. A died, never having divested himself of the legal estate in the shares; and administration to his estate was granted to B, who died leaving part of the estate unadministered. Upon the application of the trustee in C's bankruptcy, the Court granted administration to him in respect of the unadministered estate of A, limited to the shares above mentioned.

Practice as to annexing the will to this species of grant.

With regard to these administrations limited to trust property, when the deceased died testate it was not the practice of the Prerogative Court to annex the will to the grant as the representation in no way interfered with the administration of the deceased's own estate (*m*). But in *In the Goods of Butler* (*n*), in granting, for the purpose of a conveyance, adminis-

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(*h*) See *Currey* (1849), 5 N. C. 54.

(*i*) *Powell* (1829), 3 Hagg. 195; *Fowler* v. *Richards* (1828), 5 Russ. 39; *Crosley* v. *Archdeacon of Sudbury* (1815), 3 Hagg. 197; *Butler*, [1898] P. 9. See also *Kingwell* (1899), 81 L. T. 461 (where the intestate had mortgaged leasehold properties for the whole of his term except one day, and made himself a trustee of the original term for the mortgagee, and administration was granted to a purchaser of the mortgage term, limited to the original term); and cf. *Vereker*, [1896] 1 Ir. R. 200; *Whitehead* v. *Palmer*, [1908] 1 K. B. 151.

(*k*) *Keene* (1859), 1 S. & T. 265.

(*l*) *Agnese*, [1900] P. 60.

(*m*) *Fenton* (1825), 3 Add. at p. 36, n.: "It is not the present practice of the office to annex the will to an administration limited to assign a satisfied term of years."

(*n*) [1898] P. 9. And see *Crosley* v. *Archdeacon of Sudbury* (1815), 3 Hagg. at p. 202, where Sir John Nicholl said: "A practice prevailed, I understand, for two years of granting such administration without the will, or even a copy of it. *Why it was discontinued I do not know.*"

tration limited to certain leasehold property of a testator, a question arose as to whether or not the will should be annexed to the grant. Sir F. H. Jeune, said: "I think that the will had better be annexed to the grant. There will be a grant of administration with the will annexed, limited to the particular leaseholds, to the applicant or his nominee."

Sub-section 2.—*Administration limited to Property in a Particular Place.*

Where a will is limited to property abroad.

Where a deceased left a will expressly limited to her property abroad, which was proved by the executors in the foreign Court, but died intestate as to her property in this country, administration was granted in this country to her next-of-kin of so much of the deceased's estate as was situate in this country and not dealt with by her will (*o*).

Sub-section 3.—*Other Administrations limited to Part of the Property of the Deceased.*

Will of a married woman, a foreigner, invalid by the law of her domicil, but valid as the execution of a power.

It has been seen in an earlier chapter that the practice of granting probate of the will of a married woman limited to the property the testatrix had a right to dispose of, and had disposed of, by her will, has since the Married Women's Property Act, 1882, been discontinued (*p*). It was there pointed out that there are still cases where the Court refuses to make a general grant in respect of the wills of married women, *e.g.*, where the married woman, a foreigner, has made a will valid as the exercise of a power of appointment, but not executed in accordance with the law of the testatrix's domicil (*q*). In such a case administration with the will annexed is granted to the appointee limited to such property as the deceased had power to dispose of, and did dispose of by virtue of that power (*r*). These cases furnish a further instance of grants limited to part of the property of the deceased.

Will revoked by marriage, except as exercise of a power: limited grant to appointee.

Again, where, under section 18 of the Wills Act, 1837, as modified by section 177, sub-section 1, of the Law of Property Act, 1925, a will is revoked by marriage, but that will exercises a power of appointment of the excepted class, administration

(*o*) *Mann*, [1891] P. 293; Godolph., Part II, c. 30, s. 5; Bac. Abr. Exors. C. 4; Toller, 106.
(*p*) *Ante*, pp. 80, 81.
(*q*) *Ante*, p. 81
(*r*) *Ante*, p. 81, note (*b*).

with the will annexed is granted to the appointee limited to the property so appointed (*s*).

Administration to next-of-kin of a married woman limited to property acquired by her after judicial separation, protection or separation order;

Where a married woman has been judicially separated from her husband, or has obtained a protection order under 20 & 21 Vict. c. 85, or a separation order under the Summary Jurisdiction (Married Women) Act, 1895, and afterwards dies intestate during the lifetime of her husband, the Court may grant administration to the persons who would be entitled thereto had she died a widow, limited to such property as she has acquired or become possessed of since the separation (*t*).

or by virtue of a deed of separation.

And if the husband agrees by deed of separation that if the wife shall die intestate her next-of-kin shall be entitled to her property, upon her death intestate during his lifetime, administration limited to the property to which they are entitled by virtue of the deed, may be granted to her next-of-kin (*u*).

Section 3.

ADMINISTRATIONS LIMITED AS TO THE PURPOSES FOR WHICH THEY ARE GRANTED.

Sub-section 1.—*Administration limited to Proceedings in Chancery.*

Administration *ad litem*

When it is necessary for a representative of a deceased testator or intestate to be made a party to an action pending in the Chancery Division (*x*), and all persons entitled to represent the deceased refuse to take representation to his estate, the Court may grant administration to the nominee of a party to the proposed or pending action "limited for the purpose only of his becoming and being made a party to a certain cause or suit now depending, or about to be instituted, in the Chancery Division of this Court, between ———, Plaintiffs, and ———, Defendants, and to supply, substantiate, and confirm the proceedings already had, or which may be hereafter had, in the said cause or suit, or in any other matter, cause, or suit which may be commenced in the same or any other Division of the Court between the aforesaid or any other parties, touching the

(*s*) *Russell* (1890), 15 P. D. 111; but see *Poole* v. *Poole*, [1919] P. 10; and *vide ante*, p. 133.

(*t*) *Vide ante*, p. 290, where the cases are collected.

(*u*) *Ante*, p. 290, where the cases are collected.

(*x*) A workman, injured in the course of his employment, had made no request for compensation before the death, intestate, of his employer. The next-of-kin of the employer refused to take out administration. The Court gave liberty to a nominee of the workman to take out a grant under section 78 of the Probate (Ireland) Act, 1857, for the purpose only of substantiating proceedings to be taken by the workman for the recovery of compensation: *Byrne* (1910), 44 Ir. L. T. 98.

matters which are the subjects of the said cause or suit, and until a final order or decree shall be made therein, and the same carried into execution, and the execution thereof fully completed " (*y*).

Now seldom necessary. R. S. C., Order XVI, r. 46.

Such grants are now seldom necessary, for by R. S. C., Order XVI, r. 46, if in any cause or matter or other proceeding it appears that any deceased person who was interested in the matter in question has no legal personal representative, the Court has power to appoint some person to represent his estate, or may proceed in the absence of any person representing his estate (*z*).

Administration *ad litem* granted after citation of persons entitled to a general grant on mere averment of interest.

The Probate Division has full power to grant administration so limited (*a*); the grant is made only after citation of the persons entitled to the general grant, or on their renunciation (*b*). The Court will make such grants on a mere averment of interest, without in any way considering the merits of the case (*c*).

Again, if a person comes before the Probate Court having no general interest in the estate of the deceased, if he shows clearly that he has a right to some particular sum or fund, the Court may grant to him administration limited to that particular sum or fund. But if his right be doubtful, the Court will only give him authority to assert it in another Court, by granting to him letters of administration limited for the purpose of taking proceedings in Chancery, and (in a proper case) of receiving whatever that Court may hold him entitled to receive (*d*).

Powers of administrator *ad litem*.

The grant of letters of administration *ad litem* makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, and a decree obtained against such a grantee is therefore binding upon any one who may afterwards take out general administration to the estate (*e*).

(*y*) *Clough* v. *Dixon* (1841), 10 Sim. 564; *Davis* v. *Chanter* (1848), 2 Phillips, 545; *Maclean* v. *Dawson* (1859), 1 S. & T. at p. 431.

(*z*) As to the limitations of this rule, see note thereon in the Annual Practice.

(*a*) *Davis* v. *Chanter* (1846), 2 Phillips, at p. 549; *Maclean* v. *Dawson*, (1859), 1 S. & T. at p. 431.

(*b*) See *Dodgson* (1859), 1 S. & T. 259; *Williams* (1870), 2 P. & D. 81; but see *Burdon* v. *Morgan* (1872), 2 P. & D. at p. 374.

(*c*) *Maclean* v. *Dawson* (1859), 1 S. & T. 425.

(*d*) *Burdon* v. *Morgan* (1872), 2 P. & D. 371, at p. 375. See *Dodgson* (1859), 1 S. & T. 259; *Woolley* v. *Gordon* (1820), 3 Phill. 314.

(*e*) *Davis* v. *Chanter* (1846), 2 Phillips, 545, reversing the decision of the Vice-Chancellor at first instance (14 Sim. 212) requiring a general administration to be taken out. The Court never makes a general grant to a mere nominee of parties to a Chancery suit: *ibid.* And see *Dodgson* (1859), 1 S. & T. at p. 260. For cases where an administrator *ad litem* does not

Not entitled to receive the estate unless expressly authorised.

Under a similar form of letters of administration to that quoted above, it was held that the administrator *ad litem* had only authority to carry on the Chancery suit, and had no right to receive the fruits of it. Accordingly, Sir C. Cresswell revoked the grant, and made a fresh grant to the same person, limited to carry on the Chancery suit and to receive the subject-matter of the suit (*f*).

Sub-section 2.—*Administration* ad colligendum bona.

Administration *ad colligendum bona*, when granted by the Prerogative Court.

It is said that the Ordinary, in default of persons entitled to the administration, might grant letters *ad colligendum bona defuncti* and thereby take the goods of the deceased into his own hands, and thus assume the office of executor or administrator in respect to the collecting of them; but the grantee of such letters could not sell the effects without making himself executor *de son tort*. The Ordinary had no such authority, and therefore he could not confer it on another (*g*).

Powers of the Probate Division to grant administration *ad colligendum bona* to any fit person,

These same powers, and powers more extensive than these, are exercised by the Probate Division; and the Court is accustomed, where the persons entitled to the grant are abroad (*h*) or are unknown (*i*), or refuse to come forward and accept the administration (*k*), and where the delay that must ensue before a general administration can be secured is likely to imperil the property, to grant a limited administration *ad colligendum bona* to any fit person applying for a grant, *e.g.*, a creditor (*l*) or friend (*m*) of the deceased, limited, that is to say, to the collection of the property of the deceased, to giving

limited to such acts and purposes as

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sufficiently represent the deceased, see *Dowdeswell* v. *Dowdeswell* (1878), 9 Ch. D. 294; *Shipton* v. *Rawlins* (1851), 4 De G. & Sm. 477.

(*f*) *Dodgson* (1859), 1 S. & T. 259; *Burdon* v. *Morgan* (1872), 2 P. & D. 371, at p. 375.

(*g*) Toller, 107.

(*h*) *Gudolle* (1835), cit. 3 S. & T. at p. 22. See *Wyckoff* (1862), 3 S. & T. 20, where, on the authority of *Aspinall* v. *The Queen's Proctor* (1839), 2 Curt. 241, it was suggested that the Crown ought to interpose for the protection of the property of foreigners who die in England *in itinere*, until the parties entitled come forward; *Bolton*, [1899] P. 186; *Stewart* (1869), 1 P. & D. 727.

(*i*) *Clarkington* (1861), 2 S. & T. 380; *Ashley* (1890), 15 P. D. 120, where the grant was made on an affidavit by the applicant's solicitor that there was no known relations: *Schwerdtfeger* (1876), 1 P. D. 424. And see *Roberts*, [1898] P. 149, where the heir-at-law was unknown.

(*k*) *Radnall* (1824), 2 Add. 232. In *Brown* (1899), 80 L. T. 360, where a will was in the possession of a foreign Court, the Court here refused to admit a notarial copy to probate, but made a grant *ad colligendum* to the applicant until the original will, or an exemplification of it, could be brought in.

(*l*) *Clarkington* (1861), 2 S. & T. 380; *Stewart* (1869), 1 P. & D. 727; *Ashley* (1890), 15 P. D. 120; *Schwerdtfeger* (1876), 1 P. D. 424; *Malkin* (1894), 70 L. T. 811.

(*m*) *Radnall* (1824), 2 Add. 233; *Gudolle* (1835), cit. 3 S. & T. at p. 22; *Bolton*, [1899] P. 186. In *Roberts*, [1898] P. 149, administration *ad colligendum bona* was granted to the administratrix of the husband till the heir-at-law could be cited.

discharges for his debts on payment of the same, and for such further purposes for the protection and preservation of the property as the Court may direct. The administrator so constituted may be given such powers as the Court may deem fit, including, where it is for the benefit of the absent or unknown next-of-kin, power to dispose of the property or of any portion of it by sale (*n*).

are necessary for the preservation of the estate.

Power of sale.

In such cases, the Court will not, except in the most exceptional circumstances, dispense with justification of sureties (*o*).

Justification of sureties required.

The special powers of the Court under section 73 of the Court of Probate Act, 1857, and section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, have rendered applications for administration *ad colligendum bona* less frequent in modern practice (*p*).

Powers of the Court under section 73 of the Court of Probate Act, 1857, etc.

SUB-SECTION 3.—*Administration* durante absentia.

In a previous sub-section (*q*), it has been seen that where the executor or person entitled to administration is out of the jurisdiction, the Court has power, before probate or administration has been granted, to grant administration to his attorney for his use and benefit, limited until such time as he shall himself apply for and obtain a grant. There is, in addition, a form of limited administration, known as administration *durante absentia*, which may be granted either where the executor or person entitled to administration is abroad at the death of the deceased, or where the executor or administrator has gone abroad after the death of the deceased, and *after* probate or administration has been granted to him.

Administration *durante absentia*.

Contrasted with administration to attorney.

If the executor or the person entitled to a grant of administration were out of the jurisdiction, the Ecclesiastical Court always claimed the power, *before* probate had been granted or letters of administration had issued, to grant a limited administration *durante absentia* to another—limited, that is to say, until such time as the grant should be made to the executor or person entitled (*r*). For, it was said, this kind of administration stood upon the same reason as an administration during

Power of the Ecclesiastical Courts to grant administration *durante absentia*—

(*n*) *Schwerdtfeger* (1876), 1 P. D. 425; *Bolton*, [1899] P. 186. The Court usually directs the balance to be paid into the registry until a general grant shall issue: *Stewart* (1869), 1 P. & D. 727.

(*o*) *Howell* v. *Metcalfe* (1824), 2 Add. 348.

(*p*) See, for example, *Suarez*, [1897] P. 82; *Bateman* (1871), 2 P. & D. 242. *Vide post*, pp. 401 *et seq.*

(*q*) *Ante*, pp. 359 *et seq.*

(*r*) Bac. Abr. Exors. (G.). See *Suarez*, [1897] P. 82; *Cholwill* (1866), 1 P. & D. 192. Administrations *durante absentia* appear to have been granted concurrently with the practice of granting administration to the attorney of an absent executor: see *Hewson* v. *Shelley*, [1914] 2 Ch. at pp. 43, 44.

the minority of an executor, namely, that there should be one to manage the estate of the testator till the person appointed by him was able (*s*).

did not extend to cases where the executor or administrator had gone abroad *after* probate or administration granted.

But where probate had once been granted, or letters of administration had issued, the Ecclesiastical Courts did not consider themselves authorised to grant a new administration on the ground that the executor or administrator had gone abroad *after* taking a grant (*t*). The consequence of this defect in their authority was that there was no person existing within the jurisdiction duly authorised to appear or to collect the debts, as there was in those cases where administration was granted *durante absentia* of an executor who had never proved the will (*u*).

Statute 38 Geo. 3, c. 87, extended the jurisdiction of the Court to cases where the executor had gone abroad after probate obtained.

It was to remedy this inconvenience that the Administration of Estates Act, 1798 (38 Geo. 3, c. 87), was passed, whereby it was enacted : " That at the expiration of twelve calendar months from the death of any testator (*x*), if the executors (*y*) or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his Majesty's Courts of law and equity (*z*), it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next-of-kin, or legatee, grounded on the affidavit (*a*) hereinafter mentioned, to grant such special administration as hereinafter is also mentioned " (*b*).

By the Court of Probate Act, 1857, s. 74, the statute was to apply to cases

It will be observed that the statute applied only to the case of executors or an executor resident out of the jurisdiction, and not to the similar absence of an administrator (*c*). But by the

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(*s*) 4 Burn, E. L. 375 (9th ed.); *Clare* v. *Hedges* (1692), 1 Lutw. 342; *S. C.* cited in *Walker* v. *Woollaston* (1731), 2 P. Wms. at p. 585; *Slaughter* v. *May* (1705), 1 Salk. 42.

(*t*) *Per* Lord Alvanley, C.J., in *Taynton* v. *Hannay* (1802), 3 Bos. & Pull. 26, at p. 30.

(*u*) *Taynton* v. *Hannay* (1802), 2 Bos. & Pull. at p. 30.

(*x*) Under this statute, it was held that the executor must be residing out of the jurisdiction at the time the application is made, but that such application might be made at or *at any time after* the expiration of twelve months from testator's death : *Ruddy* (1872), 2 P. & D. 330.

(*y*) The statute has been held to apply to an executor's executor who is residing out of the jurisdiction : *Grant* (1876), 1 P. D. 435.

(*z*) *I.e.*, out of the reach of the process of the English Courts; *e.g.*, an executor residing in Scotland : *Hannay* v. *Taynton* (1800), 2 Add. 505; *Jouet* (1825), 2 Add. 504. But in the case of the estate of a deceased person who died domiciled within the jurisdiction, a writ of summons can now (R. S. C., Order XI, r. 1) by order of a Judge be served on an executor out of the jurisdiction.

(*a*) The place of this affidavit is now supplied by the administrator's oath.

(*b*) The section concluded, " which administration shall be written or printed upon paper or parchment stamped only with one five shilling stamp, and shall pay no further or other duty to His Majesty, his heirs or successors." This provision as to the stamp was repealed by 44 Geo. 3, c. 98. It is considered that the ordinary estate duty, if not already paid, would be payable.

(*c*) See *Harrison* (1850), 2 Rob. 184.

Court of Probate Act, 1857 (*d*), the provisions of the Act were extended to apply in like manner to all cases where letters of administration had been granted, and the person to whom such administration should have been granted should be out of the jurisdiction of his Majesty's Courts of law and equity.

where administration had been granted, and the administrator was out of the jurisdiction.

The form of the special letters of administration mentioned in section 1 of the statute 38 Geo. 3, c. 87, was set out in section 3 of the statute : they were limited for the purpose of proceedings in equity, and the affidavit to be sworn by the applicant contained an averment that the deponent was desirous of exhibiting a bill in equity for the purpose of being paid his demand out of the assets of the testator. It was accordingly held that the statute authorised a grant only in cases where there were proceedings in equity.

Under 38 Geo. 3, c. 87, grants of administration in such cases were limited for the purpose of exhibiting a bill in equity.

But the Court of Probate Act, 1858, s. 18 (*e*), extended the provisions of 38 Geo. 3, c. 87, and of the Court of Probate Act, 1857, " to all executors and administrators residing out of the jurisdiction of her Majesty's Courts of law and equity, *whether it be or be not intended to institute proceedings in the Court of Chancery*, and to all grants made before and subsequently to the passing of the last-mentioned Act "; and provided : " It shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act."

But by Court of Probate Act, 1858, s. 18, administration *durante absentia* might be granted, whether it were or were not intended to institute proceedings in Chancery.

These enactments were repealed by the Administration of Estates Act, 1925 (*f*), so far only as they apply to deaths occurring after the commencement of that Act, and they are replaced, in the case of deaths occurring on or after January 1, 1926, by section 164 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides :—

Provisions of Judicature (Consolidation) Act, 1925, s. 164.

" (1) If at the expiration of twelve months (*g*) from the death of a person any personal representative of the deceased (*h*) to whom a grant has been made is residing out of the jurisdiction of High Court (*i*), the Court may, on the application of any creditor or person interested in the estate of the deceased, grant to him in the prescribed form special administration of the estate of the deceased.

" (2) The Court may, for the purpose of any legal proceedings to which the administrator under the special administration

(*d*) 20 & 21 Vict. c. 77, s. 74.
(*e*) 21 & 22 Vict. c. 95, s. 18.
(*f*) Section 56 and Sched. II.
(*g*) *Vide supra*, p. 396, note (*x*).
(*h*) *Vide supra*, p. 396, note (*y*).
(*i*) The word " the " seems to have been accidentally omitted. As to the construction of " out of the jurisdiction," *vide supra*, p. 396, note (*z*).

is a party, order the transfer into Court of any money or securities belonging to the estate of the deceased person, and all persons shall obey any such order.

"(3) If the personal representative capable of acting as such returns to and resides within the jurisdiction of the High Court while any legal proceedings to which a special administrator is a party are pending, that personal representative shall be made a party to the legal proceedings, and the costs of and incidental to the special administration and the legal proceedings shall be paid by such person and out of such fund as the Court in which the proceedings are pending may direct."

Rule 117, N.-C.B.

By Rule 117, N.-C. B., applications under this section are to be made upon motion to the Court, and the Court may require notice to be given to persons having a prior right to a grant or to such other persons as it may think fit. A grant under the section may be limited as regards time or portion of the estate or otherwise as the Court may think fit.

Cases in which administration *durante absentia* has been granted.

Under the earlier statutes grants have been made to the personal representative of a legatee, limited to deal with the sum set apart to meet the legacy (*k*); to the father and guardian of infant legatees, limited to their interest in the unadministered estate (*l*); to a residuary legatee, where it was uncertain whether there was any residue, to enable the applicant to become a party to a suit in Chancery, and to receive such amount as the Court might find to belong to such legatee (*m*); to a creditor, where the executor of an executor was out of the jurisdiction, limited to receive a specific fund (*n*); to the assignee in bankruptcy of the administrator, limited to the fund to which the assignee was entitled (*o*); to the nominees of the assignees of the residuary legatee (*p*). Where the original administrator of a deceased intestate could not be found and was believed to be dead, the Court, by virtue of section 74 of the Court of Probate Act, 1857, granted administration *de bonis non* to one of the next-of-kin upon her affidavit that she believed the original administrator, her brother, to be dead or beyond the seas (*q*).

Effect of return of absentee.

When administration during the absence of an executor or next-of-kin is granted *before* probate or administration is taken out by him, such administration ceases on his return to this country (*r*). But with regard to administration *durante*

(*k*) *Collier* (1862), 2 S. & T. 444.
(*l*) *Hampson* (1865), 1 P. & D. 1.
(*m*) *Ruddy* (1872), 2 P. & D. 330.
(*n*) *Grant* (1876), 1 P. D. 435.
(*o*) *Hammond* (1881), 6 P. D. 104.
(*p*) *Campion*, [1900] P. 13.
(*q*) *Saker*, [1909] P. 233.
(*r*) Wms. on Exors. (11th ed.), p. 413. See *Clare* v. *Hedges* (1692), cit. *Walker* v. *Woollaston* (1731), 2 P. Wms. at p. 585.

absentia granted under the statutes, *after* probate or administration granted, it has been held that if the administrator is not appointed for a limited time, but for a particular purpose, the administration does not cease until that purpose is fulfilled (*s*). For the same reason, it was held that where an administrator had been appointed under the statute 38 Geo. 3, c. 87, and the original executor or administrator died, the administration *durante absentia* did not thereby come to an end, nor the authority of the administrator determine (*t*).

Effect of death of absentee.

Section 4.

GRANTS CÆTERORUM AND "SAVE AND EXCEPT."

Whenever any of the limited administrations before referred to, which are limited to part only of the estate of the deceased, or are limited to some particular purpose, have been granted, the persons entitled to the general grant of administration may take out administration *cæterorum—i.e.*, administration of that part of the estate not included in the limited grant (*u*).

Grants *cæterorum.*

So where the assignee of part of the deceased's estate has obtained a grant limited to the particular fund to which he is entitled, or a legatee has obtained a grant limited to the amount of his legacy, or a trustee or *cestui que trust* has obtained administration limited to property of which the deceased was a trustee, those who are entitled to a general grant, whether on intestacy or with the will annexed, may take administration *cæterorum*—administration, that is, of the rest of the deceased's estate.

To supplement grants limited to a particular part of the deceased's estate.

Under the old practice, where the will of a married woman was admitted to probate, the grant, as already stated, was limited to the property the testatrix had a right to dispose of and had disposed of by her will; and in every case the husband was entitled to administration *cæterorum* (*x*). This practice has now been discontinued, and the probate of the will of a married woman is general in form, except in a few exceptional cases mentioned in an earlier Section (*y*). In the exceptional cases where the grant is limited, the husband is entitled to an administration *cæterorum* (*z*).

Grant *cæterorum* to husband of married woman.

(*s*) *Rainsford* v. *Taynton* (1802), 7 Ves. at p. 466.
(*t*) *Taynton* v. *Hannay* (1802), 3 Bos. & Pull. 26, 34.
(*u*) *Harris* v. *Milburn* (1828), 2 Hagg. 62; *Brown* (1872), 2 P. & D. 455.
(*x*) *Vide ante*, p. 80. And see *Reay* (1862), 4 S. & T. 215.
(*y*) *Ante*, pp. 80, 81, 391.
(*z*) *Vide ante*, pp. 81, 391; and see *Leman*, [1898] P. 215; *Donovan* (1898), 78 L. T. 567.

To supplement administration *ad litem.*

Where administration limited to proceedings in Chancery has been granted, and the persons entitled to a general grant apply, a grant *cæterorum* is made to them; the limited grant will not be revoked and a general grant made (*a*).

Not required to supplement a grant *ad colligendum bona.*

A grant *ad colligendum bona*, besides being limited to particular purposes, is usually limited until such time as a general grant shall be made, and therefore determines on a general grant being made to those entitled thereto.

Grants "save and except."

Grants "save and except."—Where a married woman had made a will, and probate thereof had been granted limited to such property as she had the right to dispose of and had disposed of by her will, the husband, as has just been stated,

To husband of married woman testatrix.

was entitled to administration *cæterorum*. If, however, he applied for a grant before the will had been proved, the form of the grant was administration "save and except the property which the testatrix had the right to dispose of and had disposed of by her will."

And in the exceptional cases referred to in an earlier section where a limited grant is still made in respect of the will of a married woman, the husband, if he is the first to apply, may take a grant "save and except" (*b*).

Grants "save and except" settled land.

Cases in which administration is granted "save and except" settled land are discussed in an earlier chapter (*c*).

(*a*) *Harris* v. *Milburn* (1828), 2 Hagg. 62; *Brown* (1872), 2 P. & D. 455.
(*b*) *Leman*, [1898] P. 215; *Donovan* (1898), 78 L. T. 567; *vide supra*, p. 399.
(*c*) *Ante*, Chapter VIII, pp. 232 *et seq.*

CHAPTER XV.

GRANTS UNDER DISCRETIONARY POWERS.

SECTION 1.

DEATHS BEFORE JANUARY 1, 1926.

Power of the Court in granting administration enlarged by section 73.

THE powers of the Court with reference to grants of administration both on intestacy and with the will annexed were greatly enlarged by section 73 of the Court of Probate Act, 1857 (*a*), which still applies in cases where the testator or intestate died before January 1, 1926, but not otherwise (*b*).

Provisions of that section.

That section provides : " Where a person has died or shall die wholly intestate as to his personal estate (*c*), or leaving a will affecting personal estate (*c*), but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland (*d*), and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate (*c*) of the deceased, or of any part of such personal estate (*c*) other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate (*c*), it shall not be obligatory upon the Court to grant administration of the personal estate (*c*) of such deceased person to the person who, if this Act had not passed,

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(*a*) 20 & 21 Vict. c. 77, s. 73.

(*b*) Section 73 of the Court of Probate Act, 1857, was repealed by the Administration of Estates Act, 1925, s. 56, and Sched. II, but only so far as it applies to deaths occurring after the commencement of that Act, *i.e.*, January 1, 1926; and section 162 of the Judicature (Consolidation) Act, 1925, which replaces it in respect of deaths on or after January 1, 1926 (*vide infra*, Section 2), provides by sub-section 3 : " This section shall apply only in the case of persons dying after the date of the commencement of this Act, and the High Court in granting administration in the case of persons dying at any time before that date shall act in accordance with the principles and rules in accordance with which it would have acted if this Act had not passed."

(*c*) The provisions of the section are extended so as to apply to real estate in the case of persons dying on or after January 1, 1898, by the operation of section 2 of the Land Transfer Act, 1897, now repealed and replaced by section 2 of the Administration of Estates Act, 1925.

(*d*) This expression must now be read subject to Art. 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (Stat. R. & O. 1923, No. 405), as exclusive of the Irish Free State.

would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator, upon his giving such security (if any) as the Court shall direct; and every such administration may be limited as the Court shall think fit."

Under what circumstances grants under section 73 may be made.

To enable the Court to have recourse to the powers conferred upon it by this section, the following conditions must be satisfied :—

(1) The deceased must have died intestate, *or*
The will of the deceased must contain no appointment of an executor who is willing and competent to act, *or*
The executor appointed by the will of the deceased must be resident out of the United Kingdom, *and*

(2) The estate must be insolvent, *or*
There must be special circumstances which render it necessary or convenient for the Court to depart from the ordinary practice with reference to grants of administration.

When these circumstances coincide there is no limit to the discretion of the Court to grant administration to such person as the Court shall think fit (*e*).

It is proposed to consider in detail the cases in which the Court has had recourse to the special powers conferred upon it by the section.

(1) Executor passed over.

(1) The Court has, under section 73, passed over an executor appointed by the will of the testator; and in some cases a grant has been made under this section without requiring the executor to be cited.

Whether the Court has power to pass over an executor who is resident in this country.

In *Samson* (*ee*) Sir J. Hannen said : " The seventy-third section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this Court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate or other special circumstances. This provision gives me power, where the executor is resident out of the country, if I think he is, by reason of his position there or his bad character, unfitted to act, to exercise a discretion and refuse him the appointment. But it is plain that I must not, merely because the executor is out of the country at the time of the testator's death, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so." In the following cases, however, a more extended construction appears to have been given to the section. In *Wright* (*f*) the executor, shortly after the testator's death, disappeared and a warrant for his arrest had been issued; his whereabouts were unknown. Sir F. H. Jeune, although he did not consider that

(*e*) The section does not confer power to substitute one kind of administration for another : *Smith* (1858), 27 L. J. P. 105.
(*ee*) (1873), 3 P. & D. 48, at pp. 49, 50.
(*f*) (1898), 79 L. T. 473.

the evidence warranted him in drawing the inference that the executor was resident abroad, thought that section 73 extended to the case, and justified his passing over the executor in favour of the testator's widow (the universal devisee and legatee for life under the will) and eldest son (one of the beneficiaries under the will). And in *Drawmer* (*g*), where the sole executor was undergoing imprisonment for conspiracy and had refused to renounce, Bargrave Deane, J., passed over the executor and granted administration with the will annexed to one of the residuary legatees. In *Ray* (*h*), where property was left to an executor in trust for a minor, Lord Merrivale, P., passed over the executor, who had been served with notice of motion, but was not represented, on proof that his interest was adverse, that he had delayed obtaining probate and that he was unfit, although he resided in England and apparently was competent and not unwilling to act. And in *Potticary* (*i*), Hill, J., after argument, passed over executors who had neglected their duty and had been guilty of misrepresentation, though both were resident in England and protested their willingness to prove the will.

Executor absent from kingdom at death of testator.

The deceased executed a will in which she appointed an executor who subsequently became bankrupt, and before the death of the testator had left this country for Australia. The property being small, on the consent of the next-of-kin, the Court granted administration (will) to *one of the parties interested under the will* (*k*).

The testator by his will appointed two executors, of whom, at the time of the testator's death, one was dead and the other was in Brazil, the date of his return being uncertain. The Court, upon proof that there was urgent need of immediate representation, made a grant to the *guardian of the universal legatee* under the will (*l*).

A testator by his will nominated two executors, both of whom at the time of his death were resident out of the United Kingdom. The will contained a paragraph requesting H B R, *the partner of one of the executors*, to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator to the estate of the deceased, and the Court granted administration (will) to H B R until such time as one or other of the executors should come in and take a grant of probate (*m*).

Where an executor, before the death of the testator, left the country under an assumed name, having sold all his effects, and there was reason to believe that he did not intend to return, administration (will) was granted to the *sole beneficiary under the will*, without requiring the executor to be cited (*n*).

A sole executor fled the country under fear of criminal proceedings seven years before the testatrix's death and had not since been heard of. On the application of *one of two residuary legatees*, with the consent of the other, the executor was passed over without citation, and administration with the will annexed was granted to the applicant (*o*).

Where the executors named in the will and the only known relative of the testator were resident in territory occupied by the enemy, the Court, under section 73, granted administration with the will annexed to the *Public Trustee* until further representation should be granted (*p*).

Executor leaves kingdom after death of testator.

In the preceding cases the executors had left the kingdom before the death of the testator, but in *Massey* (*q*), where the executor took some steps towards obtaining probate and *afterwards* departed from the country in embarrassed circumstances, leaving no address, and apparently without any intention of

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(*g*) (1913), 108 L. T. 732.
(*h*) (1926), 96 L. J. P. 37.
(*i*) [1927] P. 202.
(*k*) *Cooper* (1869), 2 P. & D. 21; *Wohlgemuth* (1910), 54 Sol. Jo. 460.
(*l*) *Batterbee* (1889), 14 P. D. 39.
(*m*) *Taylor*, [1892] P. 90.
(*n*) *Crawshay*, [1893] P. 108.
(*o*) *Williams*, [1918] P. 122.
(*p*) *Krejewsky* (1918), 34 T. L. R. 184.
(*q*) [1899] P. 270.

returning, the Court, without requiring notice to be given to the executor, granted administration (will) to *one of the residuary legatees*, all parties interested under the will consenting. In this case the estate was of substantial value.

Executor not competent to act.

Where the sole executrix and universal legatee was a lunatic, and a creditor of the deceased testator applied for a grant of administration (will) and had served a citation on the guardian of the lunatic, who refused to allow personal service on the lunatic, the Court granted administration to the *creditor* without requiring the lunatic to be personally served (*r*).

A testatrix, by her will, appointed her daughter, who was under age, sole executrix, and certain persons *trustees for the daughter* until she should be of legal age. In a subsequent part of the will she directed the trustees, in case her daughter should die before coming of age, to divide the residue in a particular way. The Court refused to grant probate of the will to the trustees as executors according to its tenor, but granted administration (will) to them under section 73, by reason that the testatrix had not appointed by her will an executor competent to take probate thereof (*s*).

Executor cannot be ascertained.

Where an aged testator gave instructions that William George, of 4, Finsbury Square, watchmaker, should be his executor, and on the death of the testator it appeared that neither he nor his family knew any one of that name, and that no such person could be found or heard of at that address, the Court granted administration with the will annexed to *one of the residuary legatees*, all parties interested consenting, there being no appointment of an executor willing or competent to take probate (*t*).

(2) Grant to person entitled by the law of the deceased's domicil.

(2) The Court will grant administration under section 73 of the Court of Probate Act, 1857, to the person entrusted with the administration of the estate by the Court having jurisdiction at the place of the domicil of the deceased at the time of his death (*u*).

(3) Persons primarily entitled to the grant passed over without citation.

(3) The Court has, in granting administration under this section, passed over persons entitled to the grant in priority to the applicant; and, in granting administration as aforesaid, has dispensed with notice to or citation of the person so entitled in priority.

But a case of pressing necessity must be made out.

But administration will not be granted under this section to a person not by law entitled to a grant, when the person who is entitled has not been cited, unless the Court is satisfied that a case of pressing necessity has been made out. A general statement upon affidavit that "it is necessary for the preservation of the estate and effects of the deceased that administration should be granted" will not satisfy the Court (*x*).

Husband passed over.

Husband passed over.—Upon an application for administration with the will annexed, it appeared that the testatrix had been deserted by her husband fifteen years prior to her death, and had not heard of or from him after such desertion. On being satisfied that there was urgent need of an immediate grant, the Court granted administration to a son of the testatrix who was under her will

(*r*) *Atherton*, [1892] P. 104.
(*s*) *Stewart* (1875), 3 P. & D. 244.
(*t*) *Sawtell* (1862), 2 S. & T. 448.
(*u*) *Cosnahan* (1866), 1 P. & D. 183; *Earl* (1867), 1 P. & D. 450. See *Moffatt*, [1900] P. 152; and *vide ante*, p. 22. Such a grant may now issue on a registrar's order. *Vide post*, p. 479.
(*x*) *Cooke* (1859), 1 S. & T. 267.

trustee of substantially the whole of her estate, without requiring the husband to be cited (*y*).

A wife died intestate. Her husband survived her, and she left a son by a former marriage, a minor, who was her heir-at-law. On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, the Court granted administration to *the guardian of the infant heir-at-law* (*z*).

Husband's representatives passed over.

The conviction of a husband of the murder of his wife was held to be a "special circumstance" within the meaning of the section, and the Court passed over the legal personal representatives of the husband and granted administration to the estate of the intestate wife, upon the application of *one of her next-of-kin* (*a*).

Widow passed over.

Widow passed over.—The widow may be passed over for good cause shown, and the grant made to the next-of-kin, without the necessity of recourse to the special powers conferred on the Court by section 73 (*b*).

In *Middleton* (*c*) the Court refused to grant administration under section 73 to the next-of-kin, passing over the widow, who was alleged to have contracted a bigamous marriage, and was resident in America. Butt, J., said: "I do not think such a grant has ever been made without giving the person against whom such charges are alleged the opportunity of answering them. . . . I am afraid I must require you to cite the widow" (*d*).

Where several unsuccessful attempts had been made to serve a citation upon the widow, who had previously refused to apply for a grant, the Court granted administration to a *creditor* without requiring the widow to be served (*e*).

Where the widow of a deceased intestate, who died in India, was resident in India and had received her share of the intestate's estate, and the rest had been transmitted to England for distribution amongst the parties entitled thereto, the Court refused to make a general grant to the *personal representative of a deceased next-of-kin*, but granted administration to him under section 73 limited to the property transmitted to England (*f*).

Next-of-kin, etc., passed over.

Next-of-kin, etc., passed over.—An intestate left four children of whom one was of full age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under section 73, without notice to the major next-of-kin, granted administration to the *guardian of the minors* for their use and benefit, limited until one of the children should apply for a grant (*g*).

But the Court refused to grant administration (will) to the *guardian elected by two residuary legatees*, who were minors, without notice to the other two residuary legatees, both of whom were abroad and one of whom was of full age, when no special circumstances were put forward which convinced the Court that such a grant was necessary or convenient (*h*).

Where the sole executrix and universal legatee had died in the testator's lifetime, and the next-of-kin was abroad and could not be found, the Court, on being satisfied that an immediate representation was necessary, granted

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(*y*) *Shoosmith*, [1894] P. 23.

(*z*) *Ardern*, [1898] P. 147. A husband has also been passed over under the section in *Turner* (1886), 12 P. D. 18. *Vide ante*, pp. 289, 290.

(*a*) *Crippen*, [1911] P. 108; cf. *Hall* v. *Knight*, [1914] P. 1.

(*b*) *Vide ante*, pp. 294—296; and see *Paine* (1916), 33 T. L. R. 98 (where the widow had opposed an intestacy and had adverse claims to the estate, and was passed over in favour of the intestate's daughter).

(*c*) (1888), 14 P. D. 23.

(*d*) See, as to the cases in which the widow *may* be passed over without citation, *ante*, pp. 294—296.

(*e*) *Bishop* (1913), 108 L. T. 928.

(*f*) *Hughes* (1873), 3 P. & D. 140; cf. *Walker* v. *Carless* (1758), 2 Lee, 560; and *vide ante*, p. 295.

(*g*) *Burgess* (1863), 4 S. & T. 188; cf. *Cartright's Case* (1678), 1 Freem. 258; *ante*, p. 364.

(*h*) *Cooke* (1859), 1 S. & T. 267.

administration (will) to the *guardian of persons entitled in distribution*, who were minors, without citing the next-of-kin (*i*).

The Court, without requiring citation of the next-of-kin, to whom repeated applications had been made to take some steps in obtaining a grant, made a grant of administration with the will annexed to the sole beneficiary under the will (no executor or residuary legatee) limited to the property specifically given to her by the will (*k*).

Where a widow died without having taken administration to her husband's estate, which was of the net value of under £500, and, as he died without issue, belonged exclusively to her under section 1 of the Intestates' Estates Act, 1890, the Court granted administration to the *executor of the widow*, passing over the next-of-kin of the husband without citation (*l*).

The value of the whole property of an intestate, who died leaving a widow, but no issue, did not exceed £500. The widow was a pauper lunatic, and her father renounced his right to take a grant on her behalf. Administration for the use and benefit of the widow was granted under section 73 to a person nominated by the guardians of the union to whom she was indebted for her maintenance, without citing the next-of-kin of the intestate, who had no interest in his estate (*m*).

Where the estate was small, and the *executor of one of the next-of-kin* applied for a grant, the Court relaxed the general rule requiring a person directly entitled in distribution to be cited before a grant is made to the representatives of the next-of-kin, and granted administration under section 73 to the applicant, without requiring the citation of a person entitled in distribution, who was abroad and had not been heard of for many years (*n*).

Grant to creditors.

Grants to Creditors.—In *Hawke* v. *Wedderburne* (*o*) Sir J. P. Wilde said: "Where there is any doubt as to the fact of the insolvency of the estate, the Court clearly ought not to pass over the persons entitled under the statute in case of intestacy or under a will, although the words of the seventy-third section may perhaps be wide enough to give it power to do so." In that case the learned Judge refused to grant administration to a creditor, since the insolvency of the estate was disputed, and granted administration with the will annexed to the widow of the testator, who was the *residuary legatee* under his will.

In *Farrands* (*p*) administration was granted to a creditor under this section, passing over the *next-of-kin* of the intestate, who was a woman in a low position in life, and quite unfitted to carry on or wind up the business of the deceased, who had been a paper manufacturer. The insolvency of the estate was disputed, and Sir James Hannen said: "What should be the character of the special circumstances which may guide the Court in exercising its discretion? It would seem that insolvency of the estate is only given as an example, and I cannot conceive any reason for setting aside a next-of-kin on the ground of the insolvency of the estate, which would not be peculiarly applicable when the person entitled to the grant appears to be entirely unfitted for the office."

The Court granted administration with the will annexed to a creditor, passing over the *sole executrix and residuary legatee*, who was a lunatic, and, since the creditor had served a citation upon the guardian of the lunatic, did not require the lunatic to be personally served (*q*).

In granting administration of a small estate to a creditor, the Court

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(*i*) *See* (1879), 4 P. D. 86.
(*k*) *Baldwin*, [1903] P. 61. *Vide ante*, p. 388.
(*l*) *Bryant*, [1896] P. 159; *Green* (1901), 84 L. T. 61. Cf. *Rees* v. *Cart* (1718), 2 Hagg. App. 161.
(*m*) *Everley*, [1892] P 50. *Vide post*, p. 407.
(*n*) *Kinchella*, [1894] P. 264. Cf. *Middleton* (1828), 2 Hagg. 60; *Carr* (1867), 1 P. & D. 291.
(*o*) (1868), 1 P. & D. 594.
(*p*) (1876), 1 P. D. 439.
(*q*) *Atherton*, [1892] P. 104.

dispensed with the citation of the *next-of-kin*, on proof that they had received notice of the application (*r*).

(4) The Court has, under section 73, granted administration *durante minoritate* without requiring the next-of-kin, or the person primarily entitled to the grant, to be cited.

(4) Administration *durante minoritate* without citing next-of-kin of minor.

The Court granted administration *durante minoritate* to the guardian elected by minors for their use and benefit, without requiring renunciation or citation of their next-of-kin, where the property was very small, and the next-of-kin were in Australia, and their interest was infinitesimal (*s*).

Where, of the next-of-kin of the minor, one had renounced and the other was resident out of the jurisdiction, a grant was made to the *paternal aunt* of the minor, whom she had elected as her guardian (*t*).

(5) The Court has, under section 73, made grants of administration for the use and benefit of a lunatic passing over the person primarily entitled to that species of grant.

(5) Administration for the use and benefit of a lunatic.

The sole next-of-kin of the deceased intestate was a person "not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing her affairs," within the meaning of sub-section 1 (d) of section 116 of the Lunacy Act, 1890. Her estate was administered by a person appointed to act with the powers of a committee under sub-section 2 of such section. The Court made a general grant of administration, under section 73, to the person thus appointed, for the benefit of the next-of-kin (*u*).

When the sole next-of-kin of a deceased intestate was a lunatic without any committee, administration for her use and benefit was granted to her *stepmother* without citing her next-of-kin (*y*).

The Court has, under this section, granted administration for the use and benefit of a lunatic to persons to whom the lunatic was indebted for his maintenance and support, and who were thus *creditors of the lunatic* (*z*).

Thus where the next-of-kin of the deceased was a pauper lunatic, and had for some years been maintained at the charge of the Hamlet of Mile End Old Town, there having been appointed no committee of her person or estate, the Court granted administration to the clerk of the Guardians of the Poor of the Hamlet for the use and benefit of the lunatic limited to the period of her lunacy (*a*).

Grants were made under similar circumstances to the nominee of the institution to which the lunatic was indebted for his or her maintenance and support in *Eccles* (*b*) and *Hockin* (*c*). And in *Everley* (*d*), where the value of

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(*r*) *Teece*, [1896] P. 6; see *Heerman*, [1910] P. 357; cf. *Bishop* (1913), 108 L. T. 928; *supra*, p. 277; and *vide post*, p. 462.

(*s*) *Hagger* (1863), 3 S. & T. 65; *Webb* (1888), 13 P. D. 71.

(*t*) *Batterbee* (1889), 14 P. D. 39. And see further, as to grants of administration *durante minoritate* under this section, *Burgess* (1863), 4 S. & T. 188; *Lilley* (1897), 76 L. T. 164; *See* (1879), 4 P. D. 86; *Webb* (1888), 13 P. D. 71; and *ante*, pp. 405, 406.

(*u*) *Leese*, [1894] P. 160. See *Cooke*, [1895] P. 68; and *vide ante*, p. 371.

(*y*) *Burrell* (1858), 1 S. & T. 64. And see further, as to this species of grant, *Slumbers* (1865), 4 S. & T. 32; *Hastings* (1878), 4 P. D. 73; *Everley*, [1892] P. 50; *Hockin* (1895), 73 L. T. 316; *Findlay* (1863), 3 S. & T. 265; *Eccles* (1889), 15 P. D. 1.

(*z*) As to the position of such persons as creditors, see *Windeatt* v. *Sharland* (1871), 2 P. & D. 217.

(*a*) *Findlay* (1863), 3 S. & T. 265.

(*b*) (1889), 15 P. D. 1.

(*c*) (1895), 73 L. T. 316.

(*d*) [1892] P. 50.

the whole property of an intestate, who died leaving a widow, but no issue, did not exceed £500, and the widow was a pauper lunatic, a grant was made to the nominee of the union to which the widow was indebted for her maintenance, without citing the next-of-kin of the intestate, who had no interest, for the whole estate, by virtue of the Intestates' Estates Act, 1890, belonged absolutely to the widow.

Where the only next-of-kin of an intestate were of very advanced age, and were unwilling to take upon themselves the burden of administration, administration was, at their desire, granted to their son for their use and benefit (*e*).

(6) Administration for the use and benefit of next-of-kin out of the kingdom.

(6) Where there was urgent necessity for an immediate grant, and the person entitled thereto was out of the kingdom, the Court has granted administration under section 73 for his use and benefit until such time as the grant could be made to the person entitled or his lawful attorney.

Thus when, at the death of the intestate, his son and only next-of-kin was in New Zealand, the Court, on being satisfied that an immediate representation was necessary for the preservation of the personal estate, granted administration to the *sister of the intestate* for the use and benefit of the next-of-kin, limited until such time as the grant should be made to the next-of-kin or his lawful attorney (*f*).

Grants were made in the same form and under similar circumstances in *Jones* (*g*) to the *father-in-law* of the absentee next-of-kin, and in *Suarez* (*h*) to a *member of a firm of accountants* in whose hands the books of the intestate's firm had been placed.

But the Court must be satisfied, before making a grant of this description, that an immediate grant is necessary for the preservation of the property. Thus in *White* (*i*), where there was no evidence to this effect, a grant was refused.

Where the person solely entitled to a grant was abroad, and it was not known where she was or when she would return, and there was a sum of money payable to the estate of the deceased, the Court granted administration to a person whom the absentee had duly authorised by power of attorney to manage her property in England, although the terms of the power were not wide enough to admit of the attorney taking out administration on behalf of the absentee (*k*).

When the sole next-of-kin, who was resident abroad, had written a letter to his cousin in England giving the latter directions to deal with the estate of the deceased in a certain way, the Court made a grant to the cousin limited to carrying into effect the directions contained in the letter (*l*).

(7) Administration where an uncertainty exists as to whether person entitled to a grant in priority to applicant, survived the testator or intestate:

(7) The Court has made grants under this section:

(i.) In cases where the date of the death of the intestate or testator could not precisely be ascertained, and it was uncertain whether he died before or after the person who, if the survivor, would have been entitled to a grant.

(ii.) Without requiring citation of the person primarily entitled to a grant, who had not been heard of for a

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(*e*) *Roberts* (1858), 1 S. & T. 64; but *vide post*, pp. 409—411.
(*f*) *Cholwill* (1866), 1 P. & D. 192.
(*g*) (1858), 1 S. & T. 13.
(*h*) [1897] P. 82.
(*i*) (1862), 2 S. & T. 457.
(*k*) *Escot* (1858), 4 S. & T. 186.
(*l*) *Drinkwater* (1862), 2 S. & T. 611.

long period, and might reasonably be presumed to be dead.

or whether person primarily entitled to a grant is still alive.

Thus in *Peck* (*m*) A, a bachelor, had gone to Australia, and had not been heard of for seven years. His father died intestate at about two years and five months before the expiration of the seven years, and no personal representation had been taken out to the father. It being uncertain whether A had died before or after his father, the Court granted administration to A's estate, under section 73, to his sister as one of his next-of-kin. This case was followed in *Harling* (*n*), where a person was presumed to have died intestate in or since 1863, and his father died in 1866 also intestate. A grant was made to the brother of the presumed deceased, no representative of the father's estate having been appointed.

Again, in *Smith* (*o*), where the father of the deceased had not been heard of for seven years, the Court, although refusing to presume that the father had died at any given period within the seven years, granted under section 73 administration of the effects of the son, who had died four years after the father had last been heard of, to the mother, without requiring her first to take out administration to the father.

In *Callicot* (*p*), the intestate died in 1898. His son, who, if alive, would have been entitled to administration as sole next-of-kin, had left the country in 1872, and not been heard of since. The Court allowed a grandson of the intestate to take a grant under section 73 without requiring the missing next-of-kin to be cited by advertisements, but, following *Reed* (*q*), required the applicant to swear that he believed himself to be the sole next-of-kin of the intestate.

A grant was made under similar circumstances, and with the same requirement, in *Byrne* (*r*) and in *Chapman* (*s*), and the headnote of the latter case contains the following passage : " Where the special circumstances justify the conclusion that the person who would be entitled in priority to the applicant may be reasonably presumed to be dead, the Court should grant administration to the applicant upon his swearing that he believes himself to be the next-of-kin of the deceased " (*t*).

But each case of this nature must be decided on its own merits, and where the facts upon which the conclusion is sought to be based are not sufficiently strong, citation of the person who, if alive, would have the prior right to administration will be required in accordance with the general rule (*u*).

(8) The Court has, but only in very exceptional cases, granted administration under this section to mere nominees of the persons entitled to a grant.

(8) Grants to mere nominees of the persons entitled.

In *Roberts* (*x*), where the sole next-of-kin, on account of their great age, were desirous that the administration should be granted to their son, who had no interest in the estate, a grant was made under section 73 to the son, for their use and benefit. And in *Farrell* v. *Brownbill* (*y*) the Court decided to grant administration, with the consent of all the parties interested in the property of the deceased, to their nominee, who took no interest in the property himself (*z*).

(*m*) (1860), 2 S. & T. 506.
(*n*) [1900] P. 59.
(*o*) (1861), 2 S. & T. 508.
(*p*) [1899] P. 189.
(*q*) (1874), 29 L. T. 932.
(*r*) (1901), 84 L. T. 570.
(*s*) [1903] P. 192.
(*t*) See *Love* (1901), 17 T. L. R. 721; *Bowden* (1905), 21 T. L. R. 13. But see *Jackson* (1902), 87 L. T. 747, where doubt was cast on the case of *Reed* (1874), 29 L. T. 932, and the report of that case was said to be inaccurate.
(*u*) *Pridham* (1889), 61 L. T. 302; *Harper*, [1899] P. 59.
(*x*) (1858), 1 S. & T. 64.
(*y*) (1864), 3 S. & T. 467.
(*z*) But see Lord Penzance's remarks on this case in *Teague* v. *Wharton* (1871), 2 P. & D. 360.

But in *Bullar* (*a*) Lord Penzance refused to grant administration to the nominee of universal legatees, who were anxious that administration should be granted to him, and indicated that the right course would be for the persons entitled to take a grant and then to appoint the nominee to be their attorney. And in *Richardson* (*b*) the same learned Judge refused to lay down the rule that whenever the parties interested like to consent that some person nominated by them shall take the grant, the Court will make the grant to such nominee under section 73, and where an application of that nature rested simply upon the ground that the parties interested consented to it, he rejected the application.

Semble, the consent of all persons interested not sufficient to justify grant to mere nominee.

In *Teague* v. *Wharton* (*c*) where the next-of-kin were unable to agree amongst themselves which of them should take administration of the deceased's estate, and were all willing that such administration should be granted to a nominee who had no interest therein, Lord Penzance again held that the mere fact of their agreement was not a special circumstance to justify the Court in making a grant to the nominee under section 73.

In *Hale* (*d*) the will of the deceased had been set aside by reason of an informality in the execution, and the widow and children had entered into an arrangement by deed to carry out the provisions of the will, in spite of its informality. They were desirous that administration should, under section 73, be granted to the executors named in the will, as the nominees of the persons entitled, though the executors had no interest in the estate. Sir J. Hannen refused to make such a grant, and followed the rule laid down by Lord Penzance that the mere fact that the persons who would be entitled to administration desire that some one else should be appointed administrator, does not constitute such a special state of circumstances as to justify a grant under section 73 (*e*).

However, in *Whitlark* v. *White* (*f*) the Court, with the consent of all persons interested, made a grant of letters of administration with the will annexed under section 73, to persons named as executors in another testamentary document which was pronounced against and probate of which was revoked, Sir Samuel Evans, P., holding that there was power under section 73 to take that course, which was the most convenient in the circumstances.

In *Brotherton* (*g*), where under an intestacy, the sole next-of-kin, a daughter of the deceased, renounced, and the husband of a deceased next-of-kin also renounced and expressly consented to a grant being made to the brother of the deceased, Gorell Barnes, J., held that no special circumstances had been shown to bring the case within section 73 (*h*).

But where, in addition to the consent of all persons interested, there are other special circumstances, administration may be granted to a mere nominee of the parties.

But where, besides the fact that the persons entitled to administration desire that some one else should be appointed administrator, there are in addition other special circumstances—such, for instance, as an agreement to terminate litigation—which render such a grant convenient and desirable, it would seem that a grant may be made under this section to a mere nominee without interest in the estate.

Thus in *Hopkins* (*i*), a doubt having arisen as to the legitimacy of the sole next-of-kin, a deed was entered into by the parties interested for the distribution of the deceased's estate amongst themselves in certain proportions, and it was a part of the arrangement that administration should be applied for by a person who had under no circumstances an interest in the estate. It was held that there were special circumstances in the case which authorised the Court to grant administration to the nominee under section 73. A similar grant was made in *Minshull* (*k*), where the facts were very similar to those in the preceding case, to the next-of-kin whose legitimacy was disputed.

(*a*) (1870), 22 L. T. 140.
(*b*) (1871), 2 P. & D. 244.
(*c*) (1871), 2 P. & D. 360.
(*d*) (1874), 3 P. & D. 207.
(*e*) See also *Prosser* (1876), 11 Ir. Rep. Eq. 37.
(*f*) [1915] P. 24.
(*g*) [1901] P. 139.
(*h*) But see *Keane* (1828), 1 Hagg. 692; *Johnson* (1862), 2 S. & T. 595; *Trigg*, [1901] P. 42; and *vide ante*, p. 307.
(*i*) (1875), 3 P. & D. 235.

Again, where all parties interested in the estate of the deceased had entered into a compromise, with a view to putting an end to all further disputes and litigation, upon the basis that B, a stranger in blood, who had been employed by the deceased in auditing his accounts, should apply for and obtain a grant of administration with the will annexed, the Court, upon his application, and subject to the consents of all persons interested in the estate, made a grant to him under section 73. Gorell Barnes, J., said that he made the grant "partly on account of the litigation, which it is desired by all persons interested in the estate to put an end to, and partly also on account of the position of the applicant in relation to the estate" (*l*).

(9) Under special circumstances the Court has made joint grants of administration under section 73 to the widow and a person entitled in distribution (not next-of-kin); and to one of the next-of-kin and a person entitled in distribution.

(9) Joint grants.

In *Browning* (*m*) an application was made for a joint grant of administration to the widow of the intestate and a nephew of the intestate, one of the persons entitled in distribution to his effects. The application was made as a result of an arrangement between the parties, and in consideration of the withdrawal of a caveat. Sir C. Cresswell said: "I am of opinion that the statute 21 Hen. 8, c. 5, precludes me from joining the nephew, who is only a person entitled in distribution, and not next-of-kin, in the grant. Neither can I make the grant under section 73."

In *Grundy* (*n*), however, a joint grant of administration *de bonis non* was made under section 73 to a next-of-kin and to a person entitled in distribution, the next-of-kin consenting to the grant, there being special circumstances rendering such joint grant convenient. The learned Judge (Sir J. P. Wilde), referring to the question whether the Court was bound to follow the strict rule laid down by the statute 21 Hen. 8, c. 5, said: "I am of opinion that the terms of section 73 are wide enough to admit of its application to the present case."

In *Richardson* (*o*) the same learned Judge held that the consent of all the persons interested was not in itself a sufficient ground for making a joint grant under the section to two of the persons interested in distribution and to a nominee of the next-of-kin, where there were not in addition special circumstances which justify an exceptional grant.

In *Clayton* (*p*), under special circumstances, the estate being insolvent, the Court made a joint grant to a residuary and to a specific legatee at the desire of the creditors of the estate.

In *Walsh* (*q*), a widow died intestate leaving a brother, her sole next-of-kin, and nine nephews and nieces, who, with the brother, were the only persons entitled in distribution. The Court made a joint grant to the brother and one of the nephews under section 73 without requiring the consent of three of the nephews and nieces, who were in Australia.

(10) In special circumstances the Court has, under this section, granted administration to persons who had no direct interest in the estate of the deceased, but had a claim against the estate of the person primarily entitled to a grant.

(10) Grant to creditor, etc., of the person primarily entitled to the grant.

Where the father of an intestate, who was her sole next-of-kin, had died without taking out a grant to her estate, the Court granted administration to a

(*k*) (1889), 14 P. D. 151.
(*l*) *Potter* v. *Potter*, [1899] P. 265; and cf. *Whitlark* v. *White*, [1915] P. 24; cit. *supra*, p. 410.
(*m*) (1861), 2 S. & T. 634.
(*n*) (1868), 1 P. & D. 459.
(*o*) (1871), 2 P. & D. 244.
(*p*) (1886), 11 P. D. 76.
(*q*) [1892] P. 230.

creditor of the father, on his personal representative filing a renunciation and consent (*r*).

Where the husband of a deceased intestate had left the country, and had been adjudicated bankrupt before he had administered to his wife's estate, the Court refused to regard his right to administer as " property divisible among his creditors " under section 44 of the Bankruptcy Act, 1883, but under the circumstances made a grant of administration to the wife's estate to the husband's trustee in bankruptcy, without requiring the husband to be cited (*s*).

(11) Grant to person whose claim cannot be put on any recognised footing.

(11) Under very special circumstances the Court made a grant under section 73 to a person whose claim to administration could not be put " on any footing recognised by the practice of the Court."

An intestate died owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a stranger in blood, and after his death his debts were voluntarily paid by C. There were only two next-of-kin and persons entitled in distribution, and of these one renounced and the other was a lunatic, and his next-of-kin renounced on his behalf. There was thus no one willing or able to take a grant as next-of-kin or person entitled in distribution or creditor. Under the peculiar circumstances the Court granted administration of the intestate's estate to C. under section 73, although the applicant could not put his right to the grant on any footing recognised by the practice of the Court (*t*).

(12) Grants where persons entitled to assets were alien enemies.

(12) During the recent war, where the persons entitled to the assets of the deceased were alien enemies, grants were made under section 73 to the Public Trustee, as custodian of enemy property under the Trading with the Enemy Amendment Act, 1914 (*u*).

SECTION 2.

DEATHS ON OR AFTER JANUARY 1, 1926.

Provisions of Judicature (Consolidation) Act, 1925, s. 162.

Section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, which replaces in the case of persons dying on or after January 1, 1926, the provisions of section 73 of the Court of Probate Act, 1857, enacts as follows :—

" (1) In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted

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(*r*) *Fraser* (1867), 1 P. & D. 327; *Wensley* (1882), 7 P. D. 13.

(*s*) *Turner* (1886), 12 P. D. 18; *vide ante*, p. 311; and see *Bowron* (1915), 84 L. J. P. 92.

(*t*) *Bateman* (1871), 2 P. & D. 242; cf. *O'Reilly*, [1920] 2 I. R. 254 (under section 78 of the Probate (Ireland) Act, 1857, the Court may, in a proper case, give liberty to a stranger, passing over the next-of-kin, to apply for a grant of administration, if, on the facts, the Judge is satisfied that it is expedient to do so).

(*u*) 5 Geo. 5, c. 12, *vide ante*, p. 38. And see the following cases : *Schiff*, [1915] P. 86; *Grundt*, [1915] P. 126; *Oetl*, *ibid.*; *Koenigs*, [1915] W. N. 24; *Bluhm*, [1920] W. N. 387; *May* (1921), 38 T. L. R. 210; *Busche*, [1922] P. 30.

to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and any such administration may be limited in any way the Court thinks fit:

"Provided that where the deceased died wholly intestate as to his estate, administration shall—

"(a) Unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose; and

"(b) As regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement if willing to act.

"(2) This section shall apply only in the case of persons dying after the date of the commencement of this Act, and the High Court in granting administration in the case of persons dying at any time before that date shall act in accordance with the principles and rules in accordance with which it would have acted if this Act had not passed."

In what respects the section differs from section 73 of the Court of Probate Act, 1857.

It will be observed that the section in empowering the Court to grant administration to persons other than those interested in the residuary estate of the deceased where by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient, confines that enabling provision to cases where the deceased died wholly intestate, and omits the words which in section 73 of the Court of Probate Act, 1857, follow after the words "where a person has died or shall die wholly intestate as to his personal estate," namely "*or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland.*" Reasons have been given in an earlier chapter (*x*) for considering that this omission is not designed to deprive the Court, in cases where the deceased left a will, of exercising the same discretion as it possesses under the section where the deceased died wholly intestate, and these reasons may conveniently be recapitulated and restated here.

The statute 21 Hen. 8, c. 5, s. 2, enjoined the Ordinary, where the executor named in any testament refused to prove the said testament, to grant administration of the goods of the testator to the widow, or the next-of-kin, or to both, as by

(*x*) *Ante*, Chap. XII, pp. 338, 339.

the discretion of the said Ordinary should be thought good, and although, contrary to the letter of the statute, it was the practice of the Court to prefer the residuary legatee (*y*), the widow or the next-of-kin had, under these provisions, a statutory claim to the grant (*z*). Therefore, when section 73 of the Court of Probate Act, 1857, was passed, and a discretion in granting administration was to be conferred on the Court, it was necessary to deal with grants of administration with the will annexed, and this was done by the inclusion of the words italicised above. But the statute 21 Hen. 8, c. 5, s. 2, is repealed by the Administration of Estates Act, 1925, and its place is taken, in the case of persons dying on or after January 1, 1926, by the section of the Supreme Court of Judicature (Consolidation) Act, 1925, now under consideration. That section, in so far as it deals with grants of administration with the will annexed, is permissive merely and gives no person a statutory claim to that form of grant : the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof are to be regarded, and administration with the will annexed *may* be granted to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, *may* be granted to the trustees of the settlement, and any such administration may be limited in any way the Court thinks fit. Such administrations being by the terms of the section in the discretion of the Court, it is unnecessary to empower the Court in express terms to grant them to persons other than the persons interested in the residuary estate. But where the deceased died wholly intestate, the words of the section are peremptory : " Administration *shall* be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose," and to retain in the Court the discretion it possessed under section 73 of the Court of Probate Act, 1857, it is necessary to add the proviso, " unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person." The conclusion is, therefore, it is submitted, that the Court retains with regard to grants of administration with the will annexed, the discretion which it possessed under section 73 of the Court of Probate Act, 1857. The omission of the words " *without having appointed an executor thereof willing and competent to act,*" can create no difficulty, for the Court can always pass over

(*y*) *Vide ante*, p. 337.
(*z*) See *per* Sir John Nicholl in *Taylor* v. *Diplock* (1815), 2 Phill. 261, at pp. 275 *et seq.*

an executor who is unwilling or incompetent to act, and with regard to the omission of "*or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland*," the Court has still, in such a case, power to commit administration with the will annexed to another *durante absentia* (*a*). The omission of the passage italicised on page 413 may, however, render some of the cases decided on the somewhat extended construction given to these words in section 73 of the Court of Probate Act, 1857, and referred to in the preceding section (*b*), no longer available as precedents.

Subject to the differences in the wording of the two sections indicated above, and bearing in mind the changes in the law which have been effected by the Administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925, and already fully considered, the cases cited in the preceding section may be referred to as indicating the circumstances in which the Court will exercise the discretion conferred upon it by section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Whether under section 162 the Court may grant administration to a single administrator, if there is a minority or life interest.

In *In the Estate of Herbert* (*c*) it was held that under this section it is competent to the Court, even where there is a minority or life interest, to appoint a creditor to be a single administrator, notwithstanding the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, which directs that either a trust corporation (with or without an individual) or not less than two individuals shall take a grant of administration in such a case; for, it was said, the direction contained in the latter must be read subject to the modification contained in the former section, viz., that the Court in case of insolvency or other special circumstances is to have a discretion to grant administration to some person other than those interested in the residue (*c*). But in *In the Estate of White* (*d*), where the intestate, whose estate was deeply insolvent, left a widow and minor children, and the widow, with the consent of the creditors, applied to be appointed sole administratrix, it was held by the Court of Appeal that there was no power to make such a grant. The effect of this decision is to throw doubt on *In the Estate of Herbert*, though that case was not in terms overruled (*e*).

(*a*) *Vide ante*, pp. 395 *et seq.*
(*b*) *Supra*, pp. 402—404.
(*c*) [1926] P. 109.
(*d*) (1927), 43 T. L. R. 729.
(*e*) *Vide ante*, p. 276.

CHAPTER XVI.

PRESUMPTIVE PROOF OF DEATH—SURVIVORSHIP.

SECTION 1.

PRESUMPTIVE PROOF OF DEATH.

Executor or administrator required to depose to the exact day of the death of testator or intestate.

AN executor or administrator is required, in his oath to lead the grant of probate or letters of administration, not only to swear to the death of the testator or intestate, but to specify the day, the month, and the year in which he died. If this cannot be done, and the fact of the death is certain (*a*), a registrar, upon satisfactory explanation why a more precise date cannot be assigned, may allow the grant to issue.

The Court may allow the form of oath to be varied, and grant probate, etc., to the applicant on his swearing that the deceased died on or since a given date.

But if it be uncertain whether the testator or supposed intestate be dead or alive, the evidence must be laid before the Court on motion (*b*); and the Judge, if satisfied that the facts proved raise a reasonable presumption that the testator or intestate is no longer alive, will grant the applicant leave to swear that he died on or since the last date on which he is known to have been alive. Upon such oath being taken the grant of probate or letters of administration will issue to the applicant.

The Court does not find as a fact that the testator or intestate is dead.

Some misunderstanding may arise from the fact that applications of this character are frequently called "motions to presume death." It should therefore be observed that the Court does not find as a fact that the presumed deceased is dead, but merely finds that sufficient evidence has been laid before it to justify its granting to the applicant leave to swear the death (*c*). Its order therefore does not dispense with the necessity of proving the fact of death, if the applicant relies upon that fact in any other Court (*d*).

(*a*) *E.g.*, in a case where the deceased is found drowned, but it is impossible to ascertain on what day he met his death. No motion is required in such a case: *Long-Sutton*, [1912] P. 97.

(*b*) A registrar can deal with these applications under certain circumstances; *vide post*, p. 531.

(*c*) *Jackson* (1902), 87 L. T. 747.

(*d*) See *Thompson* v. *Donaldson* (1799), 3 Esp. N. P. C. 63; *Moons* v. *De Bernales* (1826), 1 Russ. Chan. Cas. 301; but see *French* v. *French* (1755), Dick. 268. For this reason, sequestrators or alleged creditors have no *locus standi* to resist a motion to depose to the death: *Fowler, The Times* newspaper, April 7, 1908.

The Court will not allow the death to be sworn as occurring on a particular day.

The Court gives leave to the applicant to swear the death as occurring on or since the last date upon which the presumed deceased was known to be alive. It will not allow the applicant to swear the death as occurring on a particular day—*e.g.*, at the end of seven years since the presumed deceased was last heard of (*e*). If important issues turn upon the question whether the presumed deceased was alive or dead at a given date subsequent to that upon which he was last known to be alive, that is a matter which must be a subject for proof, usually in another Court; it will not be determined on an application of this character, where the only question which arises is the fact of death.

The Court will not presume the death of any person other than the person whose estate is to be administered.

The Court will not presume the death of any person other than the person whose estate is to be administered. Therefore where a married woman died intestate, and her next-of-kin applied for administration, the Court refused to presume the death of her husband (*f*).

The Court is guided by the circumstances of each individual case.

In granting applications of this character, the Court is guided by the circumstances of each individual case. If the evidence is clear and cogent, the death of a testator or intestate may be presumed within a few months of his disappearance (*g*); on the other hand, where a person has disappeared and has not since been heard of, but good reasons can be assigned for his failure to communicate with his relatives and friends, the lapse of seven or even twenty years might not justify the Court in allowing administration to issue in respect of his estate.

Court must be satisfied that all inquiries possible have been made.

In each case the Court must be satisfied that every inquiry has been made, and that every clue which might throw any light upon the question before it, has been followed up and investigated, and that the results have been placed before the Court.

Necessity for advertisements.

It is usual to require that advertisements requesting information as to the present whereabouts of the presumed deceased, if alive, or as to the place and date of his death, should be

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(*e*) *How* (1858), 1 S. & T. 53, unless, of course, there is absolute proof of the testator or intestate's death on a given day, in which case an application for leave to vary to oath would be unnecessary.

(*f*) *Clark* (1889), 15 P. D. 10. The presumed deceased must be cited by advertisement, or a grant may be made under the Court's discretionary powers; *vide ante*, p. 409.

(*g*) In *Matthews*, [1898] P. 17, the Court, on proof of sufficient inquiries, allowed the death of a testator to be sworn three years after his disappearance; but in *Bishop* (1859), 1 S. & T. 303, an application to presume the death of one of the crew of a vessel, of which nothing had been heard for five months, was held to be premature, and the learned Judge said that inquiries ought to have been made as to whether any survivors had come to shore. Three months later the motion was renewed, and successfully. As to inquiry for survivors, see *Smyth* (1858), 28 L. J. P. 1.

published in newspapers circulating in those parts of the world where they are most likely to come to his knowledge, if alive (*h*); but advertisements in newspapers for persons supposed to be dead may be dispensed with when their history is known, and traced to within a short period of their being last heard of, *e.g.*, in a case where the presumed deceased is proved to have embarked upon a vessel, which has never come to port (*i*).

Presumption arising from seven years' absence without communication to friends and relations.

The circumstance that a person has not been heard of for seven years by those who, if he had been alive, would naturally have heard from him, raises at common law a presumption that he is no longer alive; and the Probate Division will give full weight to that presumption (*k*), unless the circumstances of the case are such as to account for his not being heard of, without assuming his death. There is, however, nothing to prevent the Court from inferring the death of a person in a proper case, although seven years have not elapsed since he was last heard of (*l*). But in *In the Goods of Winstone* (*m*), where application was made in 1898 for leave to presume the death of a person who had not been heard of since 1891, the Court, in giving leave to depose to the death, directed that the grant of administration should, except in so far as it might be required in the Chancery Division, remain in the registry until the expiration of seven years from the date of the disappearance.

No presumption that testator or intestate died at beginning or end of the seven years.

The fact that seven years have elapsed since a person was last heard of, though fair ground for presuming that he is dead, is no ground for presuming that he died at the beginning or end of the seven years (*n*). The fact of his being alive or dead at any particular period during the seven years must be proved by the party relying on it (*o*).

Effect of presumption of death by foreign Court.

Where a foreign Court of competent jurisdiction has made a grant on the presumption of the death of a testator or intestate, the grant may be accepted by the Probate Division as sufficient proof of the death, without requiring it to be proved by independent evidence (*p*).

(*h*) So the Court insisted upon advertisements even though the estate was small, and the presumed deceased had not been heard of for twenty-five years: *Robertson*, [1896] P. 8.

(*i*) *Norris* (1858), 1 S. & T. 6; *Main* (1858), 1 S. & T. 11.

(*k*) *How* (1858), 1 S. & T. at p. 54. But the Court will not act on the presumption alone. It requires proper inquiries in addition: *Robertson*, [1896] P. 8.

(*l*) *Matthews*, [1898] P. 17.

(*m*) [1898] P. 143.

(*n*) *How* (1858), 1 S. & T. at p. 54.

(*o*) *Doe* v. *Nepean* (1833), 5 Barn. & Adol. 86.

(*p*) *Spenceley*, [1892] P. 255.

Section 2.

SURVIVORSHIP.

Closely connected with the subject of presumptive proof of death is that of survivorship, which is here considered as affecting the right to a grant of letters of administration. Questions of survivorship arise when two persons perish in the same calamity, such as a wreck, a massacre (*q*), a battle, an earthquake, or some other disaster (*r*). Where such persons are related, as husband and wife, father and son, or testator and residuary legatee, and no direct proof can be obtained that either survived the other, the question arises : On what principles will the Court of Probate act in granting letters of administration to their respective estates ?

Questions of survivorship arise where persons perish in the same calamity.

By the Roman law questions of survivorship in such cases were determined by presumptions (*s*), to which recourse might be had in the total absence of direct evidence. These presumptions were founded on the probabilities of survivorship arising from the sex of the two persons and their relative ages and strength. Thus it was said that if a mother and her son, who was under the age of puberty, perished in a shipwreck, it is to be presumed that the son died first (*t*), but if the son was over the age of puberty, that he survived the mother (*u*).

By the Roman law questions of survivorship determined by presumptions.

Presumptions of a similar character are recognised in several foreign systems of jurisprudence, and there are not wanting certain early cases in which the English Court has assumed their existence as a part of the English law (*x*).

But in *Wing* v. *Angrave* (*y*) it was laid down by the House of Lords that in English law there was no presumption of law arising from age or sex as to survivorship among persons whose

In English law there is no presumption arising from age or sex as to survivorship among persons who perish in

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(*q*) See *Wainwright* (1858), 1 S. & T. 257; *Ewart* (1859), 1 S. & T. 259; *Benyon*, [1901] P. 141.

(*r*) The question arose where two persons were hanged at the same moment : *Broughton* v. *Randall* (1596), Cro. Eliz. 503; where husband and wife were swept into the sea by one wave : *Underwood* v. *Wing* (1854), 19 Beav. 459; where mistress and servant were murdered at the same time : see *Doe* v. *Nepean* (1833), 5 Barn. & Adol. at p. 92.

(*s*) See *Taylor* v. *Diplock* (1815), 2 Phill., at p. 265.

(*t*) Dig., lib. 34, tit. 5, 23.

(*u*) *Ibid.*, tit. 22.

(*x*) *E.g.*, *Sillick* v. *Booth* (1841), 1 Y. & C. C. C. 117, where the Vice-Chancellor said : " Two brothers having perished by shipwreck under circumstances of which there is no evidence, . . . by the law of England evidence of health, strength, age, or other circumstances, may be given, tending to the judicial presumption that one party survived the other." So in *Colvin* v. *The King's Proctor* (1827), 1 Hagg. 92, where husband and wife were drowned by the upsetting of a boat, the Court said that the *prima facie* presumption of law was that the husband survived. And see *Selwyn* (1831), 3 Hagg. at p. 749.

(*y*) (1860), 8 H. L. C. 183.

the same calamity, where the deaths occurred before January 1, 1926.

death was occasioned by one and the same cause (*z*), nor was there any presumption of law that all died at the same time (*a*). The question was one of fact depending wholly on evidence, and if the evidence did not establish the survivorship of any one, the Court would treat it as a matter incapable of being determined. The burden of proof lay on the person who asserted the affirmative (*b*).

Burden of proof on person who asserted affirmative.

Provisions of Law of Property Act, 1925, s. 184, with regard to persons dying on or after January 1, 1926.

This is still the rule of law with regard to persons dying before January 1, 1926, but in the case of persons dying on or after January 1, 1926, the rule has been altered by section 184 of the Law of Property Act, 1925, which provides: "In all cases where, after the commencement of this Act (*c*), two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." The presumption introduced by the statute can be rebutted by evidence, but if not so rebutted, it will prevail and regulate the right to a grant of administration.

Result of the earlier rule in cases of deaths before January 1, 1926.

As the former rules still apply to cases in which the deaths occurred before January 1, 1926, it is perhaps still necessary to illustrate their operation considered with reference to grants of administration to the estates of persons who perished in the same calamity before that date.

If testator and residuary legatee perish in same calamity before

Where a testator and his residuary legatee perish in the same calamity before January 1, 1926, and there is a total absence of evidence as to survivorship, if there is no executor, administration with his will annexed will be granted to the testator's

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(*z*) "According to our jurisprudence," said Campbell, L.C., in that case (8 H. L. C. at p. 197), "where the question arises, which of two individuals, who perished in the same calamity, survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. . . . The question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative." See also *Doe* v. *Nepean* (1833), 5 Barn. & Adol., at p. 91. So in *Underwood* v. *Wing* (1854), 19 Beav. 459, where husband and wife were swept into the sea by the same wave, and were never afterwards seen, the Court, rejecting all speculations and presumptions arising from the relative strength, sex, etc., of the parties, held that there was no evidence to show which was the survivor.

(*a*) This view was suggested in *Wright* v. *Sarmuda* (1793), 2 Phill. at p. 277, n. See also *Taylor* v. *Diplock* (1815), 2 Phill. at p. 280. In *Wing* v. *Angrave* (1860), 8 H. L. C. 183, at p. 199, Campbell, L.C., said: "There is no foundation for the doctrine . . . [that] where it is left doubtful which of two individuals died first, there is a presumption of law, *juris et de jure*, that they died at the same point of time."

(*b*) *Wing* v. *Angrave* (1860), 8 H. L. C. 183, at p. 198.

(*c*) *I.e.*, January 1, 1926: Law of Property Act, 1925, s. 209, sub-s. 2.

next-of-kin, to the exclusion of the representatives of the residuary legatee (*d*).

January 1, 1926, and there is no evidence of survivorship.

The reason for this procedure was stated by Sir John Nicholl in *Taylor* v. *Diplock* (*e*), a case in which a husband appointed his wife executrix and residuary legatee, and both husband and wife were drowned in the same wreck. "The question is," said the learned Judge, "whether the administration is to be granted to the next-of-kin of the testator or to the next-of-kin of the residuary legatee. The administration prayed is . . . to the husband. *Prima facie* it belongs to the next-of-kin or the party deceased; to him and to his property the wife of next-of-kin has a right to administer under the Statute of Administrations. But it is laid down in the books, that in case of there being a residuary legatee, the statute does not apply. The next-of-kin has the *prima facie* right; but if there is a residuary legatee he would be entitled. There is no such person here, for the party claims derivatively from the residuary legatee: the burden of proof lies on him to show that the deceased left a residuary legatee; the next-of-kin of the residuary legatee is to show that the wife survived her husband. . . . Upon the whole I am not satisfied that proof is adduced that the wife survived, . . . and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife."

If husband and wife perish in same disaster before January 1, 1921, and there is no evidence as to survivorship.

If a husband and wife perish in the same disaster before January 1, 1926, and there is no evidence that either survived the other, administration to the estate of the intestate husband will be granted to his next-of-kin, and administration to the estate of the intestate wife will be granted to her next-of-kin, to the exclusion of the next-of-kin of the husband (*f*).

Form of oath.

In both cases the Court may allow the applicant to vary the usual form of oath, and to swear (i) that the deceased and his

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(*d*) The rule was first laid down in *Taylor* v. *Diplock* (1815), 2 Phill. 261; and was recognised in *Selwyn* (1831), 3 Hagg. 748, where, however, probate of the husband's will was granted to executors substituted for the wife "in the event of her dying in his lifetime." See also *Colvin* v. *The King's Proctor* (1827), 1 Hagg. 92. In *Alston*, [1892] P. 142, a husband and wife executed identical wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first. They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other. Administration with the husband's will annexed was granted to his next-of-kin, and administration with the will of the wife annexed, to her next-of-kin. See also *Carmichael* (1863), 4 S. & T. 224; *Murray* (1837), 1 Curt. 596; *Shilling* (1856), Dea. & Sw. 183.

(*e*) (1815), 2 Phill. 261, at pp. 268 *et seq.*

(*f*) *Satterthwaite* v. *Powell* (1838), 1 Curt. 705; *Wainwright* (1858), 1 S. & T. 257; *Ewart* (1859), 1 S. & T. 258; *Benyon*, [1901] P. 141; *Good* (1908), 24 T. L. R. 493; *Bruce* (1910), 26 T. L. R. 381. See *Johnson* (1898), 78 L. T. 85.

wife died on (*or* on or since) a date stated and that, after due inquiries, there was no reason to believe that the wife survived the husband, or (ii) that the deceased and her husband died on (*or* on or since) a date stated and that, after due inquiries, there was no reason to believe that the husband survived the wife (*g*), as the case may require.

"The mode in which this Court deals with . . . [cases in which the husband and wife have perished by drowning or some other disaster about the same period, and it is impossible to know which of them survived the other]," said Lord Penzance in *In the Goods of Nicholls* (*h*), "is to say that those whose claim is founded on the survivorship of either, must prove it affirmatively. Thus, if the next-of-kin of the husband claim administration to the wife on the ground that he survived, they must produce evidence of the fact, and conversely, if the next-of-kin of the wife claim the grant [to the husband's estate], they must show that she survived." Again, in *Satterthwaite* v. *Powell* (*i*) Sir Herbert Jenner said: "The principle has frequently been acted upon, that where a party dies possessed of property, the right to that property passes to his next-of-kin unless it be shown to have passed to another by survivorship. Here the next-of-kin of the husband claims the property which was vested in his wife: that claim must be made out; it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to show that it has been divested. . . . There being nothing to show that the husband survived his wife, the administration must pass to her next-of-kin."

The foregoing rules do not apply where the date of the wife's death is known, and it is merely presumed that the husband is dead.

The foregoing considerations do not apply to cases in which the date of the wife's death is known, and it is not positively known whether the husband is dead, when application is made for a grant of administration to the wife's estate. In such a case the wife's next-of-kin, if they apply for a grant, must either satisfy the Court that the deceased died a widow, or follow the usual practice by citing the husband or his representatives to accept or refuse a grant (*k*).

If husband and wife perish in

If a husband and wife perish in the same accident before January 1, 1926, and a creditor of the husband is desirous of

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(*g*) *Wainwright* (1858), 1 S. & T. 257; *Ewart* (1859), 1 S. & T. 258; *Benyon*, [1901] P. 141; *Good* (1908), 24 T. L. R. 493; *Bruce* (1910), 26 T. L. R. 381. See *Johnson* (1898), 78 L. T. 85; and as to the practice in such cases see *Roby*, [1913] P. 6.

(*h*) (1872), 2 P. & D. 461.

(*i*) (1838), 1 Curt. at pp. 706, 707.

(*k*) *Nicholls* (1872), 2 P. & D. 461. Or they may apply for a grant under section 73 of the Court of Probate Act, 1857, swearing that they verily believe that the deceased died a widow; *vide ante*, p. 409.

taking administration to his estate, he must obtain not only the renunciation of the husband's next-of-kin, but the consent also of the next-of-kin of the wife, or cite the latter as "persons who would have been entitled to the personal estate of the wife, in case she had survived her husband," to show cause why the grant should not be made to him (the creditor).

the same calamity before January 1, 1926, and creditor applies for administration to the husband.

In *Colvin* v. *The King's Proctor* (*l*), where a creditor of an intestate bastard, who had been drowned together with his wife and only child, applied for a grant of administration to his estate, after citing the King's Proctor, the Court said that in strictness the representatives of the wife ought to have been cited; but, as the property was small and the debt large, the decree might pass.

Form of citation.

Where one of two persons, both of whom perished in the same calamity, has left a will, it must be proved, even though it be entirely inoperative under the circumstances, as giving the whole of the estate to the other.

Wills of persons who perish in same calamity must be proved.

(*l*) (1827), 1 Hagg. 92.

CHAPTER XVII.

REVOCATION OF PROBATE AND ADMINISTRATION AND THE CONSEQUENCES THEREOF.

SECTION 1.

REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Revocation of probate in common form on citation followed by an action.

ANY person whose interest is adversely affected by a probate granted in common form may, without limitation as to time, issue a citation against the person who proved the will, calling upon him to bring in the probate and to show cause why the same shall not be revoked, and if, in the event, the will is not sufficiently proved, the probate will be revoked (*a*).

Probate in solemn form cannot be revoked at instance of party or privy to the suit unless decree obtained by fraud, or later will discovered.

But if a will is proved in solemn form, no person who has been a party or privy to the proceedings can afterwards, by a fresh citation, put the executor again to proof of the will (*b*), except in two cases, namely, where the decree in the proceedings for proof in solemn form has been obtained by fraud (*c*), or where the existence of a later will has been discovered subsequent to the date of the decree (*d*). In both these cases the probate, even though granted in solemn form, is liable to revocation at the instance of parties having an interest.

Other cases in which grants may be revoked.

Apart from these instances, there are other cases in which probate or letters of administration may be revoked, either with the consent and at the instance of the person to whom they were originally granted, or without his consent at the instance of a person interested (*e*). These cases fall under three heads.

(1) Where the original grant was made in an irregular manner.

(1) Where the original grant was made in an irregular manner.

It is said that the administration may be revoked where a next-of-kin comes too hastily to take out the administration within the fourteen days, though in such case it should be granted to the same person (*f*); or where it has been granted without

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(*a*) *Ante*, p. 238.
(*b*) *Vide ante*, p. 239.
(*c*) *Birch* v. *Birch*, [1902] P. 130; *vide ante*, p. 240.
(*d*) *Vide ante*, p. 240.
(*e*) A complete summary of the five just causes for revocation will be found in the Indian Succession Act, 1865, s. 234; all of which, except the fifth, seem to embody the English law. See the Act set out, [1909] 2 Ch., at p. 352.
(*f*) Bac. Abr. Exors. E. 12; Toller, p. 125; and see Tristram & Coote (16th ed.), 290, n

citing the necessary parties (*g*); or where the surname of the deceased is wrongly stated in the grant (*h*).

(2) Grant made to person not entitled, or unlawfully made.

(2) Where the original grant was made to a person not entitled thereto, or where, owing to false or inaccurate information furnished to the Court, or material facts suppressed, the original grant was unlawfully made.

Thus an administration granted to one claiming to be the widow of an intestate may be revoked, if it subsequently appears that she was never legally married to the deceased (*i*); or to one claiming to be next-of-kin, if it appears that he is not of kin, *i.e.*, an impostor or an illegitimate relative (*k*). So, too, the Court may revoke its grant of administration if made to one of kin, but not next-of-kin, there being others nearer (*l*); or to a guardian elected by the minors, there being a testamentary guardian entitled in priority (*m*); or to a creditor without renunciation or citation of the next-of-kin (*n*); or to the Crown where those of kin exist (*o*). And administration with the will annexed may be revoked if granted to the next-of-kin, and it subsequently appears that there was a residuary legatee (*p*). And where a grant of administration to the estate of a married woman was granted to the representative of her next-of-kin, as if she had been a spinster, the grant was revoked at the instance of her husband (*q*).

But an administration not revoked if it subsequently appears that others *equally* entitled with the grantee exist.

But an administration will not be revoked if it subsequently appears that a person exists who had merely an *equal* right with the grantee to be appointed administrator (*r*).

So where one of the next-of-kin of an intestate obtained letters of administration of his estate, believing himself and his brother to be the only next-of-kin of the deceased, and subsequently seven others were discovered of the same degree of kindred, it was held that the administration could not be revoked, nor could a new administration be granted to another of the next-of-kin, though no act had been done by virtue of that administration, and all parties interested consented (*s*).

(*g*) Com. Dig. Administrator, B. 8; *Ravenscroft* v. *Ravenscroft* (1682), 1 Lev. 305.

(*h*) *Vide post*, p. 490.

(*i*) *Moore* (1845), 3 N. C. 601; *Langley* (1851), 2 Rob. 407.

(*k*) *Cornish* v. *Cornish* (1752), 1 Lee 14; *Bergman* (1842), 2 N. C. 22.

(*l*) *Blackborough* v. *Davis* (1700), 1 Salk. 38; *Burgis* v. *Burgis* (1752), 1 Lee 121; *Pringle* v. *Brown* (1752), *ibid.*, 123.

(*m*) *Morris* (1862), 2 S. & T. 360.

(*n*) Com. Dig. Administrator, B. 6.

(*o*) *Carr* (1858), 1 S. & T. 111.

(*p*) *Warren* v. *Kelson* (1859), 1 S. & T. 290; Bac. Abr. Exors. E. 12.

(*q*) *Copeland* v. *Simister*, [1893] P. 16; *Blackborough* v. *Davis* (1700), 1 Salk. 38; *S. C.*, 1 Ld. Raymond, 684.

(*r*) *Hill* v. *Bird* (1648), Sty. 102; *Dubois* v. *Trant* (1701), 12 Mod., at p. 438; *Taylor* v. *Shore* (1693), T. Jones, 161; *Ayliffe* v. *Ayliffe* (1683), 2 Keb. 812.

(*s*) *Heslop* (1846), 1 Rob. 457.

Semble, administration unlawfully granted will not be revoked after death of administrator.

And even where administration has been granted to one of kin, when a nearer of kin existed, it is doubtful whether the Court would entertain a suit to revoke that administration after the death of the administrator, for the power granted to him entirely ceases upon his death (*t*).

Grant revoked if will is discovered.

A grant of administration as on intestacy will be revoked if a will is subsequently discovered, and probate of a will or letters of administration with a will annexed will be revoked, if a later will subsequently comes to light (*u*).

Probate granted of will, codicil afterwards discovered.

Where probate has been granted of a will alone, and a codicil is subsequently discovered, a separate probate may be granted of the latter, and the original probate is not revoked, unless indeed the codicil revokes or adds to the appointment of executors under the will (*x*).

Administration with will only annexed, codicil afterwards found.

But if administration with a will annexed has been granted, and a codicil is afterwards found, it is said that the administration must be revoked, and a new administration with the will and codicil annexed must be taken (*y*).

Grant obtained by fraud will be revoked.

A grant, whether of probate or administration, may be revoked for any fraud used in obtaining it, for the Court has full power to vacate and set aside an act of its own which has been obtained by deceit or imposition (*z*).

So where probate is obtained of a forged or revoked will, or administration as on intestacy is obtained by suppressing a will, the grant may be revoked (*a*). And the Court may revoke a grant which it has made to an executor or administrator who is a minor on the assumption that he is of full age (*b*), or a grant which has been made on the renunciation of an executor who has intermeddled with the estate (*c*).

The Court revoked a grant of administration with the will annexed which had been surreptitiously obtained, without notice to the adverse party, during the pendency of a suit as to the validity of the will in the *forum domicilii* (*d*).

Probate of will of living person.

It seems scarcely necessary to add that if probate has been granted of the will, or letters of administration to the estate of a living person, the grant will be revoked on proof that the supposed deceased is in fact alive (*e*).

(*t*) *Willis* v. *Earl Beauchamp* (1886), 11 P. D., at pp. 61, 63, 64.
(*u*) *Baker* v. *Russell* (1752), 1 Lee, 167; *Carolus* v. *Lynch* (1752), *ibid.*, 13.
(*x*) Tristram & Coote (16th ed.), pp. 286, 287; see *Speke* v. *Deakin* (1913), 30 T. L. R. 73, 75.
(*y*) Tristram & Coote (16th ed.), p. 289. (*z*) Bac. Abr. Exors. E. 12.
(*a*) *Ibid.* Even if the will was proved in solemn form: *Priestman* v. *Thomas* (1884), 9 P. D. 70; *ante*, p. 240.
(*b*) Tristram & Coote (16th ed.), 286, citing Ought., tit. 222.
(*c*) Godolph, Part II, c. 31. s. 3.
(*d*) *Trimlestown* v. *Trimlestown* (1830), 3 Hagg. 243.
(*e*) *Napier* (1809), 1 Phill. 83; Bro. Administrator, pl. 3; Toller, 131.

(3) Where the original grant, though lawfully made, has since become inoperative or ineffectual.

(3) Where the grant has become inoperative or ineffectual.

So where one of two co-executors to whom probate has been granted subsequently becomes insane, or otherwise incapable of acting (*f*), the original probate will be revoked, and a fresh grant made to the other executor, power being reserved to the lunatic of joining in the grant should he on recovering his sanity wish to do so (*g*).

Grant to two executors or administrators, one of whom subsequently becomes insane.

And where of two joint administrators, whether on intestacy or with the will, one becomes insane, the grant is revoked and a fresh grant made to the capable administrator (*h*).

But where a sole executor or administrator becomes insane after a grant has been made to him, the original grant is not revoked, but a fresh grant is made to another for the use and benefit of the lunatic until he shall become of sound mind (*i*).

Where sole executor or administrator becomes insane after grant made to him.

And in such cases the original grant, though not revoked, is impounded, unless indeed the fresh grant is made to the committee of the lunatic or to the person appointed under section 116 of the Lunacy Act, 1890, with general authority over the lunatic's property, when the original grant remains at large (*k*).

Where a grant of administration of the estate of an intestate was made to a creditor who, after his debt had been fully satisfied, absconded and could not be found, the Court revoked the grant to the creditor and made a new grant to the sole next-of-kin of the deceased (*l*).

Where administrator absconds, or is desirous of retiring from the administration.

And where a creditor administrator, having paid his debt, was desirous of retiring from the administration, the Court revoked the grant to the creditor, and made a new grant to one of the children of the intestate (*m*).

It has already been seen (*n*) that the Court will not revoke

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(*f*) *Powell* (1895), cited in Tristram & Coote (16th ed.), p. 287; cf. *Knott*, [1920] 2 Ir. R. 397.

(*g*) *Marshall* (1836), 1 Curt. 297; *Sowerby* (1891), 65 L. T. 764; *Shaw*, [1905] P. 92.

(*h*) *Phillips* (1824), 2 Add. 335; *Newton* (1843), 3 Curt. 428.

(*i*) *Binckes* (1836), 1 Curt. 286; *Cooke*, [1895] P. 68. *Vide ante*, pp. 373, 374.

(*k*) *Cooke*, [1895] P. 68; and *vide ante*, pp. 374, 375.

(*l*) *Bradshaw* (1887), 13 P. D. 18; *Jenkins* (1819), 3 Phill. 33; *Covell* (1889), 15 P. D. 8; *Colclough*, [1902] 2 Ir. R. 499. This procedure forms a convenient alternative, in certain cases, to a grant *durante absentia; vide ante*, pp. 395—399. It is not confined to cases where the original administrator was a creditor: see *Covell*, *Bradshaw*, and *Colclough*, cited *supra*, and *French*, [1910] P. 169; *Loveday*, [1900] P. 154; and cf. *Thomas*, [1912] P. 177 (where the administrator of a small estate had gone to New Zealand, taking the grant with him, and the Court, to avoid expense and delay, revoked the grant without notice to the administrator and without requiring production of the original grant). The fresh grant made in such circumstances after revocation of the original grant is, *semble*, not *de bonis non*.

(*m*) *Hoare* (1833), 2 S. & T. 361, n.; *Thacker*, [1900] P. 15.

(*n*) *Supra*, p. 425.

In what cases the Court will refuse to revoke a grant.

a grant if it subsequently appears that some person exists who has merely an equal right with the grantee to be appointed administrator. And it is said that the Court cannot revoke a grant on account of abuse (*o*), or on account of the administrator's omission to bring an inventory or account (*p*).

The consent of all parties interested is no ground for revocation.

And if the administration has been properly granted, it will not be revoked even on the application of the administrator himself; nor is the consent of all parties interested, the fact that the administrator has done no act under the grant, or a mere suggestion that it will benefit the estate, sufficient to justify the revocation of such a grant and a fresh grant to another person (*q*).

The Court will not revoke a limited grant to enable those entitled to take a general grant.

The Court will not revoke a limited grant in order to enable those entitled thereto to take a general grant. The practice is, when a limited grant has been made, to supplement it by a *cæterorum* grant (*r*).

Revocation at the instance of a creditor.

It was at one time stated that the Court cannot revoke a grant on the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right (*s*). But it has since been held that there is no reason in principle why creditors should be precluded from applying to revoke an existing grant (*t*). Accordingly, where the original administrator of a deceased intestate disappeared and could not be traced, and fresh assets became payable to the legal personal representative of the deceased, the Court, at the instance of a creditor, revoked the original letters of administration, and made a fresh grant to him,

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(*o*) *Thomas* v. *Butler* (1672), 1 Ventr. 219.

(*p*) Wms. on Exors. (11th ed.), 465, citing *Hill* v. *Bird* (1648), Sty. 102.

(*q*) *Heslop* (1846), 1 Rob. 457. In *Dye* (1850), 2 Rob. 342, where probate has been lawfully granted to an executor and to an executrix, who was a married woman, and the Bank of England refused to allow a transfer of stock in the absence of the husband of the executrix, who had deserted her, the probate was revoked and re-granted to the executor alone. In this case the executrix had not intermeddled with the estate. And in *Ferrier* (1828), 1 Hagg. 241, where administration limited to a particular property was granted to the tenant for life, and he assigned his interest to his son, and asked that the grant might be revoked and a fresh grant made to the son limited to that particular property, the grant was revoked, although the administrator had intermeddled with the property. But in *Reid* (1886), 11 P. D. 70, Butt, J., refused to revoke a general grant of administration where the administratrix had intermeddled with the general estate, and to make a fresh grant to another person, although similar grounds to those shown in *Dye*, *supra*, appeared, and his decision was upheld by the Court of Appeal on the ground that there was no precedent for such an order. See, however, *Thacker*, [1900] P. 15; *Hoare* (1833), 2 Sw. & Tr. 361 *n*.

(*r*) *Harris* v. *Milburn* (1828), 2 Hagg. 62; *Brown* (1872), 2 P. & D. 455; but see *Currey* (1846), 5 N. C. 54.

(*s*) See Tristram & Coote (16th ed.), p. 291; Wms. on Exors. (11th ed.), p. 465.

(*t*) *French*, [1910] P. 169; cf. *Hake*, [1920] W. N. 117.

the next-of-kin of the deceased declining either to renounce or to apply for a grant (*u*).

Section 2.

CONSEQUENCES OF REVOCATION.

Consequences of revocation of grant on intermediate acts of executor or administrator.

It is necessary briefly to consider the effect of revocation of probate or letters of administration on the intermediate acts of the former executor or administrator.

Protection of persons acting on probate or administration.

Section 27 of the Administration of Estates Act, 1925, which replaces, in the case of persons dying after January 1, 1926, the provisions of the Court of Probate Act, 1857, ss. 77 and 78 (*x*), enacts as follows :—

"(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

" (2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made."

Position of executor or administrator who distributes estate.

With regard to acts done under the revoked probate or administration which might not have been lawfully done by the subsequent executor or administrator, the former executor or administrator has, it seems, no such protection; and therefore if he distributes the estate amongst the persons entitled on intestacy where there is a will, or in accordance with the provisions of a will where there is a later will, or the will is invalid, he is, it would seem, answerable for the moneys so distributed as if he were a stranger who had dealt with the estate, and the property so distributed may be recovered from the distributees by the person to whom probate or administration is granted on the revocation of the earlier grant (*y*). But in *Fitzpatrick* v. *M'Glone* (*z*), probate of an alleged will having been granted in common form to the executors named therein, they paid a charitable bequest to the defendant, who *bona fide*, and

Position of distributees.

(*u*) *French*, [1910] P. 169.
(*x*) Administration of Estates Act, 1925, s. 56, and 2nd Schedule.
(*y*) See *Woolley* v. *Clark* (1822), 5 Barn. & Ald. 744.
(*z*) [1897] 2 Ir. R. 542.

without notice of any invalidity of the alleged will, applied a portion thereof in accordance with the trusts of the bequest. On probate being subsequently revoked and letters of administration granted to the plaintiff, it was held that the plaintiff could not recover from the defendant the amount which the latter had expended in execution of the supposed trusts.

Transactions between executor or administrator and third parties.

With regard to transactions between third parties and the executor or administrator under the revoked grant, a distinction was formerly drawn between cases in which the original grant was revoked on the ground of the existence of a will *appointing executors*, and cases in which the grant of administration was revoked on the ground of the existence of a will *not appointing executors*, or the grant of probate was revoked on the ground of the existence of a later will *not appointing executors*.

Former distinction between administration obtained by suppression of a will appointing executors, and by suppression of a will not appointing executors.

A grant of administration obtained by the suppression of a will *appointing executors* was considered to be void *ab initio*, and all dispositions of assets by the supposed administrator void also (*a*), except acts done in the due course of administration, *i.e.*, acts which the executor under the will might have been compelled to do (*b*). For it was held that, if there were in fact executors, the property was vested in the executors from the death of the testator, and that the Court had no power to grant administration; the letters of administration and the dealings by the administrator were, therefore, considered to be simply void (*c*).

But where a grant of administration was obtained by suppressing a will *containing no appointment of executors*, the grant so obtained was held to be not void *ab initio*, but merely voidable, and the revocation to take effect only from the time of the recall (*d*). Accordingly, a sale of leaseholds by an administratrix, who had obtained administration under such circumstances, to a purchaser who was ignorant of the suppression of the will, was upheld by the Court, although the grant was revoked after the sale (*e*).

The distinction declared erroneous by the Court of Appeal in *Hewson* v. *Shelley*.

But in *Hewson* v. *Shelley* (*f*), letters of administration were granted to the widow of a man who was erroneously thought to have died intestate, and the administratrix, as personal representative of the deceased, by virtue of the Land Transfer Act,

(*a*) Unless, of course, they were saved by section 77 of the Court of Probate Act, 1857.

(*b*) *Ellis* v. *Ellis*, [1905] 1 Ch. 613; *Abram* v. *Cunningham* (1677), 2 Lev. 182; *Graysbrook* v. *Fox* (1564), 1 Plowd. 275.

(*c*) *Abram* v. *Cunningham* (1677), 2 Lev. 182.

(*d*) *Packman's Case* (1595), 6 Co. Rep. 18 *b*; *Woolley* v. *Clark* (1822), 5 Barn. & Ald. 744; *Boxall* v. *Boxall* (1884), 27 Ch. D. 220; *Craster* v. *Thomas*, [1909] 2 Ch. 349.

(*e*) *Boxall* v. *Boxall*, *ubi supra*.

(*f*) [1914] 2 Ch. 13.

1897, sold and conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will, the executors thereby appointed obtained revocation of the letters of administration, and a grant of probate, and afterwards brought an action to recover possession of the real estate sold by the administratrix. It was held by the Court of Appeal, reversing the decision of Astbury, J., that the grant of administration was not void *ab initio* and that the purchaser had acquired a good title. *Graysbrook* v. *Fox* (*g*), *Abram* v. *Cunningham* (*g*) and *Ellis* v. *Ellis* (*g*) were overruled.

Validity of conveyance not affected by revocation of representation.

And now, by section 37 of the Administration of Estates Act, 1925, which takes effect without prejudice to any order of the Court made before the commencement of that Act, and applies whether the testator or intestate died before or after such commencement (*h*), it is enacted: "All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration."

Grant issued under decree of Court, and decree reversed on appeal.

If, however, a sentence pronouncing for a will or an intestacy is reversed *on appeal*, it seems that all intermediate acts of the executor or administrator are ineffectual, unless they are saved by the statutes, because an appeal suspends the former sentence, and on its reversal it is as if it had never existed (*i*).

(*g*) *Vide supra*, note (*b*).
(*h*) Administration of Estates Act, 1925, s. 37, sub-s. 2.
(*i*) Wms. on Exors. (11th ed.), 473, citing *Packman's Case* (1595), 6 Co. Rep. 18 *b*; *Price* v. *Parker* (1665), 1 Lev. 158.

PART THE SECOND.

THE PRACTICE OF THE COURT IN NON-CONTENTIOUS BUSINESS.

CHAPTER I.

INTRODUCTORY.

SECTION 1.

NON-CONTENTIOUS BUSINESS DEFINED.

The business of the Probate Division is either (1) non-contentious or common form, or (2) contentious.

The business of the Court either "non-contentious" or "contentious."

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 175, sub-s. 1, "'common form probate business' means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases when the contest has been terminated, and all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration."

Non-contentious business defined.

The warning of caveats is to be included in non-contentious business (*a*).

SECTION 2.

SOURCES OF PRACTICE.

Upon the creation of the Court of Probate in 1857 it was laid down (*b*) that the practice of the Court should, subject to rules and orders to be made, and in so far as the circumstances of the case should permit, be according to the existing practice in the Prerogative Court.

Practice of Prerogative Court to be followed.

(*a*) Rules in Non-contentious Business, 1862.
(*b*) Court of Probate Act, 1857, s. 29; see now Judicature (Consolidation) Act, 1925, s. 32.

Rules and Orders of 1862, 1863.

Under the powers conferred by section 30 of the Court of Probate Act, 1857 (*c*), there were made in the years 1862 and 1863 a number of very copious, minute, and explicit (*d*) rules and orders, which, as amended and added to from time to time, are set out in Appendix III, Part I.

The power to make rules, with the concurrence of the Lord Chancellor and other Judges, thus given to the Judge of the Court of Probate, was, so far as non-contentious business was concerned, similarly conferred on the President of the Probate, Divorce and Admiralty Division by the Judicature Act, 1875 (*e*), and is retained under section 100 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules and Orders of 1862, 1863, unaffected by the Rules of the Supreme Court.

It can thus be stated that the non-contentious business of the Court remains unaffected by the Rules of the Supreme Court framed under the Judicature Acts (*f*). Recent legislation (*g*) has necessitated material alteration in the procedure and practice of the Probate Division, but the necessary changes have been brought about not by the Rules of the Supreme Court, but by amendments of and additions to the original rules and orders of the Court of Probate.

(*c*) Now repealed, and replaced by sections 99, 100 of the Judicature (Consolidation) Act, 1925.

(*d*) The terms are those of Sir Edward Vaughan Williams. The mode of citation of these rules in subsequent chapters is as follows : " Rule 1, N. C. B." signifies " Rule 1 of the Rules and Orders for the Instruction of the Registrars of the Principal Registry in Non-contentious Business," while " Rule 1, D. R." indicates " Rule 1 of the Rules and Orders for District Registrars in Non-contentious Business."

(*e*) Judicature Act, 1875, s. 18, now repealed.

(*f*) *Tomlinson* (1881), 6 P. D. 209.

(*g*) In particular the Administration of Estates Act, 1925, the Supreme Court of Judicature (Consolidation) Act, 1925, the Guardianship of Infants Act, 1925, and the Legitimacy Act, 1926.

CHAPTER II.

PRACTICE IN OBTAINING PROBATE IN COMMON FORM.

SECTION 1.

GENERAL RULES OF PRACTICE.

Probate is granted to the executor.

PROBATE in common form is granted to the executor named in the will, or to the executor according to its tenor.

Power reserved to take probate.

If there are several executors, one may prove alone without notice to the others, to grant probate to whom power is reserved whenever they or any of them shall duly apply for a grant. But where the Public Trustee is an executor, notice must be given to him before probate is granted to a co-executor. An executor to whom power has been reserved may apply for a grant at any time, provided he has not renounced his right in the meantime or failed to appear to a citation to accept or refuse probate.

Not more than four executors to take probate.

Probate is not granted to more than four executors. When more than four are appointed by the will, and all are competent to take probate, a notation is made upon the grant that power is reserved to the other executors to apply on vacancies occurring (*a*).

Power is not reserved to an executor substitute.

Power is not reserved to the executor *substituted* in the will on the determination of the office of the original executor by death or otherwise. In this case the original probate ceases on such determination, and a second or *cessate* probate is granted to the executor substitute.

Where general grant including settled land is sought.

In cases of death after 1925, before a general grant, including settled land is made, all trustees of the settled land duly appointed by a formal appointment, whether before or after the death, must be cleared off. If there are no such trustees, the personal representative of the settlor, where the settlement arises under a will or an intestacy, must also be cleared off, unless a registrar, upon affidavit evidence, otherwise decides (*b*).

Trust corporation.

A grant of probate may be made to a trust corporation (*c*) which is appointed executor by a will, either solely or jointly

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(*a*) Judicature (Consolidation) Act, 1925, s. 160 and Rule 114, N. C. B.

(*b*) *Vide ante*, pp. 232—237.

(*c*) *I.e.*, a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925. For the definition of a "trust corporation" see p. 206, note (h).

with another person. Probate will not be granted to a syndic or nominee of a trust corporation (*d*).

Application, how and where made.

Application may be made through a solicitor or in person by the executor at the principal registry, or at any district probate registry (*e*). Application may not be made by letter at the principal registry.

Personal applications.

Special rules, orders, and instructions have been framed to meet the cases of personal applications (*f*). Applications in person will not be received by letter nor through the medium of an agent (Rule 2, N. C. B.).

Grant not to issue within seven days from the death.

The earliest date at which the probate may issue is the eighth day after the death of the testator (*g*), unless under the direction of the Judge or by order of *two* of the registrars of the principal registry (*h*). Such an order is founded upon an affidavit, setting out the grounds of urgency.

Reason of delay of more than three years must be certified.

In every case where probate is, for the first time, applied for after the lapse of three years from the death of the deceased, a certificate setting out the reason of delay must be filed (*i*). This may be signed by the applicant and countersigned by his solicitor, or signed by the solicitor alone. An affidavit sworn by the applicant alone will be accepted. Facts which must be stated are (1) the amount of the property at the date of the death, and (2) the reason why application has not previously been made, and why a grant is now required. Where the property in respect of which the grant is required is a reversion which has fallen into possession, the dates of the deaths of the life tenants should be stated.

The following requirements must be complied with before probate in common form will be granted :—

Oath must be sworn before a commissioner for oaths.

A. Executor's Oath (*k*).—An oath must be sworn by the proving executor or executors before a commissioner for oaths, or, in cases where the executor resides abroad, before a person

(*d*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 161. A foreign trust corporation, however, by an attorney, and an English trust corporation as attorney, can take letters of administration (with will) : President's Non-contentious Probate Directions, 1925.

(*e*) The territorial limitation of the jurisdiction of the district probate registries was abolished by Order, dated January 1, 1926, made under the Judicature (Consolidation) Act, 1925, s. 158: *vide ante*, p. 8, *post*, p. 801. Personal application may also be made in "fixed duty" cases through the medium of certain officers of Customs and Excise, and application under the Intestates Acts of 1873 and 1875 may be made through the registrar of the local County Court : *vide ante*, p. 9.

(*f*) See App. III, Part. I.

(*g*) Rule 43, N. C. B.

(*h*) The order of *one* of the registrars of the principal registry is sufficient to authorise an earlier grant from a district registry : Rule 51 D. R.

(*i*) Rule 45, N. C. B. For forms see App. VII, Forms 19, 69.

(*k*) Instructions as to filling in the oath are contained in a memorandum for the use of district registrars : see Appendix IV. But certain modifications and additional requirements are necessary in consequence of recent legislation.

authorised to administer oaths under 52 Vict. c. 10 and 54 & 55 Vict. c. 50 (*l*).

The following points should be noted in filling up the oath (*m*) :—

Name and description of deponent.

The oath must state the name and addition or occupation (*n*) of the executor, and, if a woman, her status (*o*).

Name of executor misspelt in will.

If the name of an executor is misspelt in the will, in addition to his correct name the words " in the will written —— " must appear in the oath.

Description of executor.

The description of the executor contained in the will (*e.g.*, " my nephew A, son of my sister B ") must, if it is a true description, appear in the oath. The widow of the deceased is referred to in the oath as " the relict."

Executor misdescribed in will,

If the executor is misdescribed, an affidavit in proof of his identity must be made (*oo*) by some one able to disclose facts which justify the recognition of the applicant as the executor described in the will. The misdescription should also appear in the oath, preceded by the word " erroneously."

or wrongly named, or no name stated.

The same rule applies when the executor is wrongly named in the will (*p*), or when, though described, his name does not appear (*q*). No evidence of identity is required when an executor, having more than one christian name, is described in his appointment by his first christian name only.

Deed poll.

The production of the deed poll is required in cases in which the executor has since the date of the will changed his name by deed poll.

Relationship of executor to deceased.

Where the executor is a relative of the deceased, the relationship should be stated in the oath whether the will does or does not disclose such relationship.

Residence of executor

The true place of residence of the executor must appear in the oath. Except in the case of residential clubs, club addresses are not accepted.

(*l*) See the very convenient table in " Stringer on Oaths," and see 9 Edw. 7, c. 39.

(*m*) For forms see App. VII, Forms 118—134. The oath is to be subscribed and sworn to as an oath and then filed in the registry: Rule 47, N. C. B. See Rules 51—58, N. C. B.

(*n*) As " the Reverend John Johnson, of ——, clerk; John Smith, of ——, butcher," etc.

(*o*) As " wife of A. B.," " widow," " spinster," etc.

(*oo*) Rule 48, N. C. B. For form of affidavit see App. VII, Form 13. It is not sufficient to state merely that the person appointed executor and the applicant are one and the same.

(*p*) *E.g.*, John William Jones is appointed executor, but his name is written in the will " John Frederick Jones." He swears the oath as " John William Jones, in the will written ' John Frederick Jones,' " and files an affidavit of identity. And see *Baskett* (1898), 78 L. T. 843.

(*q*) *E.g.*, the testator appoints as his executor " his dear wife," " his loving son."

Trust corporation as executor.

Where a trust corporation, other than the Public Trustee, has been appointed executor, the officer appointed by the corporation to make the application must in every case lodge a sealed copy of the resolution so appointing him. It must be sworn that the corporation is a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, and is empowered by its constitution to accept the grant sought (*r*).

Testamentary papers must be marked and correctly described.

Every will, copy of a will, or other testamentary paper, to which an executor is sworn, must be marked by him and by the person before whom he is sworn (*s*). The description of the testamentary paper must be correctly stated in the oath (*t*).

Oath must specify the name, etc., of the testator.

The oath must specify the name, address, and, if a female, the status of the testator.

His signature to the will to be taken as his name.

As a general rule the signature of the testator to the will is to be adopted as his name, although it differ from the name written at the heading of the will (*u*).

When an alias will be allowed.

If it is desired that the grant should issue in more than one name, *e.g.*, where the testator held property in more than one name, an affidavit (*x*) as to the facts is essential, supplemented, if required by the registrars, by the production of bank books, deeds, etc. An alias is only allowed when shown to be justified. The registrars must be fully satisfied as to the identity of the person who holds property under the various names (*y*).

Christian name of testator omitted.

When the testator's signature omits one of his christian names other than the first (*z*), probate will be granted in his full name on a certificate by the solicitor that the signature was the testator's usual form of signature. But where the first christian name has been omitted (*a*), an affidavit justifying an alias is required.

Testator described as "the younger" or "the elder."

If the testator is described in the will as "the younger," but does not so subscribe, still he should be described in the oath as "the younger"; but a similar course is not necessary where the description in the will is "the elder."

(*r*) Rule 111, N. C. B. For the definition of a "trust corporation," *vide ante*, p. 206.

(*s*) Rule 49, N. C. B. In the case of a foreign will the original document, and not the translation, is to be marked.

(*t*) *E.g.*, "true and original last will" or "certified and sealed copy" or as the case may be.

(*u*) Memoranda for District Registrars, *post*, App. IV, p. 883.

(*x*) App. VII, Form 14.

(*y*) Rule 48, N. C. B. If the facts are satisfactorily proved, but not otherwise, the testator may be described in the oath under one or more aliases (*e.g.*, "John Smith, otherwise John Robinson"), and the grant will issue accordingly.

(*z*) *E.g.*, where Albert Edward Robinson signs himself "Albert Robinson."

(*a*) *E.g.*, where Albert Edward Robinson signs himself "Edward Robinson."

Where the address of the testator at the time of his death differs from the address given in the will or last codicil, the latter address should be given in the oath as well as the former, and should be preceded by the words " formerly of."

Testator's last place of residence.

Where the place of residence of the deceased cannot be sworn to, the best address available (including an accommodation address) should be given. But in these circumstances the domicil of the deceased must be sworn to, unless a registrar otherwise directs.

The exact day on which the testator died must be specified in the oath. It may be that this cannot be done with exactitude in certain circumstances, and *where the fact of the death is certain* (*b*), the registrars may allow this requirement to be modified. But where death is merely presumptive, application must be made for an order for leave to swear that the testator died *on or since* the date when he was last heard of (*c*).

Date of death to be specified.

The place of death of the deceased must appear in the oath.

Place of death.

The executor or executrix, if only one applies, should describe himself or herself as " the sole executor " (*or* " executrix "), " the surviving executor " (*or* " executrix "), or as " one of the executors " named in the will (or codicil) of the deceased, as the case may be (*d*).

Executor, how designated.

When more than one apply, and all are females, they are described as " the executrixes "; if some are males and some females, as " the executors."

Where the deceased died after 1925, the applicant must swear to the best of his belief whether there was land vested in the deceased which was settled prior to his death and not by his will. If it is desired to include such settled land in a general grant, the settled land must be identified, and all trustees duly appointed by a formal appointment, or, in their absence, where the settlement arises under a will or an intestacy, the personal representative of the settlor, must be cleared off (*dd*). It must be sworn whether there is other settled land.

Trustees of settled land to be cleared off.

(*b*) In a case, for instance, where the testator is found drowned, it may be sworn that he was last seen alive on a certain date, and that his dead body was found on a subsequent date : see *Long-Sutton*, [1912] P. 97.

(*c*) *Vide ante*, pp. 416—418; *post*, pp. 531, 532.

(*d*) Other designations may become necessary, as " the executrix for life, or widowhood "; " the sole executor in respect of all the estate of the deceased except estate in the colony of Natal." In cases where there is no limitation for life or otherwise in the appointment of an executor, but other executors are substituted on death, the first-named executor is to be described as " an executor named in the will." Where there is no limitation in the actual appointment of executors and there is also a substitution of executors in certain events, the proving executors should be described as " the executors named in the said will as therein mentioned."

(*dd*) *Vide ante*, pp. 232—237.

But by Rule 118, N. C. B. a grant save and except the settled land may be taken by the executor (*e*).

Statement of domicil when grant to be resealed in Scotland.

If the deceased possessed property in England and Scotland, and it is desired to reseal the grant in Scotland, the oath should state that the deceased died domiciled in England (*f*).

Value of the estate to be stated in the oath.

The gross amount of the estate as shown in the Inland Revenue affidavit, is to be stated in the oath (*g*). Where the deceased died possessed of no estate except trust property, the oath must show that the deceased was only legally entitled thereto, and had no beneficial interest therein. The fee for the grant in such cases is the same as for grants under a nominal sum.

An Inland Revenue affidavit is to be sworn.

B. The Inland Revenue Affidavit.—The executor must make, and file with the papers for the grant, an affidavit of the property for the use of the Commissioners of Inland Revenue (*h*). This must bear a receipt or certificate signed by an Inland Revenue officer that the proper duty has been paid.

Estate sworn at a nominal sum.

If it is desired to swear the estate at a nominal sum, "so far as can be at present ascertained," the Inland Revenue affidavit in such form must have been accepted by the Estate Duty Office. An undertaking to pay any further probate fees, which may become due, will be called for.

Duties payable in respect of probates and letters of admnistration.

The duties payable are regulated, in the case of deaths occurring since August 1, 1894, by the provisions of various Finance Acts between and including 1894 and 1927. Further information with regard to these duties will be found in "Instructions as to Estate Duty" set out in Appendix II. In the case of deaths occurring before August 2, 1894, the duties payable are regulated by the Customs and Inland Revenue Act, 1881 (*i*).

Engrossment of will.

C. The Engrossment.—This is to be made on paper of the regulation size. Printed and typewritten engrossments are

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(*e*) For the procedure where probate limited to the settled land is sought, see *post*, pp. 449, 450.

(*f*) *Vide post*, pp. 495, 486.

(*g*) Where the deceased was domiciled in England and death occurred before November 22, 1921, the estate to be sworn to is the estate in the then United Kingdom (*i.e.*, of Great Britain and Ireland), and where the death was before 1898, personal estate only is shown; where death occurred between November 22, 1921, and March 31, 1923, inclusive, the estate to be sworn to is that in the United Kingdom of Great Britain and Ireland (exclusive of Northern Ireland); where death occurred on or since April 1, 1923, the estate to be sworn to is that in Great Britain. Where the deceased was not domiciled in England, only the estate in England is shown in the oath.

(*h*) In cases in which power is reserved to another executor to prove, there must be also lodged a copy of the account of the estate, as shown in the affidavit, and a copy of the schedules thereto, or a summary containing sufficient details to enable an applicant for double probate to complete his papers without reference to the Estate Duty Office.

(*i*) 44 Vict. c. 12.

accepted (*k*). When more than one sheet is required, they must be arranged in book form.

Alterations duly authenticated take their place in the will, as engrossed; they are not reproduced *fac-simile*. Unauthenticated alterations are to be omitted. In the latter case an additional copy of the will in its unaltered state will be required for the registrar's *fiat*. Fiat copy.

The engrossment should be strictly accurate, and the spelling and abbreviations in the will are to be followed (*l*). No important alteration in an engrossment will be permitted, and in no case should there be an erasure other than by striking through with a pen.

Where any question of incorporation of a document arises, a decision should be obtained from the Clerk of the Seat before the engrossment is made.

In any case where the will is illegibly written, or where there is much misspelling or unauthenticated alterations, a second copy, known as a *copy to assist* may be required. Copy to assist.

A *copy to perpetuate* will be called for where the will, or part thereof, is written in pencil. That part of the will which is in pencil should appear in the copy in red ink. Copy to perpetuate.

In addition to the three preceding documents—the executor's oath, the Inland Revenue affidavit, and the engrossment—it may be necessary to furnish one or more affidavits in particular cases, in which there occur in the will or codicil irregularities, omissions, or references to other documents. Additional affidavits may be required.

It is important to note that every affidavit made by an attesting witness must contain, in addition to the facts bearing on the particular deficiency which renders it necessary, a statement establishing the due execution of the will (*m*). Every affidavit by attesting witness must depose to due execution.

The chief of these additional affidavits are as follows :—

D. Affidavit as to Due Execution (*n*).—If there be no attestation clause to the will or codicil, or if it be irregular or insufficient, the registrars require an affidavit from at least one of the subscribing witnesses to prove that the provisions of the statutes in reference to execution were complied with. Where attestation clause is absent or defective.

If both subscribing witnesses are dead, or if no affidavit can When both subscribing

(*k*) See Rule 79, N. C. B., and Direction of the President, 1896.

(*l*) Only such marginal notes as may be considered to form part of the will should be engrossed, and when the reference in the will to the notes states that they form no part thereof such notes should not be registered : President's Direction, April 21, 1913.

(*m*) Rule 57, N. C. B. The practice of registering affidavits has been discontinued, and a note is now signed by the registrar on the engrossment and registered, to the effect that affidavits of due execution, of domicil, or as the case may be, have been filed. In cases of difficulty affidavits may still be registered upon the direction of a registrar : Rule 4A, N. C. B.

(*n*) Rules 4—7, N. C. B. ; for forms, see App. VII, Forms 2, 3.

witnesses dead, or not available.

be obtained from either of them, resort may be had to other persons, if any, who were present at the execution of the will; if no affidavit by any such person can be obtained, an affidavit (*o*) must be filed, stating that fact, identifying the handwriting of the testator and the subscribing witnesses, and showing circumstances, if any, which raise a presumption in favour of due execution. In the absence of any evidence of due execution, a will may be admitted to probate if all persons prejudiced thereby are of full age and consent.

Consents of persons prejudiced.

When probate may be refused.

If the affidavits of both the subscribing witnesses show that the requirements of the statute were not complied with, probate is refused. In cases of doubt, the registrar may require the parties to bring the matter before the Judge on motion.

Where will signed in attestation or testimonium clause.

An affidavit of due execution is necessary also where the signature of the testator is placed in the attestation or testimonium clause (*p*).

Two signatures.

Where the will at the end contains two signatures, and where the attestation clause is good, an affidavit will not, as a general rule, be required, and the last signature only should be engrossed.

Interlineations and alterations.

E. Affidavit as to Interlineations and Alterations (*q*).—Where interlineations or alterations appear in the will, unless duly executed or recited in, or otherwise identified by, the attestation clause, an affidavit (*q*) or affidavits in proof of their having existed in the will before its execution must be filed, except where the alterations are merely verbal or of but small importance and are evidenced by the initials of the attesting witnesses (*r*). They may be rendered valid by the re-execution of the will or by the subsequent execution of a codicil thereto (*s*).

Where there are erasures or obliterations.

F. Affidavit as to Erasures and Obliterations (*t*).—The same rule applies to erasures and obliterations; and in every case where words, which might be of importance, are erased or obliterated, an affidavit as to the time and circumstances of the erasure is required (*u*). If no satisfactory evidence on these points can be adduced, the words erased or obliterated, if not entirely effaced (*x*), must form part of the probate (*y*).

Where the will shows signs of having had annexures.

G. Affidavit of Plight and Condition (*z*).—If there are any vestiges of sealing-wax or wafers, pinholes, or other marks,

(*o*) For forms, see App. VII, Forms 7, 8, 10.
(*p*) For form, see App. VII, Form 3.
(*q*) Rule 8, N. C. B.; for forms, see App. VII, Forms 5, 6.
(*r*) Rule 9, N. C. B. (*s*) Rule 8, N. C. B.
(*t*) For forms, see App. VII, Forms 5, 6. (*u*) Rule 11, N. C. B.
(*x*) If the words are completely obliterated, the erasure is left blank in the probate. As to what amounts to a complete obliteration, and as to certain cases in which parol evidence is admissible to prove what the words obliterated were, *vide ante*, pp. 174, 176.
(*y*) Rule 10, N. C. B. (*z*) For form, see App. VII, Form 11.

leading to the inference that a paper, memorandum or other document has been attached to the will, such marks must be accounted for on affidavit, called an affidavit of plight and condition, which should state that the will, when found on the testator's death, was in the same plight and condition in which it is now produced. The production of any such paper, memorandum, or other document may be required; if not produced, its non-production must be accounted for on affidavit (*a*).

A similar affidavit may be required when it appears that part of the will may have been torn off.

Testator blind or illiterate, or where the will is signed by a mark, or by a third person for the testator.

H. Affidavit as to the Knowledge, etc., of a Blind or Illiterate Testator (*b*).—Wills signed by a mark, or so imperfectly or badly signed as to raise an inference of illiteracy or extreme feebleness, or signed by some person at the direction of the testator, require an affidavit that the will was read over to the testator before execution or that the testator had knowledge of its contents (*c*). The same rule applies in the case of the will of a blind testator (*c*).

Where the signature is by mark, and no evidence of the testator's knowledge of the contents is available, an affidavit stating that he was neither blind nor illiterate is required.

Will not dated.

I. Affidavit as to Date.—If the will is not dated, or the date is incomplete or incorrect, an affidavit by one of the attesting witnesses stating the date of its execution is necessary (*d*).

Affidavit of search for later wills.

J. Affidavit of Search (*e*).—If no evidence as to the date is available, an affidavit must be filed stating that search has been made, and that no will of presumably later date has been found. An affidavit of search is also required where the will is endorsed or headed "Draft" or "Instructions," and where a codicil refers to a will by a wrong date.

Affidavit as to deceased's sanity.

K. Affidavit as to Sanity.—If the deceased has died in an asylum, the mental capacity of the testator has to be considered in cases where the will has been executed within a short period before death. It is the practice to require evidence of such capacity where death has occurred in an asylum within six months of the execution of the will.

Where the will refers to another document.

L. Production of Deeds and Documents referred to in the Will or Codicil.—If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent

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(*a*) Rule 14, N. C. B. (*b*) For form, see App. VII, Form 4.
(*c*) See Rule 71, N. C. B.
(*d*) The practice of inserting the date of the execution of the will or codicil in the grant, has been discontinued, and the following note is now signed by the registrar on the engrossed copy will or codicil, annexed to the grant, and registered: "Affidavit filed that will (*or* codicil) was duly executed on the day of ." (*e*) For form, see App. VII, Form 9.

part of such will, the production of such document is required. If not produced, its non-production must be accounted for on affidavit (*f*).

No such document can form part of a will unless it was in existence at the time of the will's execution (*g*).

Will executed in duplicate.

If a will was executed in duplicate, both parts must be produced, or the absence of one of them accounted for by an affidavit, which must satisfy the registrar that the part produced was the part in the testator's possession at the time of his death; otherwise probate may be refused.

Incorporated documents, as a rule, to be engrossed.

An incorporated document or paper is proved as part of the will which incorporates it, and must, as a rule, be engrossed and registered in its entirety. Exceptions are sometimes made in cases of documents of very great length (*h*) where a part only is material (*i*).

Where documents are incorporated by reference, the executor describes the will in his oath as "the will as contained in the paper writings marked A, B, and C."

Any question of incorporation should be settled before the engrossment for probate is made.

Procedure on obtaining probate.

Obtaining Probate.—The executor's oath, the Inland Revenue affidavit, the will, the engrossment, and such of the various other documents and affidavits above referred to as are necessary are taken to the department of the Receiver of Papers (Room 45) at the principal registry (*k*).

Where the grant is made under a decree or order of the Court, a plain copy of the decree or order must be lodged with the papers (*l*).

Fees payable.

A schedule of fees, particulars of which will be found in Appendix V, Part I, is made out by the Receiver.

Fixed fee in certain cases.

A fixed fee of one shilling on the grant, irrespective of the value of the property, is charged when the grant is in respect of trust property only, or in respect of other estate not liable to duty.

No fee for filing certain documents.

No fee is charged for filing the will, codicils, oath, or Inland Revenue affidavit.

Under the statutes 44 Vict. c. 12, s. 33, and 57 & 58 Vict. c. 30, s. 16, a fixed fee of fifteen shillings may be paid in respect of estates the gross amount of which does not exceed respectively

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(*f*) Rule 12, N. C. B.

(*g*) Rule 13, N. C. B. But for the effect of the subsequent execution of a codicil, see *ante*, pp. 187 *et seq.*

(*h*) *Vide ante*, p. 193; Lansdowne (1863), 3 S. & T. 194; *Dundas* (1863), 32 L. J. P. 165. (*i*) *Limerick* (1850), 2 Rob. 313; *ante*, p. 193.

(*k*) Or, where the application is to a district registry, to the proper official.

(*l*) If the order is that of a registrar, the original order and the affidavits on which it was founded should be lodged.

£300 and £500 (*m*). This fee covers all expenses of an application for probate or administration, including a reference to the Judge in chambers, where necessary. Inclusive fee where estate not over £500.

A receipt is given for the papers, for which a shilling stamp is charged. Receipt for papers.

The engrossment of the will is then examined and collated with the original, and the probate, having been filled up and annexed to the engrossment, and signed and sealed, is delivered out by the sealer (Room 64) to the person who surrenders the receipt given by the Receiver (*n*). Engrossment examined. Probate signed, sealed, and issued.

The will, after probate, is registered, *i.e.*, copied in the public books. Will registered.

An entry or record of the grant, called the "probate act," is made by the Clerk of the Seat. "Probate act."

Section 2.

PROBATE OF WILLS DATED BEFORE JANUARY 1, 1838.

In cases, now of very rare occurrence, in which application is made for probate of testamentary papers executed prior to January 1, 1838, when the Wills Act, 1837, came into operation, the practitioner is referred to Rules 17—27, N. C. B. (*o*). Rules for probate of wills executed prior to January 1, 1838.

Section 3.

PROBATE OF THE WILLS OF SOLDIERS AND SEAMEN (*p*).

Probate of the privileged will of a soldier in actual military service or of a seaman or mariner at sea (*pp*)—the sole requisite for which will is a declaration, whether oral or in writing, by the testator as to the manner in which he wishes his estate (*q*) to be dealt with after his death—will be granted upon affidavits which satisfy the registrar that the testator was, in fact, a soldier in actual military service or a mariner or seaman at sea when the will was made. Privileged wills of soldiers in actual military service and seamen at sea; how proved.

If the declaration is in writing, an affidavit identifying the handwriting as that of the testator is required (*r*); if oral,

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(*m*) The former statute applies to cases where death occurred between June 1, 1881 and August 1, 1894, inclusive; the latter Act to cases of death on or since August 2, 1894.

(*n*) The probate is usually ready about four days after the papers are lodged, if the latter are found to be in order. Inquiries with regard to the application should be made of the Clerk of the Seat.

(*o*) See App. III, Part I. (*p*) *Vide ante*, pp. 256—266.

(*pp*) Or where so circumstanced that if a soldier he would be in actual military service: Wills (Soldiers and Sailors) Act, 1918, s. 2.

(*q*) Since the passing of the Wills (Soldiers and Sailors) Act, 1918, real and personal estate; where death occurred prior to February 6, 1918, personal estate only: *Yates*, [1919] P. 93; *vide ante*, p. 257.

(*r*) *I.e.*, an affidavit of two disinterested persons where the will is unwitnessed, or of one such person if there be one witness to the document,

evidence sufficient to satisfy the registrar of the substance of the declaration, and that it was intended to be testamentary, must be adduced.

In cases of doubt or difficulty, a motion to the Court may become necessary, or the will must be propounded in an action.

The term " soldier " includes a member of the Royal Air Force (*rr*).

Fees.

In cases in which the property of a common seaman, marine, soldier or airman, dying in his Majesty's service, is exempt from estate duty (*s*), a fee of one shilling for sealing is taken, whatever the amount of the estate. In cases where a proportion of the estate duty is remitted, the *ad valorem* sealing fee is taken only on the value at which the estate is sworn after remission. The usual fees are, however, payable in County Court cases, or on applications made under the fixed fee of fifteen shillings.

Wills made by seamen or marines; special formalities under Navy and Marines

Unless the formalities prescribed by the Navy and Marines (Wills) Acts of 1865 and 1897 (*t*), and by an Order in Council made thereunder on December 28, 1865 (*u*), are complied with, a will of a person serving as a seaman or marine (*x*), though

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stating in terms that the signature is the testator's handwriting, and how they became acquainted with his handwriting : see Rules 20 and 21, N. C. B. The form in App. VII, Form 10, must be strictly followed : *Neville* (1859), 4 S. & T. 218. Where the will is signed by a mark, an affidavit stating that the deceased at the time of its execution had a knowledge of its contents must be filed : see Rule 71, N. C. B.; *Hackett* (1859), 4 S. & T. 220. Any alterations or interlineations should be referred to by the affidavit, and, if not in the testator's handwriting, there must be evidence to show that he knew and approved of them : *Tweedale* (1874), 3 P. & D. 204.

(*rr*) Wills (Soldiers and Sailors) Act, 1918, s. 5, sub-s. 2.

(*s*) *Vide* 55 Geo. 3, c. 184; 57 & 58 Vict. c. 30, s. 8, sub-s. 1; 7 & 8 Geo. 5, c. 51, s. 13; and the Air Force (Application of Enactments) (No. 3) Order, 1918.

(*t*) 28 & 29 Vict. c. 72 (see App. I), amended by 60 & 61 Vict. c. 15, and 5 & 6 Geo. 5, c. 17. The Acts are printed in App. I.

(*u*) Amended by Orders in Council of 1915 and 1916; see *post*, pp. 702—710, 728, 729.

(*x*) See these terms defined : 28 & 29 Vict. c. 72, s. 2 (App. I). The Accountant-General of the Navy has supplied the following list, which is dated March, 1927, of officers whose wills are exempt from the operation of Navy and Marines (Wills) Acts :—

Officers of the Royal Navy.—Admiral of the Fleet, Admiral, Vice-Admiral, Rear Admiral, Commodore of the First Class, Commodore of the Second Class, Captain, Commander, Lieutenant-Commander, Lieutenant, Lieutenant-Commander (Supplementary List), Sub-Lieutenant, Mate, Midshipman, Naval Cadet, Engineer Vice-Admiral or Vice-Admiral (E), Engineer Rear Admiral or Rear Admiral (E), Engineer Captain or Captain (E), Engineer Commander or Commander (E), Engineer Lieutenant-Commander or Lieutenant-Commander (E), Engineer Lieutenant or Lieutenant (E), Engineer Sub-Lieutenant or Sub-Lieutenant (E), Mate (E), Midshipman (E), Chaplain of the Fleet, Chaplain, Instructor Captain, Instructor Commander, Instructor Lieutenant-Commander, Instructor Lieutenant, Surgeon Vice-Admiral, Surgeon Rear Admiral, Surgeon Captain, Surgeon Commander, Surgeon Lieutenant-Commander, Surgeon Lieutenant, Surgeon Captain (D), Surgeon Commander (D), Surgeon Lieutenant-Commander (D), Surgeon Lieutenant (D), Paymaster Rear Admiral, Paymaster Captain, Paymaster Commander, Paymaster Lieutenant-Commander, Paymaster Lieutenant, Paymaster Sub-Lieutenant, Paymaster Midshipman, Paymaster Cadet, Shipwright Com-

duly executed in accordance with the provisions of the Wills Act, 1837, is ineffective to pass the testator's " naval assets " (*y*). But in case of a will made by such person while either serving in actual military service or being a mariner or seaman at sea, the Admiralty may pay or deliver the " naval assets " to the person claiming to be entitled thereto under such will, though not made in conformity with the Acts under discussion, if, in the special circumstances of the death of the testator, the Admiralty consider that the requirements of these Acts may properly be dispensed with (*z*).

(Wills) Acts, 1865 and 1897.

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mander, Shipwright Lieutenant-Commander, Shipwright Lieutenant, Commissioned Shipwright, Warrant Shipwright, Ordnance Lieutenant-Commander, Ordnance Lieutenant, Commissioned Ordnance Officer, Warrant Ordnance Officer, Electrical Lieutenant-Commander, Electrical Lieutenant, Commissioned Electrician, Warrant Electrician, Wardmaster Lieutenant-Commander, Wardmaster Lieutenant, Commissioned Wardmaster, Warrant Wardmaster, Lieutenant-Commander Instructor in Cookery, Lieutenant Instructor in Cookery, Commissioned Instructor in Cookery, Warrant Instructor in Cookery, Signal Commander, Signal Lieutenant-Commander, Signal Lieutenant, Commissioned Signal Boatswain, Signal Boatswain, Telegraphist Lieutenant-Commander, Telegraphist Lieutenant, Commissioned Telegraphist, Warrant Telegraphist, Lieutenant-Commander-at-Arms, Lieutenant-at-Arms, Commissioned Master-at-Arms, Warrant Master-at-Arms, Warrant Officer, Commissioned Gunner, Gunner, Commissioned Boatswain, Boatswain, Commissioned Engineer, Warrant Engineer, Commissioned Mechanician, Warrant Mechanician, Commissioned Writer, Warrant Writer, Commissioned Supply Officer, Warrant Supply Officer, Keeper and Steward of Royal Cabins in H.M. Yachts, Headmaster, Senior Master, Schoolmaster, Schoolmaster Candidate, Chief Officer Permanent Cruiser Service, Senior Mate Permanent Cruiser Service, Second Mate Permanent Cruiser Service, Senior Chief Officer, R.N. Shore Wireless Service, Chief Officer, R.N. Shore Wireless Service, Senior Chief Officer, R.N. Shore Signal Service, Chief Officer, R.N. Shore Signal Service.

Officers of the Royal Marines.—General, Lieutenant-General, Major-General, Colonel Commandant, Colonel Second Commandant, Colonel, Lieutenant-Colonel, Major, Captain, Lieutenant, Second Lieutenant, Commissioned Sergeant-Major, Commissioned Superintending Clerk, Sergeant-Major, Superintending Clerk, Commissioned R.M. Gunner, Royal Marine Gunner, Chief Schoolmaster, Headmaster, Schoolmaster, Commissioned Bandmaster, Bandmaster.

Officers of the Royal Naval Reserve.—Commodore, Captain, Commander, Lieutenant-Commander, Lieutenant, Sub-Lieutenant, Midshipman, Engineer Commander, Engineer Lieutenant-Commander, Engineer Lieutenant, Paymaster Commander, Paymaster Lieutenant-Commander, Paymaster Lieutenant, Paymaster Sub-Lieutenant, Skipper Lieutenant, Chief Skipper, Skipper, Commissioned Engineer, Warrant Engineer.

Officers of the Royal Naval Volunteer Reserve.—Commodore, Captain, Commander, Lieutenant-Commander, Lieutenant, Sub-Lieutenant, Midshipman, Commander (Special), Lieutenant-Commander (Special), Lieutenant (Special), Engineer Commander, Engineer Lieutenant-Commander, Engineer Lieutenant, Chaplain, Surgeon Captain, Surgeon Commander, Surgeon Lieutenant-Commander, Surgeon Lieutenant-Commander (D), Surgeon Lieutenant, Surgeon Lieutenant (D), Surgeon Sub-Lieutenant, Paymaster Commander, Paymaster Lieutenant-Commander, Paymaster Lieutenant, Paymaster Lieutenant (C), Paymaster Sub-Lieutenant, Paymaster Sub-Lieutenant (C), Commissioned Boatswain, Boatswain, Commissioned Signal Boatswain, Signal Boatswain, Commissioned Telegraphist, Warrant Telegraphist.

[Note.—The ranks shown should be regarded as including Officers who are described as " acting " or " probationary " in any particular rank specified.]

(*y*) *I.e.*, wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in the charge of the Admiralty : 28 & 29 Vict. c. 72, s. 3.

(*z*) 28 & 29 Vict. c. 72, s. 7. See also 5 Geo. 5, c. 17, *post*, p. 727.

Certificate of Inspector of Seamen's Wills required.

Before probate of the will of a person subject to these Acts is applied for, a certificate must be obtained from the Inspector of Seamen's Wills (*a*) stating whether there is lodged with him a will of the deceased, and whether such will is valid to pass "naval assets."

If the requirements of the Acts have been complied with, general probate is granted; but if the will is not valid to pass "naval assets" these are excluded from the operation of the probate.

Wills of merchant seamen.

The wills of merchant seamen are subject to certain similar restrictions imposed by the Merchant Shipping Act, 1894, ss. 176, 177 (*c*).

Section 4.

LIMITED PROBATES.

Practice as to limited probates.

Where, in accordance with the rules set out in an earlier chapter (*d*), the probate is limited or special, the rules mentioned in Section 1 of this chapter are generally to be complied with.

Grants limited as to property.

It should, however, be observed that where the deceased died on or after January 1, 1926, and application is made to take a separate grant of the real estate or any part thereof, or of the personal estate (not being trust estate), the oath shall state that the deceased died solvent. The renunciation, in respect of that part of the estate, of all persons first entitled to a general grant must be filed, and so in like manner in respect of a grant of trust property only (*e*).

No one entitled to a general grant may take a limited grant, save as expressly provided in the Administration of Estates Act, 1925, without direction of the Judge (*f*).

Settled land.

Probates limited to settled land are dealt with in Section 6 of this chapter.

Oath may be settled.

In cases which present exceptional difficulty, the oath may be taken in draft to the Clerk of the Seat for settlement.

Fees.

Fees for settling the oath are payable, varying according to the length of the draft, a folio being calculated at seventy-two words. Additional fees are charged if the perusal of any other deed or document becomes necessary (*g*). The oath, when settled, is returned to be engrossed and sworn. The draft oath should be included among the papers lodged to lead the grant.

Draft oath to be lodged.

(*a*) The Accountant-General of the Navy, Wills Branch, Cornwall House, S.E. 1.

(*c*) 57 & 58 Vict. c. 60, ss. 176, 177; see App. I.

(*d*) *Ante*, pp. 241—243.

(*e*) Judicature (Consolidation) Act, 1925, s. 155; Rule 116, N. C. B.; *vide ante*, p. 286.

(*f*) Rule 30, N. C. B.; *vide ante*, p. 243, note (z).

(*g*) See App. V.

Additional fees are charged for special or limited grants; particulars will be found in Appendix V, Part I. Extra fees on limited grants.

Where a copy or draft or the substance of a lost will is proved, the grant is limited "until the original will or a more authentic copy thereof is brought into and left in the registry." Lost will

Section 5.

PROBATES "SAVE AND EXCEPT" AND CÆTERORUM.

If a testator appoints one executor for a special purpose or in respect of a specific part of his estate, and another executor for all other purposes, probate is granted to the latter, if he is the first to apply, save and except that special purpose or specific part of the estate. On the other hand, if the limited executor is the first to obtain a grant, the other may take probate *cæterorum*—*i.e.*, of the rest of the testator's estate (*h*). Where there is a general and a special executor. Probate "save and except." Probate *cæterorum*.

If both executors apply simultaneously, the grant may be made in the same instrument, but the powers of the executors are distinguished—*i.e.*, probate is granted to the general executor of all the estate save and except the property which vests in the limited executor; and probate is granted to the limited executor restricted in accordance with the will (*h*). Where both general and special executors apply simultaneously.

The practice is the same as in other cases of special probates, but the oath must set out the circumstances of the case (*i*). Practice

An office copy of the "act" of the original grant must be produced when application is made for a *cæterorum* grant.

Section 6.

PROBATES IN RESPECT OF SETTLED LAND.

By section 22 of the Administration of Estates Act, 1925, the right of trustees of settled land to a grant of *probate* limited to such settled land is confined to those who were, *at the death of the testator*, the trustees of the settlement thereof (*k*). Who may take probate limited to settled land.

Where the general executors named in the will are also the trustees of the settlement, a general grant, including the settled land, may be made to them (*kk*). The executors' oath will show that there is settled land, with particulars sufficient to identify the settlement, and will state that the applicants were the trustees thereof at the date of the deceased's death. It must General grant, "including settled land."

(*h*) *Vide ante*, pp. 242, 243; and for the practice in obtaining a double probate, *post*, pp. 475, 476. (*i*) App. VII, Forms 128, 129.

(*k*) *Vide ante*, 232—237; for forms of oaths see App. VII, Forms 120, 121, 130, 131.

(*kk*) For the practice where the general executors, not being the trustees at the date of death, apply for a grant of probate including the settled land, *vide ante*, pp. 435, 439.

be sworn that there is no other settled land (*l*). The grant will contain the words "including settled land."

If further settled land is subsequently discovered, the grant will not be amended, and it will be necessary to have it revoked.

When there is other settled land.

Particulars, identifying the settled land, will be given in both oath and grant, where it is shown that there may be other settled land.

Rights of a special executor.

A special executor of settled land has all the rights of an executor; he may renounce, or power may be reserved to him in a grant limited to settled land. Upon his renunciation he need not state that he has not intermeddled.

An executor to whom probate save and except settled land has been granted is not prevented from applying, as trustee at the date of death of the testator, for a grant limited to the settled land (*m*).

Cannot take grant with trustee appointed since date of death.

A special executor may not join in a grant with a trustee appointed since the date of the death, for the latter is not entitled to a grant of probate.

Practice where save and except grant previously taken.

When a grant of probate, save and except settled land, has been previously extracted, the trustees, on applying for probate limited to the settled land, are not required to be sworn to the will, nor is an engrossment annexed to the grant. The will must, however, be sufficiently identified in the oath (*n*). It must also be sworn whether there is other settled land. An office copy of the record of the previous grant must be lodged with the papers.

Requirements where will not previously proved.

If the will of the testator has not been proved, the trustees must mark the will, which must also be engrossed.

Settled land must be identified.

The settled land in respect of which application is made must in all circumstances be identified by a statement in the oath as to the date and nature of the settlement, or the date of proof of the will under which it arises. The production of the document constituting the settlement may be required.

Previous grants to be recited.

The oath must recite all previous grants made in respect of the deceased's estate.

Inland Revenue affidavit.

The appropriate form of Inland Revenue affidavit is Form A7.

The amendment of settled land grants is dealt with in a later chapter (*o*).

(*l*) In such cases it is the practice to require an undertaking that the grant will, if called for, be brought in for amendment or otherwise. For form of oath, see App. VII, Form 120.

(*m*) An executor who was also trustee of a settlement of settled land at the time of the death of the testator may take or join in taking a grant of probate, save and except settled land, without renouncing his right in respect of the settled land. Similarly he may take or join in taking a grant in respect of the settled land without renouncing his rights in respect of the general estate.

(*n*) For form of oath, see App. VII, Form 131. (*o*) *Vide post*, p. 491.

CHAPTER III.

PRACTICE AS TO GRANTS OF LETTERS OF ADMINISTRATION.

SECTION 1.

GENERAL ADMINISTRATION ON INTESTACY.

To whom granted.

ADMINISTRATION is granted to the person or persons entitled in accordance with rules discussed in an earlier chapter (*a*). It is here only necessary to repeat that where death occurred on or since January 1, 1926, different principles from those applicable in cases of death before that date have to be observed.

Where one of several persons, equally entitled to the grant, is appointed administrator, power not reserved to the others.

When several persons are equally entitled to a grant, and a grant is made to one of such persons, power is not reserved to grant administration to the others if any or all of them shall thereafter apply. During the lifetime of the administrator their right to administration ceases, but upon his death they may come in and take a grant *de bonis non* (*b*).

Number of personal representatives.

Administration will be granted to any number of persons not exceeding four (*c*).

If a minority or life interest arises, administration will not be granted to less than two individuals unless the grant is to a trust corporation with or without an individual (*d*).

Where it may be sworn no minority or life interest arises.

But where the surviving spouse of a person dying after 1925 is entitled in priority to the first £1,000 (*e*), and it is clear from the oath that the *net* estate, excluding personal chattels, does not exceed £1,000, it may be sworn that no minority or life interest arises under the intestacy, and a grant will be made

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(*a*) *Ante*, pp. 279—234.

(*b*) *Ante*, pp. 302—354.

(*c*) Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1.

(*d*) See Supreme Court of Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1. For definition of "trust corporation," see *ante*, p. 206 (n). It may here be observed that, in a case of death after 1925, administration may be granted, after clearing off intermediate interests, without an order, to two or more persons not equally entitled, notwithstanding that there is no minority or life interest. If, however, the deceased died before 1926 and it is sought to join, for the purpose of the grant, two persons not equally entitled, but two grantees are not required, a registrar's order for a joint grant must be obtained; for form of affidavit, see App. VII, Form 39.

(*e*) See Administration of Estates Act, 1925, s. 46.

to a single applicant, unless the registrar shall require further evidence (*f*). This practice will also be applied under the Intestates Estates Act, 1890 (where death occurred before 1926), in the case of a widow applying upon an intestacy, where the *net* real and personal estate does not exceed £500, and the intestate left no issue (*f*).

Application, how made.

Application for a grant of letters of administration is made in like manner as an application for a grant of probate (*g*), except that the earliest date at which letters of administration may issue is the fifteenth day after the death, unless under the direction of the Judge or by order of two of the registrars of the principal registry (*h*).

Not within fourteen days from the death.

Certificate of delay.

In every case where administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified (*i*).

Persons with prior right to applicant must renounce or be cited.

No person is entitled to a grant of letters of administration unless all persons with a prior right to the grant have either died since the death of the intestate, without taking the grant, or have renounced their right thereto.

If they are neither dead nor have renounced, the applicant for the grant must enter a caveat and issue a citation (*k*) calling on all such persons to accept or refuse the grant. In the event of no appearance being entered to the citation, the applicant must obtain an order of the Judge on motion (*l*) that the grant shall be made to him.

Grant usually made to first applicant, if entitled.

Rule 28, N. C. B., which provides for notice by the applicant to all persons with an equal right to himself of his intention to make application, is not strictly enforced, and, in the absence of special circumstances, the grant will be made on the application of the first person entitled thereto. But where separate applications are made by two or more such persons, a grant will not be made until one or the other withdraws his application, or until they agree to take a joint grant.

Procedure where the fitness of the applicant is questioned by another equally entitled.

Where the fitness of an applicant for the grant is questioned by a person or persons having an equal right to take the grant, the latter will enter a caveat, and, when the caveat is warned, the

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(*f*) President's Direction, January 27, 1926. And where, owing to the fact that the *net* estate of a person dying after 1925 intestate is under £1,000, the whole of such estate has vested in one person, who renounces representation, a "*spes*" grant may issue. A grant will not otherwise be made to a person having no interest.

(*g*) *Vide ante*, p. 436.

(*h*) Rule 44, N. C. B. The order of one of the registrars of the principal registry is sufficient to authorise an earlier grant from a district registry: Rule 52, D. R., *vide ante*, p. 436.

(*i*) *Vide ante*, p. 436. For forms, see App. VII, Forms 19, 69.

(*k*) *Vide post*, pp. 509 *et seq.*

(*l*) *Vide post*, pp. 530, 536 *et seq.*

applicant will take out a summons before a registrar (*m*). On the hearing of this summons the claims of the rival applicants will be considered, and a grant ordered to be made to one or other of them (*n*).

Conflicting claims by persons of any one class.

All persons entitled to a share of the estate who are of any one class are equally entitled to take the grant, but if there be conflicting claims a brother, for example, would usually be preferred to a nephew (*o*).

Illegitimate children.

In the case of a female intestate dying on or since January 1, 1927, without lawful issue, it is important that the rights of her illegitimate issue, if any, are not overlooked (*p*). But it is not necessary to clear off illegitimate children in the oath of the applicant for the grant.

Second grantee.

Where it is sought to join with a person entitled to a grant a person not equally or next entitled, all persons having a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*q*).

Papers to lead the grant.

The following are the papers necessary to lead the grant of administration :—

Oath.

A. The Administrator's Oath.—The rules previously laid down with reference to the oath of an executor (*r*) will, unless inapplicable to an intestacy, assist in filling in the administrator's oath. But the wording of the administrator's oath varies with the particular circumstances of each case. The forms in the Appendix will be a guide in most cases (*s*).

Rules for filling in the oath.

Persons having a prior right to the grant must be cleared off in the oath.

The oath is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off (*t*).

The difference in the clearing-off necessary, upon an application by a cousin german of an intestate who died before 1926, and of an intestate who died after 1925, may be illustrated as follows :—

Example of clearing off.

(1) *Death before 1926.*—The deceased died a widower without child or parent, brother or sister, uncle or aunt, nephew or niece.

(*m*) *Vide post*, p. 522.
(*n*) *Vide ante*, pp. 299 *et seq.*
(*o*) See Rule 121, N. C. B.
(*p*) Legitimacy Act, 1926, s. 9, sub-s. 1 : see App. I.
(*q*) Rule 122, N. C. B. Persons equally entitled to the grant with the applicant should be cleared off by renunciation, consent or registrar's order before a trust corporation is joined as co-administrator.
(*r*) *Vide ante*, p. 436—440.
(*s*) App. VII, Forms 154—174, 185, 186.
(*t*) Rule 37, N. C. B. By " cleared off " is meant a statement showing that no persons entitled in priority to the applicant exist, or that such persons have renounced administration, or have died since the death of the intestate without having taken out letters of administration, or have been cited and have not appeared.

(2) *Death since 1925.*—The deceased died a widower without issue, parent, brother or sister of the whole or half blood, or their issue, or grandparent.

Settled land. The applicant must depose to settled land, where death occurred after 1925, as in an application for probate, and trustees thereof, duly appointed by a formal appointment, must be cleared off before a general grant, including settled land, is made. Where there are no such trustees, and the settlement arises under a will or intestacy, the personal representative of the settlor must be cleared off, unless a registrar, upon affidavit evidence, otherwise decides (*u*).

Minority and life interest. A statement must be made in the oath whether a life interest or a minority arises in connection with the estate (*x*).

Trust corporation. Upon an application by a trust corporation, it must be deposed that the corporation is a trust corporation within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925 (*y*), and it must be shown in what manner it has been authorised to apply for the grant by the persons entitled thereto. The officer making the application must lodge a sealed copy of the resolution authorising him to make it (*z*).

A grant to a trust corporation alone, made by reason of a minority or life interest, will be limited " until further representation be granted."

A grant to a trust corporation alone will not be made without the consent of the persons entitled to the grant.

Applicant taking *per stirpes*. Where the applicant claims to be entitled to share in the estate *per stirpes*, the oath should state the name and date of death of the person through whom the applicant claims to be so entitled.

Affidavit of heirship. An affidavit showing how the applicant is entitled to the real estate must be filed upon an application by an heir-at-law.

Legitimated person. Upon an application by a legitimated person, a certified copy of the certificate of re-registration, or of a decree under the Supreme Court of Judicature (Consolidation) Act, 1925, and the Legitimacy Act, 1926, must be produced, and a statement, identifying the applicant as the person referred to, must be sworn in the oath. A legitimated person will be described in the grant in the same way as an ordinary applicant.

Appropriate description of applicant. The appropriate descriptions, to be used in the oath, of applicants for a grant of administration, will be found, in cases

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(*u*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, sub-s. 1; *vide ante*, pp. 232—237, 435, 439.

(*x*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 160, sub-s. 1; Rule 113, N. C. B.; *vide ante*, p. 451.

(*y*) For definition of a " trust corporation," see note on p. 206.

(*z*) Rule 111, N. C. B.

of death before Jnauary 1, 1926, on p. 884, and where death has occurred on or since that date, on p. 889.

Inland Revenue affidavit.

B. The Inland Revenue Affidavit.—The requirements under this heading are similar to those necessary upon an application for probate (*b*).

Persons to whom administration shall be committed to give bond.

C. The Administration Bond.—Section 167, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that every person to whom a grant of administration is made shall give a bond to the senior registrar of the Probate Division by the name of "the principal probate registrar," and, subject to the provisions of the section, if the principal probate registrar, or, where the grant was made in a district registry, the district probate registrar, so requires, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the real and personal estate (*c*) of the deceased.

Bond not required of certain public officers.

A bond need not be given by the Solicitor for the affairs of the Treasury (*d*), by the Solicitor for the Duchy of Lancaster (*e*), or by the Public Trustee (*f*).

Otherwise bond not dispensed with.

Apart from these privileged officials (*g*) a bond will in all cases be required, and the Court has no discretion to dispense with it (*h*).

Form.

The bond, forms of which will be found in the Appendix (*i*), is to be executed by the applicant for administration.

Bond to be executed by applicant in person, except in very special circumstances.

In one case, where, after administration had been granted, a large sum became payable to the estate of the deceased, the Court, under circumstances of urgency, allowed another person to execute a bond to cover the increased amount, on the understanding that the administrator, who had gone abroad, should as soon as possible execute a similar bond (*l*).

Bond of married woman administratrix.

Since the Married Women's Property Act, 1882, the husband of an administratrix cannot execute the bond on her behalf. He may, however, become a surety (*m*).

Trust corporation.

A bond lodged by a trust corporation must be given by the corporation, not by the nominee of the corporation.

(*b*) *Vide ante*, p. 440.

(*c*) Before the Land Transfer Act, 1897, "personal estate" only.

(*d*) Judicature (Consolidation) Act, 1925, s. 167, sub-s. 6. By section 30, sub-section 3 of the Administration of Estates Act, 1925, the Treasury Solicitor is excused from filing a declaration upon oath of the deceased's estate.

(*e*) Judicature (Consolidation) Act, 1925, s. 167, sub-s. 6.

(*f*) Public Trustee Act, 1906, s. 11, sub-s. 4.

(*g*) These officials, although they give no bond, are subject, as regards the administration, to the liabilities and duties imposed by a bond: *vide ante*, p. 315.

(*h*) See *King of Siam* (1912), 29 T. L. R. 40. Where two persons were appointed joint administrators *pendente lite* the Court refused to dispense with the execution of a joint bond: *Stanley* v. *Bernes* (1830), 1 Hagg. 221.

(*i*) App VII, Forms 58—67.

(*l*) *Ross* (1877), 2 P. D. 274.

(*m*) *Ayres* (1883), 8 P. D. 168.

Bond, by whom attested.

Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person authorised to administer oaths under 52 Vict. c. 10, and 54 & 55 Vict. c. 50, but in no case are they to be attested by the solicitor or agent of the party who executes them. The signature of the administrator, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator (*n*).

The sureties need not necessarily execute the bond before the person who attests the signature of the administrator.

Where bond is executed by a marksman.

If any of the parties sign by a mark, the Commissioner should state that the effect of the bond was duly explained, and that the mark was made in the Commissioner's presence.

Requirements in filling up bond.

Care must be taken that the title in which the applicant applies for the grant is similarly stated in oath and bond, and any limitation in the grant to be taken must be set out in the bond, as in the oath.

Form of bond given by creditor.

The bond of a creditor administrator contains an undertaking to pay the debts " rateably and proportionally and according to the priority required by law, not, however, preferring his own debt or that of any other person by reason of being administrator " (*o*).

Stamp duty.

The bond must bear an impressed stamp of five shillings where the amount of the estate exceeds £100 (*p*).

Seals may be printed.

By an order of April 21, 1902, seals may be printed.

Sureties must be responsible persons.

The registrars are to take care, as far as possible, that the sureties are responsible persons (*q*).

married women;

A woman will be accepted as a surety, but a married woman must prove on affidavit that she has sufficient separate estate to cover the penalty of the bond.

guarantee society;

A " guarantee society " may be accepted as surety, even though its directors do not by the bond render themselves personally liable, but the balance sheet and an affidavit of sufficiency of the society must be filed (*r*). The corporate seal of the society is affixed to the bond.

(*n*) Rule 38, N. C. B. In *Parker* (1866), 1 P. & D. 301, this rule was relaxed. When the oath has to be re-sworn, and this is done before another commissioner, the bond need not be re-attested.

(*o*) *Brackenbury* (1877), 2 P. D. 272. For form of bond, see App. VII, Form 64. Before 1900 the words were " not *unduly* preferring his own debt," but in *Davies* v. *Parry*, [1899] 1 Ch. 602, it was held that these words did not disable the creditor from paying his own debt in priority to others. See practice note [1899] W. N. 262; *Balham*, [1901] Ch. 52.

(*p*) Bonds, given in respect of estates of persons dying on active service, are, in certain cases, exempt from stamp duty.

(*q*) Rule 41, N. C. B.

(*r*) *Carpenter* v. *Queen's Proctor* (1882), 7 P. D. 235. For form of affidavit, see App. VII, Form 23. In lieu of filing an affidavit of sufficiency

Solicitors' clerks are not, except in very special circumstances accepted as sureties. solicitors' clerks.

Further explanation may be required where the description of a surety is vague. Descriptions of this character are, *inter alia*, gentleman, esquire, clerk, secretary, of no occupation, and J.P. Vague descriptions of sureties.

As a general rule, the sureties to the administration bond must reside within the United Kingdom (*s*), the Channel Islands, or the Isle of Man (*t*). Sureties residing in the Irish Free State are now deemed to be foreign sureties (*u*). Foreign sureties not generally accepted.

But where it is sworn that a deceased person, of whatever nationality, was resident abroad, and left no debts in this country, foreign sureties to the bond may be accepted (*x*). Exceptions.

In all other cases, leave to give bond with foreign sureties must be obtained on summons to a Judge in chambers (*y*).

As a general rule two sureties are required (*z*). Number of sureties.

But where the gross estate is under £50 one surety may be accepted unless a registrar shall otherwise order (*a*).

Formerly when administration was granted to the husband or his representative or his attorney, one surety only was required (*b*). But a husband, as such, is no longer excused from furnishing two sureties in cases where death has occurred on or since January 1, 1926 (*c*).

The principal probate registrar or a district registrar may allow the number of sureties to be increased (*d*). Increase in number of sureties

Application may also be made to the principal probate registrar or a district registrar to dispense with sureties upon On good cause shown sureties may be dispensed with.

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with each case, application may be made by a company to the Senior Registrar to approve a general affidavit of sufficiency, which, if accepted, will be filed with the Record Keeper.

(*s*) *I.e.*, Great Britain and Northern Ireland.

(*t*) The rule was established at a time when the assignee of the bond could not have served the sureties with process if they were resident abroad; but by 15 & 16 Vict. c. 76, s. 18, service can be effected on a person abroad. The rule was consequently relaxed: *Reed* (1863), 3 S. & T. 439; *Fernandez* (1879), 4 P. D. 229; but not as to Scotland, for 15 & 16 Vict. c. 76 did not apply to Scotland or Ireland: *Herbert* v. *Sheill* (1864), 3 S. & T. 479; but see *Houston* (1865), 1 P. & D. 85, where sureties resident in Scotland were allowed. See now R. S. C., Order XI.

(*u*) Direction of the President, April 11, 1923.

(*x*) Direction of the President, October 14, 1925.

(*y*) Direction of the President, May 10, 1893; *Scott*, [1895] P. 342. Where the deceased died domiciled in a British colony, it was held that the administrator must apply to a Judge in chambers for leave to give bond with foreign sureties: *Simpkins*, December 3, 1896.

(*z*) Rule 39, N. C. B.

(*a*) President's Non-contentious Probate Directions, 1925.

(*b*) Rule 39, N. C. B., prior to the amendment of 1925. This was also a rule of the Prerogative Court: see *Noel* (1832), 4 Hagg. 207, and also *Hunt*, [1896] P. 288.

(*c*) President's Non-contentious Probate Directions, 1925.

(*d*) Judicature (Consolidation) Act, 1925, s. 167, sub-s. 1.

good cause being shown (*e*). Thus, the Court has dispensed with sureties where the estate had been paid into the Court of Chancery and was being administered by that Court (*f*); where the proposed administrator was the nominee of a public department (*g*); where the applicant for the grant was entitled to the whole estate and all debts had been paid (*h*), and where the Court desired to allow the administratrix a free hand in the management of the estate (*i*).

Unless a registrar having regard to all the circumstances otherwise directs, sureties will not be required in the following cases (*k*) :—

(1) Where application is made by two or more individuals, and there is no minority, provided that all persons having a vested interest in the residue of the estate consent to sureties being dispensed with, and that it be sworn that the estate is solvent;

(2) Where a grant of administration is applied for by a trust corporation having its principal office within the jurisdiction, whether alone or with an individual (*l*);

(3) Where two or more trustees of settled land within the meaning of section 22, sub-section 1 of the Administration of Estate Act, 1925, apply for a grant of administration, whether they apply of their own initiative or under section 23 of this Act;

(4) Where application is made by a Crown servant in his official capacity (*m*).

More bonds than one may be given so as to limit liability of sureties.

The Court will not by reason of the estate being large and the risk small dispense with sureties. But application may be made to a registrar, under section 82 of the Court of Probate Act, 1857 (as amended by the Grant of Administration (Bonds) Act, 1919), to allow the security to be made up by any number of bonds (*n*).

(*e*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 167, sub-s. 1. See also *King of Siam* (1912), 29 T. L. R. 40.

(*f*) *Cleverly* v. *Gladdish* (1862), 2 S. & T. 335; *De la Farque* (1862), 2 S. & T. 631; *Stelfox* (1894), 70 L. T. 814; *Leach* (1899), 80 L. T. 170. But the Court must be satisfied that the Court of Chancery will continue to have the management of the estate after the grant of administration : *Jackson* v. *Jackson* (1865), 1 P. & D. 13.

(*g*) *Solicitor of the Duchy* v. *Canning* (1880), 5 P. D. 114; *Bryan*, [1905] P. 88.

(*h*) *De la Farque* (1862), 2 S. & T. 631; *Allen*, [1893] P. 184; *Paton*, [1901] P. 188; *Unwin* (1902), 87 L. T. 749; see *Harper*, [1909] P. 88.

(*i*) *Cory*, [1903] P. 62; *Rushworth* (1908), 25 T. L. R. 128.

(*k*) Direction of the Principal Probate Registrar, December 14, 1925.

(*l*) See also Rule 111, N. C. B. Where the Public Trustee is joined as a trust corporation with the person entitled to the grant, the latter alone delivers the bond, which is given without sureties : Principal Probate Registrar's Direction, July 28, 1927.

(*m*) *E.g.*, a receiver in bankruptcy. See also *Belcher* v. *Maberly* (1840), 2 Curt. 629; *Cope* (1890), 15 P. D. 107; *Astbury* (1899), 80 L. T. 296; *Causton*, [1906] P. 124; *Bowron* (1915), 84 L. J. P. 92.

(*n*) *Earle* (1885), 10 P. D. 196; *McGowan* (1885), 10 P. D. 197.

Applications for leave to dispense with sureties to an administration bond are made to the principal probate registrar or a district probate registrar (*o*).

Applications for leave to dispense with sureties, how made.

The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them (*p*).

Original sureties will not be discharged.

In ordinary circumstances sureties are not required to justify, or, in other words, to make an affidavit that each surety is, after payment of all his just debts, well and truly worth half the penalty of the bond (*q*).

Justification of sureties not usually required.

But when any person takes letters of administration in default of the appearance of parties cited, but not personally served with the citation (*r*), or for the use and benefit of a lunatic or person of unsound mind, unless he is a committee (*s*) or person appointed under a lunacy order, or where the death of the deceased is presumed, a declaration of the estate (*t*) must be filed, and the sureties must justify.

When justification is required.

Where administration is granted pending suit, or under section 73 of the Court of Probate Act, 1857, or section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, justification of sureties is usually required (*u*).

In any case the Court may order the sureties to justify on the application of a person interested in the estate. Thus on the application of a next-of-kin (*x*) or of a legatee (*y*) the sureties have been required to justify, at least to the extent of the applicant's interest in the estate (*z*).

Justification may be called for by person interested

Creditors, as a general rule, have no right to call upon the kin to give justifying security, and a departure from this rule is made only for very cogent reasons (*a*).

As a general rule, creditors have no such right.

A person who desires to obtain an order that the sureties should justify, should enter a caveat, and appear to the warning.

How order for justification is obtained

(*o*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 167, sub-s. 1.

(*p*) *Stark* (1866), 1 P. & D. 76.

(*q*) For form of affidavit of justification, see App. VII, Forms 22, 23.

(*r*) See *Aitkin* v. *Ford* (1830), 3 Hagg. 194, n.; *Milligan* (1849), 2 Rob. 108; *Belcher* v. *Maberly* (1840), 2 Curt. 629.

(*s*) Rule 42, N. C. B. In these cases the Court will not relax the rule even partially, except in very special circumstances: *Howell* v. *Metcalfe* (1824), 2 Add. 348; *Jackson* v. *Jackson* (1865), 1 P. & D. 12.

(*t*) For form of declaration, see App. VII, Form 92.

(*u*) President's Non-contentious Probate Directions, 1925.

(*x*) *Coppin* v. *Dillon* (1831), 4 Hagg., at p. 376.

(*y*) *Pickering* v. *Pickering* (1828), 1 Hagg. 480.

(*z*) *Jackson* v. *Jackson* (1865), 1 P. & D. 12; *Friswell* v. *Moore* (1819), 3 Phill., at p. 139; *Hardstone* (1828), 1 Hagg. 487. See *Williams* (1830), 3 Hagg. 217; *Howell* v. *Metcalfe* (1824), 2 Add., at p. 350; *Campbell* (1829), 2 Hagg. 555; but see *Taylor* v. *Diplock* (1815), 2 Phill., at p. 280.

(*a*) *Hughes* v. *Cook* (1753), 1 Lee, 386; *John* v. *Bradbury* (1866), 1 P. & D. 245; *Hackman* v. *Black* (1755), 2 Lee, 251. A creditor's application was granted in *Noel* (1832), 4 Hagg. 207.

The application for justifying security is then made on summons to a registrar.

Penalty on bond to be double the amount of the property to be dealt with.

An administration bond is, unless a registrar otherwise directs, to be given in double the amount of the property to be placed in possession of, or dealt with by the administrator (*b*).

In calculating the amount of the bond twice the value of the personal estate must be taken. Where death occurred before 1926 the penalty in respect of the real estate is calculated at twice the annual value (*c*), and in cases of death after 1925 at double the capital value (*d*).

Alteration in penalty.

Where any alteration in the amount of the penalty appears in the bond, the attestation clause must refer to such alteration.

Reduction of penalty.

Application for reduction of the penalty is made to a registrar (*e*).

Cases in which the penalty has been reduced.

Orders reducing the penalty on the bond have been made in the following cases :—

Where the original grant of administration had expired the Court allowed the bond, upon application for a fresh grant, to be given in double the amount of the unadministered estate (*f*).

Where administration was granted merely for the purpose of executing a formal release to the trustee under a marriage settlement, a bond for a nominal sum was accepted (*g*).

Where the estate amounted to £3,000, to which the intestate's mother was solely entitled, and there were debts to the amount of £45, the Court accepted a bond, with sureties, for double the amount of the debts—namely, £100 (*h*).

Where, an unexpected addition to the estate, after the grant had issued, necessitated the re-swearing of the value of the estate, the Court directed the acceptance of a separate bond in the penalty of a sum which, together with the penalty on the original bond, would be double the sum under which the estate was to be re-sworn (*i*).

Where the greater part of the estate had been paid into the Court of Chancery to be administered there, a penalty of double

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(*b*) Rule 39, N. C. B. By a direction of Sir J. Hannen (March, 1885), when an administration bond with a penalty of less than the full amount is tendered at the principal registry, the registrars are at liberty to receive it, provided the deficiency does not exceed £5 per cent. The Official Solicitor, applying for a grant in his official capacity, may give a bond for the actual amount of the estate : President's Direction, November, 1895.

(*c*) President's Direction, February, 1898.

(*d*) President's Non-contentious Probate Directions, 1925.

(*e*) Court of Probate Act, 1857, s. 82, as amended by the Grant of Administration (Bonds) Act, 1919.

(*f*) *Halliwell* (1885), 10 P. D. 198; *Fozard* (1863), 3 S. & T. 173; *Oakey*, [1896] P. 7.

(*g*) *Stacpoole* (1861), 2 S. & T. 316.

(*h*) *Gent* (1858), 1 S. & T. 55.

(*i*) *Weir* (1859), 1 S. & T. 506.

the amount remaining in the hands of the administrator was allowed (*k*).

Where, under a misapprehension, the penalty was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled (*l*).

Power of Court to assign bond.

Where it appears to the satisfaction of a Court or a Judge that the condition of an administration bond has been broken, the Court or Judge may, on an application in that behalf, order that the bond shall be assigned to such person as may be specified in the order, and the person to whom the bond is assigned shall be entitled to sue thereon in his own name as if it had been originally given to him instead of to the principal probate registrar and to recover thereon as trustee for all persons interested the full amount recoverable in respect of the breach of the condition thereof (*m*).

Under what circumstances assignment will be ordered.

The application is made upon summons to a registrar, who will order an assignment (*n*), upon being satisfied by affidavits that the application is made *bona fide*, that a *prima facie* case has been made out that the condition has been broken, and that the applicant is entitled to sue the administrator for the breach (*o*).

Practice.

The assignment which is made by the "principal probate registrar," and which must bear an impressed stamp for 5s., is drawn up by the registrar's clerk. The bond and assignment are not given out (*p*).

Where the Court refused to assign a first bond.

Where an administrator executed a bond with one surety under a nominal penalty, and, having subsequently resworn the value of the estate at an increased sum, executed a fresh bond with two new sureties, the Court refused to assign the first bond until the action on the second had been disposed of (*q*).

(*k*) *Morris* (1889), 15 P. D. 9; *Cormack*, [1891] P. 151; *Paxton* (1889), 14 P. D. 40.

(*l*) *Goold* (1865), 4 S. & T. 20.

(*m*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 167, sub-s. 4. It is further provided by sub-section 5 that any bond given under any enactment repealed by the Administration of Justice Act, 1925, may be enforced or assigned as if given to the principal probate registrar.

(*n*) For form of assignment, see App. VII, Form 57.

(*o*) *Young* (1866), 1 P. & D. 186. See *Bouverie* v. *Maxwell* (1866), 1 P. & D. 272, at p. 275; *Baker* v. *Brooks* (1862), 3 S. & T. 32; *Cope* v. *Bennett* (1911), 105 L. T. 541. And see the following cases (but not on the practice, which is altered); *Young* v. *Oxley* (1858), 1 S. & T. 25; *Sandrey* v. *Michell* (1862), 3 S. & T. 25; *Cartwright* (1876), 1 P. D. 422.

(*p*) If the bond is filed at a district registry, the district registrar must be requested to forward it to the principal registry. Arrangements must be made with the Record Keeper for the attendance of a clerk with the bond and assignment at the hearing of the action.

(*q*) *Irving* (1869), 1 P. & D. 658.

Surety induced to execute bond by misrepresentation.

Where one surety executed the bond on the assurance that the other person named in it as co-surety would execute it, and the latter refused, the bond being executed by another surety without the first surety's assent, the bond was held void and ordered to be cancelled (*r*).

Practice on extracting letters of administration.

Extracting the Grant.—The procedure to be adopted in extracting letters of administration is similar to that described with regard to probate (*s*).

Creditor, who applies for a grant of administration, must clear off prior interests

Application by creditor.—Application by a creditor for letters of administration may now be considered. A creditor must, before the grant will be made to him, obtain the renunciation of all persons entitled to share in the estate (*t*), and the representatives of any of them who have died subsequently to the deceased, or must cite these persons to accept or refuse letters of administration (*u*). Upon the failure of such persons to appear to the citation, the Court will, on motion, order a grant to issue to the creditor.

Where deceased was a bastard intestate creditor must give notice to His Majesty's Procurator-General.

A creditor who is desirous of obtaining a grant of administration to the estate of a bastard intestate who has died without issue or surviving spouse, must give notice of his application to His Majesty's Procurator-General or to the Solicitors for the Duchies of Lancaster or Cornwall, as the case may be (*w*). If the officer in question signifies by letter that he declines to take administration on behalf of the Crown, the grant (*x*) will be made to the creditor without an order. The creditor's notice must disclose the value of the assets, and a grant will not issue for a larger amount than that disclosed, without further notice to the officer of the Crown.

Rights of bastard's mother under Legitimacy Act, 1926.

It must in this connection be observed that in the case of a bastard intestate dying on or since January 1, 1927, his mother, if surviving, has the same interest in his estate as if he had been born legitimate and she were the only surviving parent (*y*).

(*r*) *Cowardin* (1901), 86 L. T. 261. Re-delivery of the bond by an original surety, upon the substitution of a fresh co-surety, is thus necessary.

(*s*) *Vide ante*, pp. 444, 445.

(*t*) The persons whom it will be necessary to clear off will differ according as the deceased died prior to January 1, 1926, or on or since that date: *vide ante*, pp. 308, 333.

(*u*) In granting administration of a small estate to a creditor, the Court has dispensed with citation of the next-of-kin on proof that they had received notice of the application: *Teece*, [1896] P. 6; *Morgan* (1896), 75 L. T. 190; but see *Cope* (1890), 15 P. D. 107. The Court may dispense with citation or notice under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or section 73 of the Court of Probate Act, 1857, as the case may be; *Turner* (1886), 12 P. D. 18; *Conolly* (1896), 74 L. T. 461; *Adams* (1896), 74 L. T. 462, n.; *Heerman*, [1910] P. 357; *vide ante*, p. 406. For forms of citation, see App. VII, Forms 76, 77.

(*w*) Rule 75, N. C. B.

(*x*) Of the personal estate only where death occurred before 1926.

(*y*) Legitimacy Act, 1926, s. 9, sub-s. 2. For form of citation of bastard's mother by a creditor, see App. VII, Form 76.

It will, therefore, in such a case be necessary for the creditor to clear off the mother before he will be in a position to apply for the grant.

A creditor, who is desirous of obtaining a grant of administration to a person who has died without leaving any known kin must give notice to, and receive a similar intimation of acquiescence from, the proper officer of the Crown (*z*).

Where intestate died without known kin.

He must then issue a citation against the kin (if any) entitled to share and all persons having or pretending to have a right to a share of the estate (*a*) as prescribed by Rule 76, N. C. B. (*b*). If no one appears to the citation, application for a grant to the creditor is made to the Court on motion (*c*).

A creditor, to whom administration is thus granted, will, in addition to the special form of creditor's bond, be required to file a declaration of the estate, and the sureties to his administration bond must justify (*d*).

Grant obtained by order on motion after citation.

Section 2.

PRACTICE AS TO GRANTS OF ADMINISTRATION WITH THE WILL ANNEXED.

An application to obtain a grant of administration with the will annexed resembles generally an application to obtain letters of administration on an intestacy, though in certain respects it has features in common with an application for probate (*e*).

Practice as to administration *cum testamento annexo*.

The application may be made on the eighth day after the death of the deceased.

When application can be made.

The grant is made to the person entitled in accordance with rules discussed in an earlier chapter (*f*). Where several persons are equally entitled, and the grant is made to one of them, power is not reserved to the others; during the lifetime of the administrator they have no right to administer, but upon his death they may take administration with the will annexed *de bonis non*.

To whom grant is made.

Grants of administration (with the will annexed) will not be made in respect of the same property, to more than four persons (*g*). A life interest or a minority in the estate necessitates

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(*z*) Rule 75, N. C. B.

(*a*) If death occurred before 1926 the creditor will cite the next-of-kin (if any) and, where the deceased died possessed of real estate, the heir-at-law. The grant in these cases will be limited to the personal estate.

(*b*) But see *Heerman*, [1910] P. 357, where such citation was dispensed with under section 73 of the Court of Probate Act, 1857. For the practice as to citations, see *post*, pp. 509 *et seq.*

(*c*) *Vide post*, p. 520. If the deceased died before January 1, 1926, the grant will be limited to the personal estate.

(*d*) Rule 42, N. C. B. But see *Hake*, [1920] W. N. 117. For form of creditor's bond, see App. VII. Form 64; see also *ante*, p. 459.

(*e*) *Vide ante*, pp. 436 *et seq.*, and pp. 452 *et seq.*

(*f*) *Vide ante*, pp. 335 *et seq.*: see also Rule 119, N. C. B.

(*g*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 160.

a grant to a trust corporation with or without an individual, or to not less than two individuals (*h*).

A residuary legatee or devisee for life or a legatee or devisee for life can no longer take a grant alone (*i*). If it is desired, in such a case, for the grant to be taken by a trust corporation alone, the consent of the life tenant is required.

The applicant must obtain the renunciation of, or cite, all persons with prior right to the grant.

All persons with a prior right to the applicant must, in the absence of renunciation be cited (*k*), as in administration on intestacy. Thus the residuary legatee or devisee in trust must cite the executors; the beneficial residuary legatee or devisee for life must cite the executor and residuary legatee and devisee in trust. The persons to be cited and the prior interests to be cleared off will differ according as the deceased died before, or on or since, January 1, 1926 (*l*).

Oath to clear off all persons with a prior right, and to show capacity in which applicant is entitled.

The oath, forms of which will be found in Appendix VII (*m*), presents no very distinctive features. It is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off (*n*). The oath must show the capacity in which the applicant is entitled, and, if he is misdescribed in the will, such misdescription must be recited in the oath. If the discrepancy be great, the identity of the applicant must be proved by affidavit.

Settled land.

Where death occurred after 1925 there must be a statement as to settled land, and trustees thereof, duly appointed by a formal appointment, must be cleared off before a general grant, including settled land, is made. Where there are no trustees, and the settlement arises under a will or intestacy, the personal representative of the settlor must be cleared off unless a registrar, on affidavit evidence, otherwise decides.

Minority and life interest.

It must be sworn whether any person has a life interest under the will, and whether any beneficiary is a minor. If either contingency arises, the grant must be made to at least two persons or to a trust corporation.

Trust corporation

The provisions of Rule 111, N. C. B. (*o*) must be complied with, where application is made by a trust corporation (*p*). A grant to a trust corporation alone made by reason of a minority

(*h*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 160. But where the surviving spouse of a person dying after 1925 is entitled in priority under section 46 of the Administration of Estates Act, 1925, to the first £1,000, and it is clear from the oath that the *net* undisposed-of residue under the will, excluding personal chattels, does not amount to £1,000, it may be sworn, in this respect, that no minority or life interest arises. President's Direction, January 27, 1926.

(*i*) President's Non-contentious Probate Directions, 1925.

(*k*) For forms of citation see App. VII, Forms 72—82.

(*l*) *Vide ante*, pp. 335 *et seq.*

(*m*) App. VII, Forms 136—148.

(*n*) Rule 37, N. C. B.

(*o*) *Vide ante*, p. 454.

(*p*) For definition of "trust corporation," see p. 206.

or life interest will be limited "until further representation be granted." A grant will not be made to the syndic of a trust corporation.

A grant to a trust corporation alone will not be made without the consent of the persons entitled to the grant.

Syndic of corporation.

A syndic of a corporation other than a trust corporation must swear that the corporation is not a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, and must lodge the resolution under seal by which he is appointed syndic. The grant will be made "for the use and benefit of the corporation and until further representation be granted."

Where residue is given to a *class* of which applicant is a member.

Where the residue is not given by the will to any person or persons specifically, but to a class, *e.g.*, "to my children," the oath must state that the applicant is "the lawful child of the testator, and *as such* one of the residuary legatees named in the will."

The formal requirements to be set out in the oath are similar to those required in an executor's oath (*q*).

The will, how proved.

The will is proved in all respects in the same way as by an executor (*r*). An engrossment of the will must be lodged, and affidavits as to due execution, plight and condition, etc., may be called for as required.

Administrator (with will) must give bond.

The bond (*s*) for administration with the will annexed differs in form, but in no other respect, from that given by an administrator on intestacy (*ante*, pp. 455—462).

Inland Revenue affidavit.

An Inland Revenue affidavit is required (*t*).

Section 3.

PRACTICE AS TO LIMITED ADMINISTRATIONS (*u*).

Persons entitled to the general grant must be cleared off.

Limited administrations are not granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge (*w*).

No person entitled to a general grant may take a limited grant without leave.

Save as is in the Administration of Estates Act, 1925, expressly provided, no person entitled to a general grant in

(*q*) *Vide ante*, pp. 436—440.
(*r*) *Vide ante*, pp. 438—444.
(*s*) For form, see App. VII, Form 59.
(*t*) *Vide ante*, p. 440.
(*u*) *Vide ante*, pp. 357—400.
(*w*) Rule 29, N. C. B. An order for a limited grant, after citation of persons entitled to a general grant, must usually be obtained on motion (see *post*, p. 535). But where application is made for a grant limited to the only portion of an estate *left unadministered*, the application, which is supported by affidavits, is reported to the Judge by the registrar, and the grant issues by order under the direction of the Judge without a motion: Tristram & Coote (16th ed.), p. 381.

respect of the estate of a deceased person will be permitted to take a limited grant, except under the direction of the Judge (*x*).

Oath must be framed in accordance with the facts.

The practice in obtaining a limited grant is the same as in applying for a general grant. But in all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case (*y*).

Grants limited as to property.

Where application is made under section 155 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*z*), for a separate grant of the real estate (or any part thereof) or of the personal estate (not being trust estate), the solvency of the estate must be sworn to in the oath. The renunciation in respect of that part of the estate of persons first entitled to a general grant must be filed, and so in like manner in respect of a grant of trust property only.

The oath, in cases of exceptional difficulty, may be taken in draft to the Clerk of the Seat to be settled by him (*a*).

Value of property sworn.

Where the grant is limited to a particular property, the value of that property only is sworn to in the oath.

Bond.

The administration bond is, in all cases of limited or special administrations, to be prepared in the registry (*b*).

Additional fees.

In addition to the ordinary fees, extra fees are charged for special or limited grants. Particulars will be found in Appendix V, Part I.

Section 4.

ADMINISTRATION "SAVE AND EXCEPT" AND CÆTERORUM.

Administrations "save and except" and *cæterorum*.

The practice as to these grants when they become necessary (*ante*, p. 399) is the same as that in other cases of administrations limited to part of the deceased's estate (*c*).

A plain office copy of the act of the former grant must be lodged when application for a *cæterorum* grant is made.

Section 5.

ADMINISTRATION WITH AND WITHOUT WILL LIMITED TO SETTLED LAND.

Requirements similar to those in the case of probate.

Generally speaking, the formalities upon an application for a grant of administration, with or without the will annexed,

(*x*) Rule 30, N. C. B. The direction is obtained by order on motion. For an exception to the general practice of refusing a limited grant to a person entitled to a general grant, see *von Brentano*, [1911] P. 173. A limited grant may be made to the Public Trustee, although he may be entitled to a general grant: President's Direction, July 20, 1915.

(*y*) Rule 37, N. C. B.

(*z*) This section replaces the Administration of Estates Act, 1925, s. 13.

(*a*) *Vide ante*, pp. 448, 449. (*b*) Rule 40, N. C. B.

(*c*) For form of oath, see App. VII, Forms 157, 158.

limited to settled land, are similar to those required upon an application for probate by "special executors" (*d*).

Settled land must be identified.

The settled land, in respect of which the grant is desired, must be identified by stating in the oath the date of the settlement, or of the probate of the will under which the settlement arises, and all previous grants must be recited. It must also be stated whether there is other settled land.

Applicant's title.

The applicants must show how they are entitled to the grant in respect of the settled land.

Administration (with will).

Where letters of administration (with will) are sought by trustees appointed since the death of the life tenant, the applicants must clear off the trustees (if any) at the date of death, and show how they (the applicants) became trustees. The production of the order or deed of appointment may be required.

Administration on intestacy.

Upon an intestacy a grant will be made to the trustees of the settled land whether appointed before or since the date of death.

All trustees need not apply.

It is not necessary for all the trustees to join in the grant.

Personal representatives of settlor.

The personal representatives of the settlor, where the settlement is created by a will, or arises under an intestacy, upon swearing that there are *no* trustees of the settled land, take the grant as the executors of the will (or the administrators of the estate) of the settlor.

Personal representatives of tenant for life.

The personal representatives of the tenant for life must clear off trustees, duly appointed by a formal appointment, before taking a grant limited to the settled land. Where there are no such trustees, and the settlement arises under a will or an intestacy, the personal representative of the settlor must be cleared off, unless a registrar, on affidavit evidence, otherwise decides.

General grant "including settled land."

Where persons entitled to take a grant in respect of the general estate are entitled to a like grant (*e*) in respect of the settled land, a general grant "including settled land" will be made in the same conditions as apply in the case of probate (*f*).

When will must be marked and engrossment lodged.

The marking of the will (if any) and the lodging of an engrossment is required or dispensed with as upon an application for probate limited to settled land.

When sureties to bond will be dispensed with.

Sureties to the bond (*h*) will generally be dispensed with when two or more trustees within the meaning of section 22,

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(*d*) *Vide ante*, pp. 449, 450: for forms of oath, see App. VII, 138, 139, 175.

(*e*) Probate of settled land and letters of administration (with will) in respect of the general estate, and *vice versa*, clearly cannot form part of a single grant. In such cases separate grants in respect of the settled land and general estate must be taken.

(*f*) *Vide ante*, pp. 435, 439, 449, 450.

(*g*) *Vide ante*, p. 450.

(*h*) The penalty in the bond will be double the value of the property passing under the grant.

sub-section 1 of the Administration of Estates Act, 1925, apply, whether on their own initiative or under section 23 of the Act (*i*).

SECTION 6.

PRACTICE AS TO GRANTS TO AN ATTORNEY.

Grants to attorney of person residing out of England.

In the case of a person residing out of England, administration or administration with the will annexed may be granted to his attorney acting under a power of attorney (*j*).

But, where a minority or life interest arises, the donor of the power must appoint two attorneys, or a trust corporation (*k*), with or without an individual, to take the grant.

A grant may however be made to a single attorney of an executor, notwithstanding that there is a minority or life interest (*l*).

Where the grant must be made to two attorneys, it is immaterial that they represent the interest of a single individual (*m*).

Power of attorney.

The power of attorney, which should be under seal (*n*) and witnessed by a disinterested person, is filed at the registry. If it is a general power and is needed for other purposes, it may, subject to the substitution of an examined copy, be delivered out after the grant has been made.

Attorney administrator's oath.

The attorney swears in his oath (*o*), which must contain the usual averments as to minorities and life interests, and, in cases of death after 1925, as to settled land, that the executor, or the person entitled to a grant, whom he represents, is out of England.

Attorney of executor.

An executor in England must renounce or consent before a grant will be made to the attorney of executors who are abroad. A grant made to the attorney, for the use and benefit of one of several executors who are abroad, is limited until the donor of the power, or any or all of the executors, apply for and obtain probate of the will.

Attorney of person entitled to administration.

The attorney of one of several persons entitled to a grant of administration, with or without the will annexed, may take the grant for his use and benefit without notice to persons equally entitled. The grant in this case is limited until such time as

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(*i*) Principal Probate Registrar's Direction, December 14, 1925.

(*j*) Rule 32, N. C. B.; and see *ante*, pp. 359—363.

(*k*) For definition of "trust corporation," see p. 206.

(*l*) A joint grant of administration (with will) will be made to the attorney of a company (not being a trust corporation) and an individual appointed executors under a will, but no chain of executorship will, however, arise, unless the company ceases to exist during the life of the individual.

(*m*) President's Non-contentious Probate Directions, 1925.

(*n*) But see *ante*, p. 362; and for forms, see App. VII, Forms 243, 244. The power of attorney is exempt from stamp duty unless it is for other purposes than solely to take a grant.

(*o*) For forms, see App. VII, Forms 135, 176, 177; form of bond, App. VII, Form 62.

the donor of the power shall himself apply for and obtain the grant. But where the Public Trustee takes a grant as attorney, the grant does not provide for a subsequent application by the donor of the power.

Status of the attorney of an absentee *jus habens.*

A person acting under a power of attorney has the same equality and priority as the donor of the power would have if applying personally (*p*).

Procedure in taking grant.

The attorney administrator must execute the usual bond, which will set out the limitation shown in the oath, and must prove the will, if any, in the same manner as his constituent would have done had he applied personally.

Inland Revenue affidavit copy account.

A copy account of the estate shown in the Inland Revenue affidavit must be filed (*q*).

Section 7.

PRACTICE AS TO GRANTS OF ADMINISTRATION DURANTE MINORE ÆTATE (*r*).

Guardians of minors and infants, when entitled to administration *durante minoritate.*

Guardians of minors and infants are not entitled to a grant without clearing off all persons of age equally entitled with the minors and infants (*s*).

Grants of administration may be made to guardians for the use and benefit of minors and infants, and elections by minors of their next-of-kin or next friend, as the case may be, are required (*t*).

The grant must be made to not less than two individuals or to a trust corporation (*u*) with or without an individual.

Minor executor does not necessitate two applicants.

But except where there are minor or infant beneficiaries, or where life interests are created by the will, the fact that an executor is an infant does not of itself necessitate a grant to two persons.

Election of guardian.

A minor, in the absence of a testamentary or other lawful guardian, may elect his nearest-of-kin, and where a second guardian is required, any other of his kin (*y*) to be his guardian or guardians. The election, which must be filed, is to be signed in the presence of an attesting witness and need not be under seal. Upon the renunciation and consent of all the nearest-of-kin, a trust corporation may be elected as guardian.

(*p*) Additional Instructions under the Land Transfer Act, 1897; see App. IV.

(*q*) *Vide ante*, p. 440.

(*r*) *Vide ante*, pp. 363—369; and for forms of oath, see App. VII, Forms 178—181; form of bond, App. VII, Form 60.

(*s*) Additional Instructions under Land Transfer Act, 1897; see App. IV. Where the deceased died before 1926 the heir-at-law must be cleared off before a grant will be made to the guardian of the next-of-kin.

(*t*) Rule 33, N. C. B.

(*u*) For definition of "trust corporation," see *ante*, p. 206.

(*y*) President's Non-contentious Probate Directions, 1925.

Nomination by guardian of co-administrator.

A guardian duly constituted may nominate as his co-administrator some other person whose fitness he shall show by a filed statement, unless the registrar otherwise direct (*z*). But, before he can nominate a co-administrator, the guardian, unless he be a statutory guardian, must clear off all other guardians (if any) of the minor or infant.

Next-of-kin of minor must be cleared off.

If the nearest-of-kin renounce the guardianship, the renunciations are to be filed, and must be sworn to in the oath.

If the minor elects some person or persons other than his nearest-of-kin, and the nearest-of-kin has not renounced the guardianship, an order must be obtained from the registrar. The registrar may require notice of the application to be given to the nearest-of-kin.

Assignment of guardian: order necessary.

The same principles which govern the guardianship of a minor, apply to the assignment of a guardian to an infant (under the age of seven years). Such assignment is made by a registrar by order founded on an affidavit (*a*) showing that the proposed guardian is *de facto* nearest-of-kin, or that the *de facto* nearest-of-kin has renounced his right to the guardianship and is consenting to the assignment of the proposed guardian, or is unfit to be appointed, and that the proposed guardian is willing to undertake the guardianship (*b*).

Surviving parent statutory guardian.

No election or assignment is required where a grant is taken by the *surviving* parent of a minor or infant (*c*). But where father and mother are both alive an election or assignment is necessary.

Where sole person first entitled to grant is nearest-of-kin.

Where the sole person first entitled to a grant which must be made to two persons, is also the nearest-of-kin of a minor next entitled, such person may, if he is the statutory guardian, or has been duly elected, nominate a co-administrator. In the case of an infant an order will be required, unless the guardian is a statutory or testamentary guardian. The grant is not made for the use and benefit of the minor or infant, and is not limited.

Minor next entitled.

Trust corporation.

A trust corporation nominated by a guardian elected or assigned may join in the grant. The nomination must be signed by the guardian in the presence of a witness (*e*).

(*z*) President's Non-contentious Probate Directions, 1925.

(*a*) For forms of affidavit, see App. VII, Forms 40 and 41; for form of order, see App. VII, Forms 212, 213.

(*b*) Rule 34, N. C. B.; and President's Non-contentious Probate Directions, 1925.

(*c*) Guardianship of Infants Act, 1925. A mother is not, however, the statutory guardian of her illegitimate children, and she must be elected or assigned as their guardian. In cases where the bastard died before 1927, the consent of his Majesty's Procurator-General must be obtained, before the mother can be elected or assigned guardian.

(*e*) President's Non-contentious Probate Directions, 1925.

It is immaterial, where a grant must be made to two guardians, that they represent the interest of a single individual (*f*).

Testamentary guardian or guardian appointed by the Chancery Division or by foreign Court.

A guardian appointed by will must in his oath refer to the will as proved. If appointed by deed, he must produce the deed. A guardian appointed by the Court of Chancery must file an office copy of the decree or order.

Where minors or infants are domiciled in a foreign country, the guardians appointed by a foreign Court must file a copy of the order, duly authenticated by the seal of the Court. Proof of the validity of the appointment is required.

The Court will not grant administration to one of several testamentary guardians, or guardians appointed by the Court of Chancery, or otherwise, unless the rest renounce and consent.

Where there is no testamentary guardian or guardian appointed by the Chancery Division, this fact must be shown in the oath.

Settled land.

The oath must, where death occurred since 1925, contain a statement as to settled land.

Where there are both minors and infants.

Where there are both minors and infants, the guardian elected by the minors to take a grant, may act for the infants without being specially assigned to them. If the object be to renounce a grant, a guardian must be specially assigned to the infants (*g*).

The first part of the preceding paragraph applies only where the elected guardian is also nearest-of-kin of the infants; otherwise the infant's nearest-of-kin must be cleared off, and the guardian elected by the minors assigned by order to the infants.

All minors should join in election.

All minors equally entitled to a grant must join in the election of the guardian. If one is unwilling so to do, he must renounce his right to administration by his guardian, elected by him for that purpose, or must be cited (*h*). But in special circumstances —*e.g.*, where some of the minors are resident abroad—the registrar may accept the election of several minors for the use and benefit of them all, without requiring such renunciation or citation, upon an explanatory affidavit being filed.

A declaration of the estate must be exhibited except in certain cases.

Administrators for the use and benefit of minors or infants must exhibit a declaration on oath (*i*) of the estate, except when the effects are sworn under £20, or when the administrators are the guardians appointed by the Court of Chancery, or other competent Court, or are testamentary guardians (*k*).

(*f*) President's Non-contentious Probate Directions, 1925.
(*g*) Rule 35, N. C. B.
(*h*) *Spriggs* v. *Banks* (1845), 4 N. C. 102.
(*i*) App VII, Form 92.
(*k*) Rule 36, N. C. B.

Where the minor or infant is a bastard, or without known relations.

If the minor or infant has no known relations, or is a bastard, the consent of the Procurator-General (*l*) must be obtained before a stranger is elected or assigned guardian.

Section 8.

PRACTICE AS TO GRANTS OF ADMINISTRATION FOR THE USE AND BENEFIT OF A LUNATIC (*m*).

Persons equally entitled with lunatic to be "cleared off."

A grant will not be made to a person for the use and benefit of a lunatic without clearing off all other persons equally entitled with the lunatic to share in the estate (*n*).

Application by committee or person appointed under Lunacy Acts.

Where the grant is applied for by the committee of the lunatic, the production of the commission will sufficiently prove his title, and also the lunacy of the person of whose estate he is committee. If there be two committees, both must take or one must renounce.

A person appointed under section 116 of the Lunacy Act, 1890, must produce the order or authority signed by a Master in Lunacy, and bearing the seal of the Court.

Where the person entitled has not been found a lunatic by inquisition.

Where the person, for whose use and benefit the grant is to be made, has not been found a lunatic by inquisition, a joint affidavit by his medical attendant and the patient's nurse is required, stating that the patient is totally incapable of managing himself or his affairs (*o*).

Oath.

The administrator takes a special form of oath, in which it must be sworn that the person entitled to the grant is a lunatic, and whether or not a committee has been appointed or an order in lunacy made, and reciting the circumstances of the case (*p*).

Where declaration and justification required.

Where the administrator takes for the use and benefit of a lunatic or person of unsound mind, unless he be a committee (*q*), or a person appointed under the Lunacy Act, a declaration of the estate must be filed, and the sureties to the bond must justify (*r*).

The application for the grant on behalf of the lunatic must, where there is a minority or life interest, be made by two

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(*l*) Or of the Solicitors of the Duchies of Lancaster and Cornwall, as the case may be : *vide ante*, p. 470 (note).

(*m*) *Vide ante*, pp. 370—375.

(*n*) Additional Instructions under the Land Transfer Act, 1897.

(*o*) For form of affidavit, see App. VII, Form 18. The affidavit of a doctor connected with a public institution or mental hospital, in which a lunatic is confined, is held to be sufficient.

(*p*) For forms, see App. VII, Forms 182—184.

(*q*) A Scotch curator and a committee duly appointed by a foreign Court do not require justifying sureties.

(*r*) See Rule 42, N. C. B. See also *Hardstone* (1828), 1 Hagg. 487. Form of declaration : App. VII, Form 92.

individuals or by a trust corporation with or without an individual (*s*).

When grantee becomes insane.

Applications for grants of administration for the use and benefit of a person who has become insane after a grant has been made to him, may be made to the Court on motion (*t*).

Section 9.

PRACTICE AS TO ADMINISTRATION PENDENTE LITE (*u*).

Application, how made.

Application for the appointment of an administrator *pendente lite* is made to the Court on motion (*post*, p. 605).

Security.

The security to be given by the administrator is usually ordered to be fixed by the registrar.

Papers to lead the grant.

The oath (*x*), the bond (*y*), a declaration of the estate, an affidavit of justification of sureties, a plain copy of the order on motion, and the Inland Revenue affidavit are lodged at the registry, and the grant issues in the ordinary way.

Joint administrators *pendente lite* must execute a joint bond.

Where application is made.

A grant of administration *pendente lite* can only be made in the principal registry.

Section 10.

PRACTICE AS TO ADMINISTRATION DE BONIS NON (*z*).

Administration *de bonis non cum testamento annexo*.

Application for a grant of administration with the will annexed *de bonis non* differs in a few respects from an original application.

The oath.

The oath (*a*), in addition to the ordinary requirements, recites the issue and date of the original grant, the date of death of the original grantee, and the fact that part of the estate remains unadministered. It must also be shown how the chain of executorship, if any, was broken.

Amount of the estate to be sworn.

The applicant swears that he will administer according to law the *unadministered* estate, and the amount of the estate sworn in the oath is the value of the unadministered estate.

(*s*) *Vide ante*, p. 287; for definition of a "trust corporation," see p. 206.

(*t*) *Vide ante*, pp. 373—375. But in practice the application to impound the original grant is generally made at the Notation Department of the principal registry: *vide post*, p. 489.

(*u*) *Vide ante*, pp. 376—382 post, pp. 605, 606.

(*x*) App. VII, Form 188.

(*y*) App. VII, Form 67. A receiver of the real estate enters into a special form of bond. But an order for the appointment of an administrator *pendente lite* of the estate of a person dying on or after January 1, 1926, will provide for the administration of the real and personal estate, unless the Judge shall otherwise order; President's Non-contentious Probate Directions, 1925.

(*z*) *Vide ante*, pp. 350—356.

(*a*) For forms, see App. VII, Forms 149—153.

Minority and life interest.

Minorities and life interests must be sworn to, as upon an original application for letters of administration.

Redemption of life interest.

If a single applicant alleges redemption of a life interest, the redemption must be shown by affidavit, and the registrar will require to be satisfied that the whole of the life interest of the person in question, whether at present ascertainable or not, has been redeemed (*b*).

Settled land.

In cases of death since 1925, the oath must contain an averment as to settled land.

Copy Act of previous grant.

A copy of the act or record of the first grant or last previous grant must be applied for and lodged with the papers.

The oath, where sworn.

The applicant may attend at the registry and be sworn to the original will, in which case the original will must be looked up, and a fee paid for the search. Or he may be sworn to and mark the original grant (*c*), or to a certified copy under seal of the will (*d*).

The bond.

The bond (*dd*) is given in respect of the unadministered estate.

Engrossment.

The engrossment for the *de bonis non* grant may be made in the registry on payment of a fee, or the practitioner may himself engross the will from a copy, if he prefers. In either case he must take out a search ticket in the public hall, and order the will to be sent to the examiner for the purpose of collating the engrossment.

The Inland Revenue affidavit.

The unadministered estate only is included in the Inland Revenue affidavit (*e*), giving the value at the date of the affidavit; and on the presentation of a memorial (*f*) with the affidavit, the Commissioners of Inland Revenue will impress a duty-paid stamp or endorse a certificate of payment of duty on the affidavit, if duty has been paid on the original estate.

Certificate of payment of duty, or duty-paid stamp.

Where the deceased died *before* August 1, 1894, and the whole unadministered estate does not exceed £100, no memorial or certificate need be obtained.

(*b*) President's Non-contentious Probate Directions, 1925. An acknowledgment, by the person having the life interest, of the redemption must be lodged.

(*c*) The grant, if so marked, is filed in the registry.

(*d*) But where the former administrator was sworn to a notarial copy of the will in a foreign case, the applicant cannot be sworn to the grant or a copy thereof: Tristram and Coote (16th ed.), p. 241.

(*dd*) For form of bond, see App. VII, Form 61.

(*e*) Where the application is for a second or subsequent grant in respect of property which came within the operation of a previous grant, and the deceased died after August 1, 1894, the form of Inland Revenue affidavit A 5 must be prepared. Where the deceased died on or before that date Form A or Form B is applicable according to the circumstances. If the unadministered estate was not within the operation of the previous grant, the form of Inland Revenue affidavit applicable to an original grant should be used. Where the full duty payable on the estate within the previous grant and still unadministered has not been paid, a corrective affidavit must first be made and the duty paid.

(*f*) For form, see App. VII, Form 103.

The original grant need not be produced to the Commissioners if issued after June 1, 1891. The memorial must be signed by the solicitor extracting the grant.

Administration *de bonis non*.

The foregoing instructions, except where they refer to the will, apply equally to grants of administration *de bonis non* on an intestacy (*g*).

Where applications for *de bonis non* grant may be made.

Application for a grant *de bonis non* is to be made at the principal registry or at the district registry where the original grant issued (*h*).

Certificate of delay not required.

No certificate of delay is required upon an application for a grant *de bonis non*.

Section 11.

PRACTICE AS TO SECOND OR CESSATE GRANTS—DOUBLE PROBATES (*i*).

Second or *cessate* grants, when required.

When the original grant was limited for a specified time, or until the happening of a certain contingency or event, and that time elapses, or that contingency or event occurs, the original grant ceases and expires, and, if the estate has not been fully administered, a second or *cessate* grant must be made.

Upon the death of a surviving attorney or guardian of a person entitled to a grant, a *cessate* grant issues to new attorneys or guardians. But if the person entitled to the grant dies, a grant *de bonis non* is made.

Double probates.

Where power has been reserved, in the original grant of probate, to one or more of the executors, the Court will, on the application of such executor or executors (*k*) grant them a double probate of the will (*l*).

Application, where made.

The application must be made at the principal registry or at the district registry out of which the first grant issued.

The oath.

The oath must, in addition to the requirements upon an original application, recite the facts of the former grant.

Cessate grant.

Where a *cessate* grant is sought, the oath (*m*) must show, with dates, how the original has ceased, whether owing to the death of the grantee, the coming-of-age of the minor, the finding of the original will, or as the case may be. If the application

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(*g*) For forms of oath, see App. VII, Forms 191—195.

(*h*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 153.

(*i*) *Vide ante*, pp. 243, 244, 384—386.

(*k*) An executor, to whom power has been reserved, subsequently applies for double probate as " one other of the executors " or " the other " executor. Where there are already four acting executors, a double probate will only be granted upon vacancies occurring.

(*l*) An application for an order on executors to supply information necessary for obtaining double probate, may be made on summons: *Griffin* (1910), 54 Sol. Jo. 378.

(*m*) For forms of oath, see App. VII, Forms 132—134, 148, 189, 190.

follows the recovery of a lunatic, evidence of such recovery must be forthcoming.

Double probate.

In the case of an application for double probate (*n*) by an executor to whom power has been reserved "upon vacancies occurring," the name and date of death of the executor who has died must be stated.

Amount of estate to be sworn.

The applicant swears generally that he will administer the estate (not merely the unadministered estate), but the amount of the estate as sworn is only the value of the unadministered estate.

Practice generally.

The practice on an application for a grant *de bonis non* (*o*) is in other respects, generally, to be followed.

Bond.

The bond, when required, is given in respect of the unadministered estate. The title of the applicant in the bond must correspond to that given in the oath.

The double probate grant may be annexed to the original grant.

Office copy of first grant required.

An office copy of the first grant must be lodged with the papers.

(*n*) For form of oath, see App. VII, Form 123.
(*o*) *Vide ante*, pp. 473, 474.

CHAPTER IV.

PRACTICE AS TO PROBATE OF WILLS OF PERSONS DOMICILED ABROAD AND GRANTS ACCORDING TO FOREIGN LAW.

SECTION 1.

PROBATE OF THE PRIVILEGED WILLS OF BRITISH SUBJECTS (*a*).

Will of British subject valid under the Wills Act, 1861, s. 1.

IN order to obtain probate of a will of personalty valid under Lord Kingsdown's Act, 1861, or administration with such a will annexed, in addition to the ordinary formalities, the following affidavits must be filed :—

Affidavit of British status.

Affidavit of foreign law.

Under section 1 of the Act.—(1) An affidavit of the British status (*b*) of the testator and (2) an affidavit (*c*) sworn by some person conversant with the law of the country in question setting out that the will is valid by the law of the place where it was made, or where the testator was domiciled when it was made, or by the law of that part of the British Empire where the testator had his domicil of origin, as the case may be. The second affidavit is unnecessary when the law of the place of the domicil of origin of the testator is similar to the English law, and the will is valid by English law.

Exceptions.

Will of British subject valid under the Wills Act, 1861, s. 2.

Under section 2 of the Act.—(1) An affidavit of British status (*b*) setting out where the will was made; (2) if the will was made in Scotland, an affidavit (*d*) setting out its validity by Scottish law.

SECTION 2.

PROBATE OF FOREIGN WILLS.

Probate of a foreign will of personalty may be granted on one of two grounds :—

Where the will has been adopted as a valid testament by the Court of the country of domicil.

First, when the will has been adopted as a valid testament by the Court of the country of domicil (*e*).

The English Court, in order to be satisfied on this point, must have before it a duly authenticated copy of the actual

(*a*) *Vide ante*, pp. 30—32.

(*b*) See App. VII, Form 16. If it is desired to set up the will of a married woman under Lord Kingsdown's Act, it must be shown that the status of her husband is British, or, in the event of the husband having abandoned his British status since marriage, that the deceased retained her British status by declaration under section 10 of the British Nationality and Status of Aliens Act, 1914.

(*c*) See App. VII, Form 15.

(*d*) By a Scottish advocate or a Writer to the Signet (App. VII, Form 17).

(*e*) *Deshais* (1865), 4 S. & T. 13. *Vide ante*, pp. 24, 25.

document recognised by the foreign Court (*f*), and there must be satisfactory evidence of the act of recognition by the foreign Court, usually a copy of its decree under the seal of the Court (*g*).

Translation, by whom made.

A translation of both these documents must be annexed to them, and the translator, unless his competency is vouched for by his official position (*h*), must file an affidavit verifying the translation and stating his qualification.

A sealed copy of a will made by a foreign notary who has the custody of the original is, in some cases, admitted to probate without proof of foreign law, but as to this the direction of the Clerk of the Seat should be taken.

Translation may be marked before engrossment.

It is advisable to submit the translation to the Clerk of the Seat, in order that he may mark the parts which should be engrossed.

The executor is sworn to the foreign original or copy.

Where the will is valid by the law of the testator's domicil.

Secondly, probate will be similarly granted on proof that the will is valid by the law of the country in which the testator was domiciled at the time of his death (*i*).

In this case the document to be proved is the original will, or a duly authenticated copy of the original will, if the latter cannot for good reasons be brought before the Court (*k*).

Oath.

In both cases the oath to lead the grant must contain a statement as to the country in which the testator died domiciled.

Affidavit of foreign law.

The validity of the will is proved by an affidavit of an expert in the law of the country in question—*i.e.*, a person who is familiar with that law not merely from theoretical study (*l*) but from practical experience in the Courts. The certificate of an ambassador of the country is sufficient (*m*). The Court, with some hesitation, accepted the affidavit of a notary public, who

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(*f*) *Vigny* (1865), 4 S. & T. 15. See, as to Russian probate, a departure from this rule: *Clarke* (1867), 36 L. J. P. 72. In *Rule* (1878), 4 P. D. 76, the practice in the text was adhered to; but in *Lemme*, [1892] P. 89, where a translation of the will of a British subject had been registered in the French Court, probate of a certified copy of the original will (not the translation) was granted "until such time as the original will is brought in." This case was followed, with reference to the will of a German subject, in *Von Linden*, [1896] P. 148. And see *Von Faber* (1904), 20 T. L. R. 640.

(*g*) *Vigny*, cit. *supra*; *Clarke*, cit. *supra*; *Rule*, cit. *supra*.

(*h*) *E.g.*, a British consul or an English notary public.

(*i*) *Vide ante*, pp. 28—30.

(*k*) *Deshais* (1865), 4 S. & T. 13.

(*l*) *Bonelli* (1875), 1 P. D. 69. Form of affidavit: App. VII, Form 15.

(*m*) *Klingemann* (1862), 3 S. & T. 18; *Prince Oldenburg* (1884), 9 P. D. 234; *Dost Aly Khan* (1880), 6 P. D. 6. In *Terry* (June 16, 1894), it was held that the affidavit of a clerk in the American Consulate in London as to the validity of a will by the laws of America, was not sufficient, but it was intimated that a certificate from the consul, under seal of the consulate, that the will was valid by the American laws, giving also the grounds of his opinion, would be accepted. In this case, evidence that the deceased died domiciled in America was required.

stated that he had had extensive practice in the law in question (*n*).

In all cases of French or Dutch wills naming an executor there must be expert evidence to show whether the powers of the executor are sufficient to entitle him to take the grant in England. Powers of executor.

Colonial law may be proved by the certificate of the Secretary of State for the Colonies, and Scottish law by a Writer to the Signet or a member of the Scottish Bar (*o*). Colonial and Scotch law.

Section 3.

GRANTS OF ADMINISTRATION (WITH OR WITHOUT WILL) TO PERSONS ENTITLED THERETO BY FOREIGN LAW.

The principles upon which the Court acts and the form of the grant in such cases have been described in a preceding chapter (*p*). To what persons the grants are made.

Such grants are made—

(1) To "the person entrusted with the administration of the estate by the Court having jurisdiction at the place where the deceased died domiciled." Appointee of foreign Court.

(2) To "the person entitled to administer the estate by the law of the place where the deceased died domiciled." Person entitled to administer by law of the domicil.

The applicant should be thus described in the oath, which should state the domicil of the deceased at his death, and, if he died intestate, should show that he left persons entitled to his estate (*q*). Oath.

A duly authenticated copy of the foreign grant under seal must be filed, where application is made by the "person entrusted." Where the "person entitled" applies, an affidavit by an expert in the law of the country of domicil must be filed, stating that the applicant is the person entitled to administer the estate by the law of that country (*r*). Copy of foreign grant. Affidavit of law.

It is not necessary to "clear off" executors before a grant is made to the person entrusted or entitled.

The oath should state whether a minority or life interest arises, and, where death took place since 1925, whether there is settled land.

Where application is made in either capacity (1) or (2), a registrar's order must be obtained (*s*). Order required.

(*n*) *Whitelegg*, [1899] P. 267. (*o*) Tristram and Coote (16th ed.), p. 59.
(*p*) *Vide ante*, pp. 21—25.
(*q*) In cases where the residue of the estate is not disposed of, and where there is no evidence whether or not there be successor according to the law of the domicil, the consent of the solicitor for the Treasury must be produced. (*r*) For form of affidavit, see App. VII, Form 15.
(*s*) For forms of order, see App. VII, Forms 217, 218.

CHAPTER V.

PRACTICE AS TO RESEALING IRISH, SCOTTISH, AND COLONIAL GRANTS.

Section 1.

RESEALING OF IRISH GRANTS IN ENGLAND.

Practice affected by creation of Government of Northern Ireland and of Irish Free State.

The practice as to the resealing of Irish grants has been considerably affected by the creation of a Government in Northern Ireland and of the Irish Free State (*a*), and falls, in consequence, into five sub-sections, which must be dealt with separately. These sub-sections are :—

(1) Irish grants (except Irish Free State grants issued after March 31, 1923), where death occurred before November 22, 1921;

(2) Northern Ireland grants, where death occurred between November 22, 1921, and March 31, 1923, inclusive;

(3) Northern Ireland grants, where death occurred on or since April 1, 1923;

(4) Southern Ireland and Irish Free State grants, where death occurred between November 22, 1921, and March 31, 1923, inclusive (except grants issued after March 31, 1923);

(5) Irish Free State grants, issued on or since April 1, 1923.

Sub-Section 1.—*Death before November* 22, 1921.

Irish grants : death before November 22, 1921.

Provision is made by section 95 of the Probates and Letters of Administration (Ireland) Act, 1857, (*aa*), for the resealing of Irish grants in England (*b*).

(*a*) See *Gault*, [1922] P. 195; *Brogan*, [1922] P. 276.

(*aa*) 20 & 21 Vict. c. 79. The section is repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, so far as it relates to grants made in respect of persons dying on or after April 1, 1923.

(*b*) See *Roche* (1861), 7 Jur. (N.S.) 784; *Divenny* v. *Corcoran* (1862), 32 L. J. P. 26. The resealing is not dependent on the domicil of the deceased, the rule in this respect differing from the rule as to Scottish grants. The grant may, where the deceased died since January 1, 1898, be resealed, even though the property is real property only : *Sidney* (November 15, 1900). The English Court has not been deprived of its power to make an original grant in respect of property situate in England where the relative Irish grant has not already been resealed : *Irwin* v. *Caruth*, [1916] P. 23. A Colonial grant resealed in Ireland and produced for resealing in England, will be treated as an ordinary Irish grant, and will be resealed according to the rules set out in the text.

Certificate of duty paid.

Rule 73, N. C. B., directs that no Irish grant is to be resealed unless there is produced a certificate from the Inland Revenue authorities in Ireland that duty in respect of the estate in England has been paid. This certificate can be applied for by letter and is issued without fee (*c*).

Certificate of sufficiency of bond.

By section 29 of the Court of Probate Act, 1858 (*d*), it is enacted that in cases of administration a certificate must be filed, showing that a sufficient bond has been given to the Court in Ireland to cover the English property. Application for this certificate should be made to the registry in Ireland where the grant issued (*e*).

Grant must be produced together with a copy.

In addition, the grant and a copy thereof (including a copy of the will, if any), must be lodged when the application to reseal is made.

Application, how made.

The above-mentioned documents may be lodged with the Receiver of Papers at the principal registry by the grantee or any person giving a London address (*f*). The employment of a solicitor is not a necessity. They may also be left at the probate registry in Dublin or in Belfast, or at the registry where the grant issued, for transmission to the principal registry in England. In the latter case the fees payable in England will be taken at the Irish registry where the grant is deposited.

Resealing grants made under 57 & 58 Vict. c. 30, s. 16.

Where the grant issued under section 16 of the Finance Act, 1894, the fee for resealing is 2s. 6d. Application to reseal grants issued under this section may be made, if desired, by the applicant, through the registry in Ireland, by post to the Personal Application Department.

Sub-section 2.—*Northern Ireland Grants: Deaths between November 22, 1921, and March 31, 1923, inclusive.*

Northern Ireland grants (deaths between November 22, 1921, and March 31, 1923, inclusive) : Inland Revenue affidavit required as to estate in England.

The practice with regard to the resealing of Northern Ireland grants, where death occurred between November 22, 1921, and March 31, 1923, inclusive, is similar to that indicated above, with the exception that a receipted Inland Revenue affidavit in respect of property in England has to be lodged in place of the certificate from the Inland Revenue authorities in Ireland (*g*).

An *ad valorem* Court fee on the English estate is taken, unless it be shown to the satisfaction of the registrar that such estate is included in the Northern Ireland grant, in which case

(*c*) If the grant issued before June 1, 1881, application for this certificate must be made to the Estate Duty Office, London. The production of the grant and an affidavit of facts will, in these cases, be required.

(*d*) Repealed so far as it relates to grants made in respect of persons dying on or after April 1, 1923. (*e*) See *Potts* (1860), 2 S. & T. 5.

(*f*) The fees payable on resealing will be found in App. V, Part I.

(*g*) Government of Ireland (Resealing of Probates, etc.) Order, 1922. See also *Gault*, [1922] P. 195.

Fees.

the fees applicable under the previous sub-section (*h*) are to be taken. A fee of 15s. is payable where fixed estate duty is paid in England.

Bond may be given.

A bond may be given in lieu of the certificate of sufficiency of bond (*i*).

Application, how made.

The application in this and the following sub-sections is made as previously described (*j*).

Sub-section 3.—*Northern Ireland Grants: Deaths on or since April* 1, 1923.

Northern Ireland grants: deaths on or since April 1, 1923.

In cases of death on or since April 1, 1923, the power to reseal Northern Ireland grants in England is conferred by section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*k*).

Inland Revenue affidavit in respect of estate in Great Britain.

The practice generally is similar to that set out in the previous sub-sections of this chapter, except that an Inland Revenue affidavit in respect of property in Great Britain is required (*l*), in lieu of the certificate of duty required in cases of death before November 22, 1921.

No bond or certificate of sufficiency.

No bond or certificate of sufficiency of bond need be lodged.

Fees.

Where the Northern Ireland grant was made under section 16 of the Finance Act, 1894, and there is estate in England, the fee for resealing is 2s. 6d., if the case is one in which a grant might have been made under that section in England (*m*). In other respects the fees to be taken are the same as those dealt with in Sub-section 2 of this chapter.

Sub-section 4.—*Southern Ireland Grants: Deaths between November* 22, 1921, *and March* 31, 1923.

Southern Ireland and Irish Free State grants: deaths between November 22, 1921, and March 31, 1923, inclusive.

Where it is sought to reseal a Southern Ireland or Irish Free State grant (except a grant issued on or since April 1, 1923), in a case where death occurred between November 22, 1921, and March 31, 1923, inclusive, the practice to be followed is that applicable to Irish grants in respect of deaths before November 22, 1921 (*n*).

(*h*) See App. V, Part I.
(*i*) Senior registrar's direction, July 1, 1924.
(*j*) *Vide ante*, p. 481.
(*k*) See App. I.
(*l*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 169, sub-s. 3.
(*m*) *Ibid.*, s. 169, sub-s. 2.
(*n*) See Irish Free State Constitution Act, 1922, Art. 74 of the Irish Free State Condition, and Art. 2 of the Irish Free State (Adaptation of Enactments) Order, 1923.

SUB-SECTION 5.—*Irish Free State Grants on or since April* 1, 1923.

No resealing of Irish Free State grants issued on or since April 1, 1923.

Grants issued by the Irish Free State on or since April 1, 1923, are not to be resealed in England, notwithstanding that the death may have occurred before that date (*o*).

SECTION 2.

RESEALING OF ENGLISH GRANTS IN IRELAND.

Practice varies according to date of death.

As in the resealing of Irish grants in England, so in the resealing of English grants in Ireland the creation of the Government of Northern Ireland and of the Irish Free State has caused variations in the practice to be adopted, according to the date on which the deceased died.

All Ireland: death before November 22, 1921.

With regard to the resealing in Ireland of English grants (except, in the case of the Irish Free State, of grants issued in England on or since April 1, 1923), in respect of persons dying before November 22, 1921, the requirements correspond with those required by the English Court when resealing a similar Irish grant (*p*).

Certificate of duty paid.

In addition to the grant and a copy thereof, with a copy of the will (if any), the production is required of a certificate that the duty on the Irish estate has been paid. Application for this certificate may be made by letter to the Controller, Estate Duty Office, Somerset House. No fee is payable.

Certificate as to sufficiency of bond.

Where the grant is one of administration, the probate registrar in Ireland will require a certificate that the bond given in England is sufficient to cover the estate in Ireland. Application, which must be supported by affidavit (*r*), for this certificate is made to the Notation Department (*s*). Where the grant issues under the Finance Act, 1894, s. 16, the certificate is given without any fee beyond the 15s. payable under that section, if applied for at the time the grant is made.

The papers may be deposited in the English Probate Registry for transmission to Ireland, there to be resealed.

Applications under Rule 107, N. C. B. (*t*), to transmit by post the grant to Ireland, for the purpose of such grant being resealed, are made at the Personal Application Department (*u*) by the administrator, executor, or his solicitor. The documents

(*o*) President's Direction, March 17, 1925.

(*p*) See the Probates and Letters of Administration (Ireland) Act, 1857, s. 94.

(*r*) A form of affidavit (see App. VII, Form 26) may be obtained at Room 43 of the principal registry. The bond must be looked up in the public hall.

(*s*) Or, if the grant issued at a district registry, at that registry.

(*t*) See App. IV.

(*u*) Or at the district registry where the grant issued. See Rule 102, D.R.

above mentioned are there deposited, together with fees payable in Ireland (*x*) in the form of postal orders.

Northern Ireland : death between November 22, 1921, and March 31, 1923, inclusive.

In cases of death between November 22, 1921, and March 31, 1923, inclusive, an English grant will be resealed in Northern Ireland upon the delivery of an affidavit accounting for the estate duty in respect of the assets in Northern Ireland in like manner as upon an application for an original grant of representation (*y*). This affidavit must be lodged in duplicate in the appropriate form, and takes the place of the certificate of duty previously required.

In addition, the Northern Ireland Court will require the lodgment of the grant, a certified copy of the grant and will (if any), a notice of the application, and, in cases of administration, a bond in respect of the property in Northern Ireland. Justification of sureties may be required.

Where death occurred on or since April 1, 1923.

Where death occurred on or since April 1, 1923, an English grant will be resealed in Northern Ireland in the same manner as when death took place after November 21, 1921. But the affidavit, in like manner as upon an application for an original grant of representation, shall account for the estate duty payable in Northern Ireland in respect of the personal property of which the deceased was competent to dispose at his death (*a*).

Application to reseal an English grant in Northern Ireland may be made under Rule 107, N. C. B. (*z*).

Irish Free State : death between November 22, 1921, and March 31, 1923, inclusive.

Except where the grant issued on or since April 1, 1923, an English grant in respect of a person dying on or since November 22, 1921, and before April 1, 1923, will be resealed in the Irish Free State in the manner in which an English grant was resealed in Ireland where death occurred prior to November 22, 1921.

No resealing of grants made on or since April 1, 1923.

Grants made in England on or since April 1, 1923, are not to be transmitted for resealing in the Irish Free State (*b*).

Section 3.

SCOTTISH GRANTS RESEALED IN ENGLAND.

Scottish confirmation resealed in England has the effect as to personal estate of a grant in England.

The Supreme Court of Judicature (Consolidation) Act, 1925 (*c*), s. 168, sub-s. 1, provides that when a confirmation of the executor (*i.e.*, the equivalent in Scotland to an English grant of probate or letters of administration) of a person who

(*x*) For particulars of fees, see App. V, Part I.
(*y*) Government of Ireland (Resealing of Probates, etc.) Order, 1922.
(*z*) *Vide ante*, p. 483 : for fees, see App. V, Part I.
(*a*) Government of Ireland (Resealing of Probates, etc.) Order, 1923.
(*b*) President's Direction, March 17, 1925.
(*c*) By this statute are repealed the Confirmation of Executors (Scotland) Act, 1858, s. 12, and, so far as relates to the resealing of confirmations in England, the Sheriff Courts (Scotland) Act, 1876, s. 41.

died domiciled in Scotland, which includes, besides the estate situate in Scotland, also personal estate situate in England, is produced to the High Court, and a copy thereof deposited in the principal registry the confirmation shall, if there is inserted therein or noted thereon a statement signed by the sheriff clerk to the effect that the deceased died domiciled in Scotland, be sealed with the seal of the principal registry and returned to the person producing it, and shall thereafter have the like effect in England as if it were a grant made by the High Court (*d*).

Additional confirmation.

An additional confirmation, when the deceased died domiciled in Scotland, may similarly be resealed whether or not the original confirmation has been resealed, and notwithstanding that the additional inventory contains no estate in Scotland. Further, any confirmation or additional confirmation of personal estate in Scotland, which contains or has appended thereto a note, signed by the sheriff clerk, of trust funds in England, may be resealed (*e*).

Trust funds in England.

But an *original* confirmation which does not contain Scottish property will not be resealed. Neither can a confirmation be resealed if the only property in England be realty (*f*).

Practice.

The confirmation and a copy are left with the Receiver of Papers at the principal registry. Particulars of the fees payable will be found in Appendix V, Part I.

Special provisions relating to small estates

Confirmations granted under the Intestates Widows and Children (Scotland) Act, 1875, or the Small Testate Estates (Scotland) Act, 1876 (*g*), may be sent by post to the principal registry through the Sheriff Court in Scotland, accompanied by a fee of 2s. 6d., and when resealed will be returned to the

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(*d*) It has been held that the act of resealing a confirmation is merely a ministerial act, as to which the English Court has no discretion to order or refuse, provided the requirements of the statute are fulfilled : *Rankine*, [1918] P. 134.

(*e*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 168, sub-s. 2. See, as to the effect of a grant so resealed, *Hood* v. *Barrington* (1868), L. R. 6 Eq. 218; *Ewing* v. *Orr Ewing* (1885), 10 A. C. 453. A testator died possessed of property of small value in England, and entitled under the will of X to large assets in Scotland, which were being duly administered there. His executors proved his will in Scotland only and a legatee applied in the Probate Division for a grant of administration of the estate in this country. The executors opposed the application, and it was held that the Court was not bound to make such a grant to the legatee, its power being discretionary, and that, as it was not shown that the executors were not doing their duty, there was no necessity for a grant in this country. Application refused : *Ewing* (1881), 6 P. D. 19.

(*f*) See *Ryde* (1870), 2 P. & D. 86. In order to deal with the real estate a separate grant must be taken out in England. The Inland Revenue affidavit in such case will require a certificate of duty paid indorsed by the Estate Duty Office, Scotland. The issue of the confirmation must be sworn to in the oath.

(*g*) As extended by the following statutes : 44 Vict. c. 12, s. 34, and 57 & 58 Vict. c. 30, s. 23, sub-s. 7. Note that sections 3 of the respective Acts are repealed by the Judicature (Consolidation) Act, 1925, so far as these sections relate to the resealing of confirmations in England, and are replaced by section 168, sub-section 3 of the last-mentioned Act.

Sheriff Court from which they were received (*h*). No copy of a confirmation granted under these statutes will be required.

Section 4.

ENGLISH GRANTS MADE OPERATIVE IN SCOTLAND.

Where deceased died domiciled in England, grant may be certified to have effect of confirmation in Scotland.

An English grant whereon there appears any note or memorandum, signed by the proper officer, that the deceased *died domiciled in England*, will, on its production, together with a copy thereof, to the clerk to the Sheriff Court of the County of Edinburgh, be endorsed with the proper certificate, and thereupon will have the same operation in Scotland as if a confirmation had been granted by the said Court (*i*).

Domicil must be noted on the grant.

Where, upon application for the English grant, it is intended to have the same resealed in Scotland, the oath must contain an averment that the deceased died domiciled in England, and the Scottish property must be distinguished in the Inland Revenue affidavit. The domicil will then be noted on the grant.

If a notation of domicil is required on a grant made under section 16 of the Finance Act, 1894, it may be made without additional fee if applied for concurrently with the grant.

Notation of domicil after issue of grant.

Where, *after* the grant has issued, a notation of domicil is required, the executor or administrator, or one of the executors or administrators, must swear an affidavit (*k*), upon which the registrar will make an order for the notation (*l*).

The grant and affidavit in this case are taken to the Notation Department at the principal registry or to the district registry where the grant was made.

Section 5.

RESEALING COLONIAL GRANTS IN ENGLAND.

Provisions of 55 Vict. c. 6, sealing in England of colonial grants.

Provision is made by the Colonial Probates Act, 1892 (*m*), for the resealing by the English Court of grants made by the Court of any British possession, not forming part of the United Kingdom, to which the Act has been made applicable by Order in Council (*n*).

(*h*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 168, sub-s. 3.

(*i*) Confirmation of Executors (Scotland) Act, 1858, s. 14 (see App. I); Sheriff Courts (Scotland) Act, 1876, ss. 35, 41 (see App. I).

(*k*) App. VII, Form 46.

(*l*) For form of order, see App. VII, Form 224. This order may now be made by a district probate registrar: President's Non-contentious Probate Directions, 1925.

(*m*) 55 Vict. c. 6 (see App. I).

(*n*) A list of the British possessions to which the Act has been applied by Orders in Council will be found on pp. 717, 718. Attention is drawn to the fact that the provisions of the Act have *not* been extended to Quebec.

The Act extends to authorise the sealing in England of grants made by a British Court in a foreign country (section 3). And of grants made by British Courts in foreign countries.

The application is made in the principal registry by the executor or administrator, or by the attorney, lawfully authorised *for the purpose*, of such executor or administrator; either in person or through a solicitor (Rule 92, N. C. B.). Where application is made by the attorney the power must be lodged with the papers. Power of attorney.

A notice of the application in the prescribed form (*o*) must be inserted once in the *Times* newspaper. Eight days from the insertion must elapse before the application is made. Notice of application.

A special form of oath (*p*) is sworn, and on application to seal letters of administration the administrator or his attorney must give bond to cover the estate within the jurisdiction of the Probate Division. The same practice as to sureties and amount of penalty is to be observed as on application for letters of administration (*q*). Oath. Bond.

Rules 92—105, N. C. B., contain clear instructions as to the practice to be observed on applications for resealing colonial grants. Practice generally.

But unless it is shown by the grant or affidavit that the deceased died domiciled in the colony, the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, must be observed if there is a minority or a life interest under English law (*r*). Minority or life interest.

Where the deceased died domiciled in the colony where the grant was made, such grant may be resealed even if it is a grant such as would not be made in England (*s*). When English practice need not be followed.

In order to obtain recognition of an English grant by a British Consular Court authorised to recognise grants, application must be made at the Notation Department of the principal registry (*t*) for a notation of domicil to be made. The application should be supported by an affidavit and by a copy of the Order in Council or other authority giving effect to such representation (*u*). Recognition of English grants by British Consular Courts.

(*o*) Rule 94, N. C. B. For form, see App. VII, Form 1.

(*p*) App. VII, Form 196.

(*q*) Rule 95, N. C. B. Form form of bond, see App. VII, Form 63.

(*r*) President's Non-contentious Probate Directions, 1925.

(*s*) *McLaughlin*, [1922] P. 235. In *Sanders*, [1900] P. 292, a colonial grant was resealed in England, although the deceased left no property in this country; but see *Roche* (1861), 7 Jur. (N.S.) 784. In *Smith*, [1904] P. 114, a limited colonial grant was resealed. In *C. S. Smith, deceased*, June, 1898, it was held that an application by one grantee to reseal the grant in England, without the consent of the other grantees, should not be entertained.

(*t*) Or the district probate registry where the grant issued.

(*u*) Such Orders in Council have been made in respect of British Consular Courts in Abyssinia, Dec. 19, 1913; China, Mar. 17, 1925; Egypt, Nov. 7, 1910 (Ottoman); Hejaz, Nov. 7, 1910 (Ottoman); Morocco, Nov. 28, 1889; Persia (Inland), Dec. 13, 1889; Siam, Sept. 30, 1914; British Solomon Islands and Gilbert and Ellice Islands, Jan. 21, 1914; and Zanzibar, Dec. 8, 1924.

CHAPTER VI.

PRACTICE AS TO THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Revocation of grant on the application of grantee or with his consent.

A GRANT may be revoked on the application of the person to whom it was granted, or at the instance of the applicant for the fresh grant with the consent of the grantee, on an affidavit (*a*) showing that it has been wrongly or improperly obtained.

Application, where made.

The application for the necessary order of the registrar (*b*) is made at the Notation Department, or, where the grant issued from a district registry, at that registry. But if the new grant is to be extracted from the principal registry, a district registry grant may be revoked there.

Affidavit in support of application.

The affidavit must state the ground for the revocation, and the right to the new grant, and must give particulars of the grant to be revoked. If a will or codicil is to be proved, production of the document is essential. If the grantee died before the grant was sealed, the certificate of death must be exhibited.

Motion where grantee will not consent.

In the absence of the grantee's consent to revocation, application is made to the Court on motion.

Action if he resists revocation.

Where a grantee has been cited to bring in a grant in order that the citor may apply for the revocation thereof, an action for revocation becomes necessary if the grantee resists the revocation (*c*).

Cancellation of revoked grant generally required.

The Court requires the revoked grant to be brought into the registry, voluntarily or by citation, for cancellation before the fresh grant is made (*d*). But where the production of the first grant cannot be compelled owing to the grantee having left the jurisdiction, or because his whereabouts are unknown (*e*), or it has been lost or mislaid (*f*), or is in the hands of a solicitor

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(*a*) App. VII, Forms 42, 43.
(*b*) App. VII, Forms 220, 221.
(*c*) *Vide post*, pp. 550—552.
(*d*) No credit can be given for the *ad valorem* fees paid on the original grant, which are considered to be paid for work done.
(*e*) *Baker* v. *Russell* (1752), 1 Lee. 167; *Scotter* v. *Field* (1848), 6 N. C. 182; *Langley* (1851), 2 Rob. 407.
(*f*) *Carr* (1858), 1 S. & T. 111. In this case the grantee was required to give an undertaking that, if found, he would bring the grant into the registry and that it would not be acted upon.

who claims a lien over it for his costs (*g*), the Court will still revoke the grant.

In proper cases a grant may be revoked notwithstanding that it has ceased owing to the death of the grantee or otherwise.

A plain office copy of the act of the revoked grant must be lodged with the papers for the fresh grant.

Impounding grants.

Upon an application to impound a grant, upon the lunacy of the sole grantee (*h*), the facts should be deposed to by the applicant for the fresh grant, and there should be an affidavit by the doctor and nurse of the lunatic (*i*). The application may be made at the Notation Department, or at the district registry where the grant issued.

Impounded grant delivered out.

The original grant is impounded until such time as the lunatic recovers, when, upon an order of the registrar to be obtained at the Notation Department, the impounded grant will be released (*k*).

(*g*) *Barnes* v. *Durham* (1869), 1 P. & D. 728, where an undertaking was required from the person at whose instance the grant was revoked to bring it into the registry as soon as it came into his possession.

(*h*) *Vide ante*, pp. 373—375; *Cooke*, [1895] P. 68. For form of order, see App. VII, Form 225.

(*i*) An affidavit by the doctor alone is sufficient where the lunatic is confined in a public institution.

(*k*) The order is based on medical evidence shown by affidavit.

CHAPTER VII.

PRACTICE AS TO ALTERATIONS IN GRANTS—ESTATES RESWORN—EXEMPLIFICATIONS AND DUPLICATE GRANTS.

SECTION 1.

ALTERATIONS IN GRANTS.

By order of a registrar of the principal registry.

No grant is to be altered by a district registrar without an order of a registrar of the principal registry having been previously obtained (*a*).

Application, where and how made.

Where for any reason a grant requires to be altered or amended, an affidavit of the facts (*b*) is made by the grantee and is taken with the grant to the Notation Department (*c*). If the reason given and the evidence adduced are sufficient, a registrar of the principal registry will order (*d*) such alteration or amendment to be made. The grant, as amended, will be signed by a registrar or district registrar, as the case may be.

In what cases an alteration in the grant may become necessary.

An alteration may be allowed if the surname or Christian name of the deceased has been misspelled, or her status, if a woman, misdescribed. Where the circumstances justify it, an address of the deceased, additional to that originally given in the grant, may, by order, be added (*e*).

No alteration in the surname, etc., of the deceased will be made.

The registrar will not usually alter the surname or the first or only Christian name of the deceased, except in cases of mere misspelling; in other cases the grant must be revoked. But an additional Christian name, which has been omitted, may be introduced, upon a certificate of birth, death or baptism being annexed to the affidavit.

An alias may be added in accordance with the rules for the insertion of an alias in the original grant (*f*).

When new bond is required.

If the name of the deceased, or the date of his death, is altered, a new bond must be given or the original bond re-executed.

(*a*) Rule 63, D. R.
(*b*) App. VII, Form 45.
(*c*) Or to the district registry if the grant issued there.
(*d*) For form of order, see App. VII, Form 223.
(*e*) *Towgood* (1872), 2 P. & D. 408.
(*f*) *Vide ante*, p. 438.

An error in the Christian names of an executor may be rectified upon an adequate explanation (*g*). Alteration of name of executor.

The Court may order a memorandum to be endorsed on the probate after it has issued as to the true date on which the will was executed (*h*). Memorandum as to the true date of the will.

The above enumeration of cases in which a grant may be altered is not exhaustive. Where the error is not of sufficient importance to require the revocation of the grant, and is a *bona fide* mistake, the necessary amendment may, on satisfactory evidence, be made.

A general grant may be amended by adding the limitation " save and except settled land " only in cases where the value of the settled land was not included in the amount for which the grant was made. The affidavit to lead such amendment must state clearly that the settled land is in addition to the property covered by the grant. If the land was included, in the belief that it was not settled land, the grant is incorrect in amount as well as in extent, and must be revoked (*i*). Amendment of grants in respect of settled land.

Similarly, the words " including settled land " may be added to a general grant, provided that it is clearly shown by affidavit that the value of the settled land is already included in the grant. If it was wrongly described as free estate, it must be shown that the grantees are also entitled to a grant covering the settled land.

Where a mistake has been made in the engrossment of the will, on application to the superintendent of the scrivenery department or to the district probate registrar, the engrossment will be re-examined and the alteration made. Mistake in engrossing the will, how rectified.

Where the registrar refuses to make the alteration asked for, application may be made to the Court on motion. Where the registrar refuses to make the alteration.

Section 2.

ESTATES RESWORN—CERTIFICATE OF ADDITIONAL SECURITY.

If it is discovered, after a grant has issued, that the amount at which the estate was sworn was less than its actual amount, by reason of under-valuation, or because additional assets have been ascertained, additional estate duty must be paid under a " corrective affidavit " (*j*). Value of estate re-sworn after grant issued.

(*g*) *Honywood*, [1895] P. 341.
(*h*) *Allchin* (1869), 1 P. & D. 664.
(*i*) A grant " save and except settled land " will not be amended to a general grant; neither will amendment be allowed of a grant " including settled land " upon the discovery of further settled land.
(*j*) If the deceased died on or before August 1, 1894, the affidavit is in Form D; if after that date, in Form D 1.

Certificate of additional security.

In the case of a grant of probate, the matter is dealt with solely by the Estate Duty Office; but if the grant was one of administration, with or without the will annexed, the Inland Revenue authorities will require a *certificate of additional security* (*k*). Application for this certificate is made at the Notation Department (*l*).

Application for certificate, how made.

An affidavit must be sworn by the administrator stating the amount at which the estate was originally sworn, and the value of the estate since discovered (*m*). The fees payable will be found in Appendix V.

By whom affidavit in support of application may be made.

If there are joint administrators, both must join in the affidavit. A person acting under a power of attorney for an absent administrator may swear this affidavit, and execute the other necessary documents presently referred to on his behalf. When the administrator was absent in Japan, the Court allowed another person to make the affidavit and to execute the bond, on the understanding that as soon as possible the administrator would execute a similar bond (*n*).

Fresh bond. Penalty.

The fresh bond required to be taken (*o*) is to cover the amount of the estate not included when the first bond was given (*p*), the penalty being calculated on the same basis, in relation to the additional estate, as upon the original bond (*q*).

Further copy account and declaration, and justification of sureties.

When an account of the estate was required in the first instance, a further copy of the account must be filed; when a declaration of the estate or an affidavit of justification was required, a further declaration or a further affidavit of justification is necessary. A certificate of delay is, however, unnecessary.

Notation and certificate.

The bond, grant, affidavit, and such other of the above-mentioned documents as are necessary having been lodged, a *notation* is made by the registrar upon the grant, to the effect that the estate has been resworn and additional security given; and a *certificate* to the same effect is signed (*r*).

Where additional property is to be included in a grant *de bonis non*.

Where the original administrator is dead, and additional property is to be included in the grant *de bonis non*, the applicant for such grant will first make a corrective affidavit and pay the additional duty. The usual certificate that the duty has been

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(*k*) 55 Geo. 3, c. 184, s. 42.

(*l*) Or, if the grant issued at a district registry, at that registry.

(*m*) For forms of affidavit, see App. VII, Forms 24, 25.

(*n*) *Ross* (1877), 2 P. D. 274; and see *Sutherland* (1862), 4 S. & T. 189.

(*o*) By 55 Geo. 3, c. 184, s. 42.

(*p*) See *Weir* (1859), 1 S. & T. 506. If the original grant was special or limited, the bond should be submitted in draft, before execution, to the Notation Department.

(*q*) *I.e.*, the real estate being, in cases of death before 1926, calculated at twice the annual value, and, where death occurred after 1925, at double the capital value: *vide ante*, p. 460.

(*r*) For form of certificate, see App. VII, Form 70.

paid will then be given by the Estate Duty Office, upon a memorial (*s*) being submitted by the proposed administrator.

In certain cases credit given for fees paid.

Where the grant issued under the Intestates' Widows and Children Acts, 1873 and 1875 (*t*), and the estate is subsequently resworn at a larger amount, the full fees, which would have been payable had the full value of the estate originally been set out, must be paid, but credit is given for the amount of fees actually taken. Credit is similarly given where payment was originally made, on personal application, of the small fees authorised by the Amended Table of Fees, 1875 (*u*), or where the estate was originally sworn at or under £100.

Where fixed fees originally paid, no credit given.

Where the grant was taken out under the Customs and Inland Revenue Act, 1881, s. 33, or under the Finance Act, 1894, s. 16, and the fixed fee of 15s. was paid, no credit is given upon the estate being resworn at such an amount as to take the case out of the provisions of these sections. The full fees on the estate, as resworn, must be paid.

When no further *ad valorem* fees are required.

No further *ad valorem* fees are demanded when the estate was originally sworn at over £100, and the full *ad valorem* fees were paid, unless the estate was sworn at a nominal amount, and an undertaking was given to pay the additional fees, if further estate were subsequently discovered.

Value of estate under double probate.

Where one of two executors proved the will, swearing the property, the amount of which depended on the result of a pending suit in Chancery, at £60,000, and paying the duty thereon, the other executor was allowed to take a double probate, swearing the property at £2,000 (*x*).

Section 3.

EXEMPLIFICATIONS AND DUPLICATE GRANTS.

Exemplifications.

Exemplifications of grants of probate or letters of administration for use in foreign or colonial Courts may be obtained on application at the registry where the grant was made. These exemplifications issue under the seal of the Court, and recite the grant, with a copy of the will, if any.

Practice.

Search (fee, 1s.) must first be made for the record of the grant, and, the exemplification having been ordered from the Clerk of the Calendars, the necessary parchment will be supplied, and must be taken to the Stamping Department of the Inland Revenue, to be impressed with the requisite duty stamp (£3).

(*s*) *Vide ante*, p. 474 : for form see App. VII, Form 103.
(*t*) 36 & 37 Vict. c. 52, and 38 & 39 Vict. c. 27.
(*u*) See App. V, Part I.
(*x*) *Bell* (1871), 2 P. & D. 247.

The stamped parchment must be returned to the Clerk of the Calendars, together with a fee of £1 1s. on the exemplification (*y*) and 1s. 6d. per folio for engrossing and collating the same.

Special certificate.

The *testimonium* clause signed by the registrar may, in cases in which it is required, *e.g.*, by many American Courts, be amplified by a special certificate signed by the President.

Duplicate grants.

A duplicate grant of probate or letters of administration may issue, on payment of the proper fees (*z*).

Practice.

A written authority under the hand of the executors or administrators, showing the reason why the duplicate is required, must be lodged. The attorney of such executors or administrators must, if he makes the application on their behalf, produce his letter of attorney and file a copy. A copy of the record of the original grant, and an engrossment of the will (if any), must accompany the application (*a*).

Original will to be looked up.

A search ticket for the original will (if any) must be obtained, and the will must be sent to the examiners in order that the engrossment may be collated.

If the application is made more than six months after the issue of the original grant, or where more than two duplicate grants are applied for, the application is referred to the registrar for his sanction.

Duplicate resealing.

Where application is made to reseal Scottish, Irish or colonial grants in duplicate, a similar letter of explanation must be filed, and the duplicate grant must be examined with the original copy filed in the registry.

(*y*) For forms of exemplifications, see App. VII, Forms 98, 99.

(*z*) See App. V, Part I. Duplicate grants bear the date on which they issue, with the exception that where the original grant was made before 1926, the date of the duplicate is to be that of the original grant.

(*a*) It is also necessary to produce either the original grant or a certificate from the Estate Duty Office showing the amount of the duty paid.

CHAPTER VIII.

PRACTICE AS TO RENUNCIATION, CONSENT, AND RETRACTATION.

SECTION 1.

RENUNCIATION.

Renunciation defined.

RENUNCIATION is a formal act in writing whereby a person having a right to a grant of probate or administration renounces such right (*a*).

Form of renunciation.

By whom executed.

A renunciation need not be under seal (*b*); indeed, if it be under seal, it is a deed, and must be stamped accordingly. It may be executed by the *jus habens* or by his attorney, provided the power of attorney expressly authorises the attorney so to renounce (*c*). Until the renunciation is filed it is not final, but may be withdrawn (*d*), but when recorded it takes effect from the date of it (*e*). Where an absolute renunciation has been recorded, it is not necessary again to cite the renunciant when a subsequent grant is made in respect of the same estate (*f*).

Takes effect from date when made.

Should be witnessed.

A renunciation should be witnessed by a disinterested person.

No unnecessary renunciations are to be filed.

Care should be taken that no unnecessary renunciations are filed upon an application for a grant, for if such renunciations are referred to in the applicant's oath, the registrars will require the oath to be amended and resworn.

Renunciation by an executor.

In a preceding chapter (*g*) the power of an executor to renounce, and the consequences of the renunciation by an executor, are very fully discussed. It is only necessary to observe here that an executor stands in a different position from other persons entitled to a grant in respect of his power to renounce and the consequences thereof.

Before grant applied for.

A renunciation by an executor, before application has been made for a grant, and after the death of the testator, may be taken to the Record Keeper at the principal registry, or to a district registry, to be filed. The renunciation must be accompanied by the original will. A copy of the minute recording the filing may be ordered.

(*a*) For forms of renunciation, see App. VII, Forms 245—251. Form of order for filing renunciation: App. VII, Form 222.
(*b*) *Boyle* (1864), 3 S. & T. 426.
(*c*) *Rosser* (1864), 3 S. & T. 490.
(*d*) *Morant* (1874), 3 P. & D. 151.
(*e*) *Munday* v. *Slaughter* (1839), 2 Curt., at p. 74.
(*f*) *Harrison* v. *Harrison* (1846), 1 Rob. 406.
(*g*) *Vide ante*, pp. 224—231.

The renunciation is, however, usually filed with the papers lodged on the application for the grant.

Renunciation by executor to whom power has been reserved.

An application to renounce probate by an executor, to whom power has been reserved, is made at the Notation Department of the principal registry (*h*). The renunciation and the probate are lodged, whereupon the registrar makes an order (*i*) directing the filing of the renunciation. The renunciation is *noted* on the act or record, but not upon the grant, and, in order to prove the renunciation, a copy of the act or, in certain cases, a copy of the renunciation must be obtained.

Position as to renunciation of person entitled to administration.

A person entitled to a grant of administration, unlike an executor, cannot be compelled to take the grant though he may have intermeddled with the estate (*k*). The representatives also of a person who has renounced administration are not bound by his renunciation, but may come in and take a grant *de bonis non*. And though, where a person entitled to administration has *renounced* (*l*), he need not again renounce or be cited when a subsequent grant is required, if he has merely been cited and failed to appear on the occasion of the first grant, he must again be cited when application is made for the subsequent grant (*m*).

The will must be brought into the registry.

A person entitled to a grant of administration with the will annexed must, on renouncing, deposit the will at the registry (*n*).

Where the person entitled to the grant is dead.

Where the person entitled to the grant of administration is dead, and his executors or administrators are entitled to the grant in their representative capacity, all his personal representatives must renounce before the grant can be made to another. If there is no legal personal representative appointed of the deceased person, all persons having an interest in his estate must renounce (*o*).

Renunciation by minors or infants.

Minors and infants renounce administration by their guardians, but renunciation of probate by a guardian of an executor, who is a minor, is not in accordance with the practice of the Court (*p*). The persons entitled to be appointed guardians of a minor or infant for the purpose of taking a grant are entitled to be so appointed for the purpose of renouncing the grant (*q*). But

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(*h*) Or to a district registry if the grant was made there.

(*i*) In the district registry a minute is signed by the district registrar, who does not make an order, and notice of the renunciation is sent to the principal registry.

(*k*) *Ackerley* v. *Oldham* (1811), 1 Phill. 248; *Ackerley* v. *Parkinson* (1815), 3 M. & S. 411; *Fell* (1861), 2 S. & T. 126; *Davis* (1860), 4 S. & T. 213.

(*l*) *Harrison* v. *Harrison* (1846), 1 Rob. 406.

(*m*) *Skeffington* v. *White* (1828), 1 Hagg., at pp. 702, 703; *ante*, p. 353.

(*n*) *Fenton* (1826), 3 Add. 35. *Vide ante*, p. 229.

(*o*) Tristram and Coote, 16th ed., p. 268.

(*p*) *Ibid.*, p. 269.

(*q*) *Vide ante*, pp. 363—369, 469—471.

where there are both minors and infants, the guardian elected by the minors for the purpose of renunciation may not act for the infants, to whom a guardian must be specially assigned by order of the registrar (*r*).

Renunciation on behalf of a lunatic.

A lunatic or person of unsound mind renounces probate or administration by his committee.

The nearest of kin of a lunatic may not renounce probate or administration on behalf of the lunatic, who must, if his renunciation is required, be cited to accept or refuse a grant (*s*).

Renunciation of guardianship.

A person entitled as guardian of a minor or infant to a grant of administration for the use and benefit of the minor or infant, may renounce his right (*t*).

No renunciant in one character may as a general rule take the grant in another character.

Rule 50, N. C. B., provides: "Except where otherwise provided in these Rules, no person who renounces administration (with or without the will) of the estate of a deceased person in one character, is to be allowed to take representation to the same deceased in another character."

Position of executor.

This rule, before its revision in 1925, included a direct reference to the case of a person who renounced probate (*u*), and it seems that the effect of the change in the wording of the rule is to allow an executor to renounce probate and yet take a grant of administration with the will annexed in another capacity (*w*).

Effect of Rule 50, N. C. B.

The general effect of the rule is that no person entitled, as kin, to a grant of administration on intestacy, or a person entitled to a grant of administration with the will annexed as residuary legatee or devisee, can renounce his right in that capacity and take administration as a creditor.

Rule capable of modification in a proper case.

But the rule has always been treated by the Court as intended for general guidance, and capable of modification if sufficient reason be shown (*x*). Accordingly, where two persons, appointed executors and residuary legatees in trust and guardians of the testator's children, renounced their right to a grant as executors and residuary legatees in trust, they were allowed to take a grant of administration with the will annexed *de bonis non* as testamentary guardians for the use and benefit of the children (*y*).

(*r*) Rule 35, N. C. B.

(*s*) Tristram and Coote (16th ed.), p. 270. For practice as to citation, see *post*, pp. 509 *et seq.*

(*t*) App. VII, Form 248.

(*u*) *Bullock* (1847), 1 Rob. 275; *Richardson* (1860), 1 S. & T. 515; *Morrison* (1861), 2 S. & T. 129; but see *Wheelwright* (1878), 3 P. D. 71. Where a man under a will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground. He cannot throw aside probate and take a more limited grant: but see *Russell* (1869), 1 P. & D., at p. 635; *Toscani*, [1912] P. 1; *vide ante*, pp. 230, 231.

(*w*) *Vide ante*, pp. 230, 231.

(*x*) *Per* Sir J. P. Wilde in *Loftus* (1864), 3 S. & T., at p. 311.

(*y*) *Loftus* (1864), 3 S. & T. 307; and see *Gill* (1873), 3 P. & D., at p. 115.

An executor who had renounced was allowed to take a grant of administration with the will annexed as the attorney of the other executors (*z*), and to take a grant of administration with the will annexed *de bonis non* as a creditor (*a*).

A renunciation by a widow of a grant in her own right does not prevent her from joining in a grant on behalf of her children as their guardian (*b*).

A husband was allowed to take a grant of administration with the will annexed as creditor, although he had signed a renunciation executed by his wife as residuary legatee (*c*).

Section 2.

CONSENT.

Consent.

Where several persons are equally entitled to the grant, and administration is applied for by one of them, the renunciation of the others is not required. Where two of such persons contend for the grant, the position of either applicant is strengthened if he can obtain the consents of the persons equally entitled with himself to the administration.

When "*spes*" grant is allowed.

Upon the renunciation and consent of a universal legatee and devisee, or of a person entitled to the whole of the estate of an intestate, a "*spes*" grant will be made to the lawful issue of the person who has renounced and consented.

Cases in which all persons entitled to grant must join in renunciation or consent.

Where there are several persons entitled to a grant as co-administrators, testamentary guardians, or as guardians appointed by the Court of Chancery, the Court will not grant the administration to one alone of such persons without the renunciation or the consent of the others.

In the case of several executors no such renunciation or consent is required.

Section 3.

RETRACTATION.

Retractation defined.

Retractation is the withdrawal of a renunciation which has been entered and recorded (*f*).

Retractation by executor only reluctantly allowed.

The circumstances in which a retractation by an executor is allowed are discussed in an earlier chapter (*g*). It is sufficient

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(*z*) *Russell* (1869), 1 P. & D. 634.
(*a*) *Toscani*, [1912] P. 1.
(*b*) Tristram and Coote (16th ed.), p. 272.
(*c*) *Biggs* (1868), 1 P. & D. 595.
(*f*) For form of retractation, see App. VII, Form 252.
(*g*) *Vide ante*, pp. 229, 230.

here to note that retractation by an executor is only reluctantly permitted by the Court in very exceptional circumstances.

Application to be made on motion.

An application to retract his renunciation is made by an executor to the Court on motion (*h*). If the grant has been made, he must lodge the grant with the motion papers (*i*). If the executor is given leave to retract, a notation of the subsequent probate is made on the original grant and on the record, or if the original grant is not available upon the record alone. The grant when so noted is retained in the registry, unless an order to the contrary is made (*k*).

Right of person entitled to administration to retract unaltered by statute.

Retractation is much more freely allowed where the renunciation is that of a person entitled to a grant of administration. For whereas it is provided by section 5 of the Administration of Estates Act, 1925 (*l*), that the rights of an executor who renounces shall wholly cease, the practice which prevailed in the Ecclesiastical Court and allowed retractation by a person entitled to administration, is unaffected by statute. Thus a next-of-kin who renounced his right to the original grant was entitled on the death of the creditor administrator to retract his renunciation and to claim the grant *de bonis non* (*m*).

A residuary legatee, also, who has renounced administration (with will) *de bonis non*, has been permitted to retract his renunciation, and to take administration in preference to a creditor, although the estate was alleged to be deeply insolvent, it being stated by Sir H. J. Fust that "according to the practice of the Court, a residuary legatee is allowed to retract his renunciation before a grant be made to another" (*n*).

Grant after retractation similar in form to original grant.

Where a next-of-kin of an intestate had renounced his right, and had consented to a grant for the use and benefit of the widow, who was a lunatic, until she should become of sound mind, he was held not to be entitled, on retracting his renunciation, to take a grant *de bonis non* in his own right on the death of the administrator; but the Court permitted him to take

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(*h*) *Melville* v. *Ancketill* (1909), 25 T. L. R. 655.

(*i*) Rule 112, N. C. B.

(*k*) *Ibid.*

(*l*) This section replaces, where death occurred after the commencement of the Act, 20 & 21 Vict. c. 77, s. 79 and 21 & 22 Vict. c. 95, s. 16.

(*m*) *Skeffington* v. *White* (1828), 1 Hagg., at p. 702; cf. *Bradfield*, [1922] 2 Ir. R. 213. Where an official receiver in bankruptcy, to whom administration was granted on the renunciation of the widow and six children of the deceased, desired, having paid all the debts, to be relieved of his office, the Court allowed the widow and children to retract their renunciations, revoked the letters of administration, and made a joint grant to the widow and two of the children in respect of the unadministered estate: *Thacker*, [1900] P. 15. See also *Hoare* (1833), 2 S. & T. 361, n.; *Heathcote*, [1913] P. 42 (retractation by husband where grant made to his trustee in bankruptcy); and *vide ante*, p. 427.

(*n*) *Waters* (1850), 2 Rob. 142; and see *Blake* (1866), 14 L. T. 769.

administration for the use and benefit of the widow, who remained a lunatic (*o*).

Where a person previously cited desires to take the grant *de bonis non*.

When a person who has failed to appear to a citation to accept the original grant desires to take administration *de bonis non*, no retractation is required. But such a person is subject to the rules which regulate grants made to persons after retractation (*p*).

Application made *ex parte* to registrar.

Application to retract a renunciation by a person entitled to administration is made *ex parte* to the registrar upon an affidavit setting out the facts.

(*o*) *Penny* (1846), 1 Rob. 426.
(*p*) Tristram & Coote (16th ed.), p. 276.

CHAPTER IX.

PRACTICE AS TO DECLARATION, INVENTORY, AND ACCOUNT.

Declaration, when required.

When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, or for the use and benefit of a lunatic or person of unsound mind, unless he be a committee (*a*), a declaration on oath (*b*) of the estate of the deceased must be filed (*c*). A declaration is also required where the grant is made on the presumption of the death of the deceased, or where the grant is taken by an administrator *pendente lite*, or by the elected or assigned guardian of minors or infants.

Inventory and account; who may claim.

Any person interested in the estate in process of administration (*d*), may call upon the executor or administrator to exhibit an inventory of the estate (*e*), and to render an account of his administration (*f*). A cessate administrator may in like manner call upon the original administrator (*g*).

Application, how made.

By the present practice the application is made to the registrar on summons (*h*). It is not necessary to enter a caveat.

Disobedience to the order, if made, is punishable by attachment (*i*).

Inquiry into the inventory and account may in proper cases be ordered.

(*a*) Or person appointed under the Lunacy Acts.

(*b*) For form, see App. VII, Form 92.

(*c*) Rule 42, N. C. B.

(*d*) *E.g.*, a person entitled to share in the estate, a legatee or a creditor.

(*e*) For form, see App. VII, Form 102. An inventory may be called for at any short period after administration, *i.e.*, before the expiration of six months; but in regard to the account there does not appear to be any defined limit of time; Tristram & Coote (16th ed.), p. 325.

(*f*) See *Baker* v. *Baker* (1860), 2 S. & T. 380. And see *Bouverie* v. *Maxwell* (1866), 1 P. & D. 272.

(*g*) See *Taylor* v. *Newton* (1752), 1 Lee 15.

(*h*) Formerly by citation. A form of affidavit to lead the summons will be found in App. VII (Form 44).

(*i*) See *Baker* v. *Baker* (1860), 2 S. & T. 380.

CHAPTER X.

PRODUCTION OF TESTAMENTARY PAPERS.

By what means production of testamentary papers can be enforced :

THERE are two modes in which a person may be compelled to produce and bring into the registry any testamentary paper shown to be in his possession or under his control :—

(1) By a subpœna, issued by one of the registrars of the principal registry under section 23 of the Court of Probate Act, 1858 (*a*). This is the simpler and more usual mode.

(2) By an order of the Court made on motion under section 26 of the Court of Probate Act, 1857 (*b*).

(1) By subpœna. Practice.

The subpœna (*c*) issues on a registrar's order (*c*). An affidavit (*c*) stating that the will is in the possession, within the power, or under the control of the person against whom the subpœna is to issue, must be filed in the Contentious Department. The form of order, which can be obtained in the department, and the form of subpœna should be filled up by the practitioner.

Service of subpœna. Endorsement of notice.

The subpœna should be personally served, and should be endorsed with a notice under R. S. C., Order XLI, r. 5. It is very doubtful whether a subpœna can issue for service out of the jurisdiction.

Procedure on bringing in testamentary paper.

The procedure to be followed by a person who brings in a testamentary paper in obedience to the subpœna is laid down in Rules 84—86, N. C. B., save that testamentary papers are now taken to the Record Keeper's Department.

Where it is not in the possession of the person served.

If the person served has not the will in his possession or control he should enter an appearance at the Contentious Department and file an affidavit setting out the facts (*e*).

Disobedience punished by attachment.

If the subpœna is disobeyed, it may be enforced by process for contempt, or by attachment (*f*). But the Court has refused to order an attachment to issue in the first instance, directing

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(*a*) *Vide post*, p. 693.

(*b*) It seems that this mode is still available, and is not superseded by s. 23 of the Court of Probate Act, 1858 : *Shepherd*, [1891] P. 323.

(*c*) Form of subpœna : App. VII, Forms 258, 259. Form of order : App. VII, Form 239. Form of affidavit : App. VII, Form 48.

(*e*) *Rawlings* v. *Emmerson* (1887), 57 L. J. P. 1.

(*f*) *Simmons* v. *Deane* (1858), 27 L. J. P. 103.

that the person served should attend in Court to be examined in reference to his possession of the paper (*g*).

(2) By order on motion.

Section 26 of the Court of Probate Act, 1857, provides that the Court may, whether any suit or other proceeding shall or shall not be pending with respect to any probate or administration, order (*h*) any person to produce and bring in any paper, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person (*i*); and if it be not shown that any such paper is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same (*k*). In case of default, such person will be subject to process for contempt.

Order to attend to be examined as to knowledge of testamentary papers.

Service of order.

The copy of the order directing attendance or production of the testamentary papers should be personally served, and should be endorsed with a notice under R. S. C., Order XLI, r. 5. Conduct money must, it seems, be tendered (*l*).

Position of attesting witnesses.

The Court will not, under this section, order the attendance for examination in open Court of attesting witnesses to a will because they have declined to give information as to the execution to a person who is attacking the will (*m*). But where the attesting witnesses refused to make an affidavit as to the execution of a will, the Court, under 20 & 21 Vict. c. 77, s. 24, required their attendance in person to state what they knew about the execution (*n*).

Solicitor has no lien on will.

The lien of a solicitor does not extend to an original will, and he cannot refuse to produce it (*o*).

(*g*) *Parkinson* v. *Thornton* (1867), 37 L. J. P. 3; see *Floyd* (1909), 53 Sol. Jo. 790, 801.

(*h*) These orders are now made on motion.

(*i*) See *Shepherd*, [1891] P. 323. If such person files an affidavit stating that the paper is not in his possession or control, he may be ordered to attend and be examined concerning his possession or knowledge of the paper: *Laws* (1872), 2 P. & D. 458; *Banfield* v. *Pickard* (1881), 6 P. D. 33; *Parkinson* v. *Thornton*, cit. *supra*; *Floyd*, cit. *supra*.

(*k*) The examination must be either on interrogatories or in open Court; the Court has no power to order a person to attend before the district registrar: *Laws* (1872), 2 P. & D. 459; but the Court may order a person to attend to be examined *viva voce* before a commissioner: *Banfield* v. *Pickard* (1881), 6 P. D. 33. As to the right of a person so examined to be represented by counsel, see *Cope* (1867), 36 L. J. P. 83.

(*l*) *Townend* v. *Townend*, [1907] P. 239, n.; *Harvey*, [1907] P. 239; overruling *Wyatt*, [1898] P. 15.

(*m*) *Evans* v. *Jones* (1867), 36 L. J. P. 70.

(*n*) *Sweet*, [1891] P. 400; *Bays* (1910), 54 Sol. Jo. 200. For form of order, see App. VII, Form 203.

(*o*) See Williams on Exors. (11th ed.), p. 224, and cases there cited.

PART THE THIRD.

THE PRACTICE WITH REGARD TO CAVEATS, CITATIONS, SUMMONSES, AND MOTIONS.

CHAPTER I.

CAVEATS.

Object of entering a caveat.

ANY person intending to oppose the issue of a grant of probate or letters of administration must enter a caveat (*a*), whereby the issue of a grant with reference to the estate in question is prevented until the caveat has been removed. This affords the caveator an opportunity of raising any question with reference to the grant, and compels the applicant for the grant to warn the caveat, and so disclose his name and his interest in the estate of the deceased.

Opposing interests disclosed.

The caveator, in his appearance to the warning, makes a similar disclosure, and the parties are thus put in possession of information which may lead either of them, should their interests conflict, to institute an action against the other for the purpose of establishing a claim to a grant.

The entry of a caveat is thus often a step preliminary to an action. But it is not necessarily so, for there may be subsidiary questions, such as justification of sureties, which a person interested in the estate may wish to bring forward.

Caveator may support applicant's claim.

If the caveator finds that his interests do not conflict with those of the applicant, it is open to him to support the latter's claim (*b*).

Practice in entering caveat.

A caveat, which in form is a notice in writing (*c*), sets forth the name and last place of abode of the deceased, the day and place of his death, and the name and address of the person entering it. It may be entered either in the principal registry (*d*)

(*a*) Rule 59, N. C. B.; Rule 7, C. B.
(*b*) *Ingram* v. *Strong* (1815), 2 Phill., at p. 315.
(*c*) App. VII, Form 68.
(*d*) The caveat is entered in the caveat book at the "Seat."

or in a district registry, and by the caveator personally or by his solicitor or agent (*e*). If it is entered in the principal registry, the person entering it must insert the name of the deceased in the index of the caveat book (*f*). A receipt is given, and this must be produced if the caveat is subsequently subducted.

Receipt.

Caveat remains in force for six months.

A caveat bears date on the day it is entered, and remains in force for six months. It may be renewed from time to time (*g*). In cases in which contentious proceedings are pending care should be taken to see that the caveat is duly renewed.

Notice of entry of caveat at district registry.

When a caveat is entered in a district registry, the district registrar sends a copy to the principal registry (*h*).

How caveat ceases to have effect.

The caveat remains in force until it has expired, or has been subducted, or until it has been warned and no appearance entered, or until the contentious proceedings consequent upon it have terminated (*i*).

Subduction of caveat.

A caveat may be subducted, or withdrawn, at the registry at which it was entered, at any time before it has been warned. But after the warning subduction is only allowed when the warning has not been served—this must be shown by affidavit—or when six days have not expired from the date of the issue of the warning.

When subducting the caveat the party who entered it must produce the receipt given when the caveat was entered.

Warning of caveat.

A warning of a caveat is a notice to the caveator, signed by a registrar of the principal registry, to enter an appearance at that registry within six days (*k*), and to set out his interest.

Time for appearance to warning.

What warning must disclose.

All caveats must be warned from the principal registry (*l*). The warning must state the name and the interest of the party on whose behalf it is issued and, if he claims under a will or codicil, the date of such will or codicil, and must contain an address within three miles of the General Post Office, to which any notice requiring service may be sent (*m*). The form of warning is filled in at the registry (*n*).

Service of warning.

A warning is to be served by leaving a copy thereof at the place mentioned in the caveat as the address of the person

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(*e*) See *Panton*, [1901] P. 239, as to the position of a person entering a caveat.

(*f*) Rule 59, N. C. B.; Rule 7, C. B.

(*g*) Rule 60, N. C. B.

(*h*) Rule 74, D. R. It should be noted that provision is no longer made for the sending of notice to a district registry of a caveat entered in the principal registry.

(*i*) Rule 77, D. R.

(*k*) This period is exclusive of Sunday, Christmas Day and Good Friday (Rule 87, N. C. B.).

(*l*) Rule 63, N. C. B.

(*m*) Rule 65, N. C. B.

(*n*) The practitioner should attend at the "Seat" to issue the warning: for form see App. VII, Form 265.

who entered it (*o*); or the registrar may, if any difficulty arises, send the warning by registered post to the caveator at the address given in the caveat (*p*). When service has been effected an endorsement of service should be made on the warning.

Default of appearance to the warning.

If after the warning has been duly served, six days have elapsed, and no appearance has been entered, the grant will be made to the applicant on his filing an affidavit of service, of search, and of non-appearance (*q*).

Appearance where entered.

Caveator's interest to be set out.

An appearance to the warning is entered either by the caveator himself or by his solicitor at the Contentious Department of the principal registry. The entry must disclose the interest of the caveator in the estate, and must be accompanied by an address within three miles of the General Post Office (*r*).

If an appearance be not entered within the six days allowed, the caveator may still apply by summons for leave to appear, provided the grant has not passed the seal.

A copy of the appearance should be sent to the solicitor of the person who has warned the caveat.

Who may appear to the warning.

Without the permission of one of the registrars, no appearance can be entered for any person claiming an interest (*s*) otherwise than as—

(1) Executor;

(2) Legatee or devisee (contingent, residuary, specific, or otherwise) in trust or beneficial;

(3) A person entitled to share in estate of the deceased in case of intestacy (*t*);

(4) Creditor;

(5) The legal representative of any of the above-mentioned persons.

The appearance must state the date of the will or codicil under which an interest is claimed.

The appearance entered for a person entitled on an intestacy, or his representative, must set forth the relationship to the deceased of such person.

Appearance to warning by a minor.

In entering an appearance to warning on behalf of a minor, the procedure required for the entry of appearance to a writ on behalf of a minor should be followed (*u*).

(*o*) Rule 63, N. C. B. (*p*) Rule 64, N. C. B.

(*q*) Rule 67, N. C. B. For form of affidavit, see App. VII, Form 28. The warning should be exhibited to the affidavit.

(*r*) Rules 26 and 27, C. B. All appearances should be entered in the index by the person entering them.

(*s*) If the appearance to the warning discloses an interest insufficient to entitle the caveator to resist the grant, the applicant for a grant should take out a summons to discontinue contentious proceedings: *vide post*, p. 522.

(*t*) Where death occurred before 1926 an appearance may be entered by the heir-at-law of the deceased.

(*u*) *Vide post*, p. 566.

After entry of appearance the proceedings are contentious, but there is no *lis pendens* until issue of writ.

When the entry of the appearance has been made, no grant can issue without an order, and the matter is entered as a cause. Contentious business thereupon commences, and the expenses of the entry of the caveat and the warning are upon taxation considered as costs in the cause (*x*). It has, however, been held that there is no *lis pendens* until the writ is issued. Since the Judicature Acts, at all events, an action is only commenced by the issue of a writ of summons (*y*).

Proceedings after appearance.

Summons to discontinue.

After the entry of appearance, if the caveator abandons his opposition to a grant, an order to clear off the caveat may be made on a summons to discontinue contentious proceedings (*z*).

But if the caveator persists in opposition to the grant, a writ of summons is issued, and an action is commenced.

Where the interests of the parties are identical.

Where the caveator desires to appear to the warning, and his interest is clearly identical with that of the person who has warned the caveat, his appearance may be rejected in the registry, or the matter may be referred to the registrar. His course will then be to issue a summons before the registrar, who will decide which of the parties shall take the grant.

An executor may not appear to a warning by a co-executor.

An executor, as such, cannot enter an appearance to a warning by another executor in respect of the same will, for in this case a grant to the one cannot prejudice the position of the other (*a*).

(*x*) Rule 12, C. B.
(*y*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291.
(*z*) *Vide post*, p. 522.
(*a*) *Vide post*, pp. 512 and 513, n.

CHAPTER II.

CITATIONS.

A CITATION (*a*) is an instrument in writing, signed by a registrar of the principal registry and issued under the seal of the Court, reciting a cause or matter before the Court and the the interest therein of the person extracting the citation, and calling upon the person named therein to enter an appearance, and, in certain cases, to take some other step in relation to that cause. To this is added an intimation that if the party cited does not appear, or, appearing, does not show cause to the contrary, the Court will proceed to make the decree or order asked for in the citation. Citation defined.

Citations are now of four kinds (*b*) : (1) citations to accept or refuse a grant, (2) citations to bring in a grant, (3) citations to propound a testamentary instrument, and (4) citations to see proceedings. Kinds of citation.

The three last named have reference to, or are preliminary steps in, an action, and are therefore called contentious citations. Citations to accept or refuse a grant are non-contentious citations (*c*). Contentious and non-contentious citations.

SECTION 1.

CITATIONS TO ACCEPT OR REFUSE A GRANT (*d*).

Reference has been made to the established rule which requires every person having a superior right to a grant to Citations to accept or refuse a grant.

(*a*) The ordinary way of commencing proceedings for proving a will in solemn form in the ecclesiastical Courts was by citation. But it was not the only way, for a suit might be commenced by caveat, and, on the caveat being warned and an appearance entered, the party upholding the will might proceed to propound it in a "common condidit" : *Peacock* v. *Lowe* (1867), 1 P. & D., at p. 312; *Coplestone* v. *Nicholas* (1863), 33 L. J. P. 57. Now, under Order I, Rule 1, of the Rules of the Supreme Court, an action in the Probate Division is commenced by writ of summons; see *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291.

(*b*) Citations for purposes other than the commencement of an action are unaffected by the Rules of the Supreme Court; see Order I, Rule 2.

(*c*) There are other forms of non-contentious citation—*e.g.*, an executor who has intermeddled may be cited to take probate (not accept or refuse), and refusal renders him liable to attachment : *vide ante*, p. 225. Form of citation : App. VII, Form 88; of order : App. VII, Form 206. Citations to exhibit an inventory and to render an account are practically obsolete, since an order to file an inventory and account may now be, and generally is, obtained on summons : *vide ante*, p. 501. Citations to show cause why a bond should not be assigned have similarly been displaced by summonses : *vide ante*, p. 461.

(*d*) For forms of citations to accept or refuse a grant, *vide* App. VII, Forms 72—82.

renounce or to be cited before the grant can be made to any other person (*e*). Where a person with a superior right to a grant declines to assert, or delays in asserting, that right, the Court may, at the instance of any party having an interest (which interest is proved by the oath of the party (*f*)), call upon such person to accept or refuse the grant, and may, in case of default, order that the grant be made to the citor.

Purposes served.

The citation thus either compels a representation to be taken by those who are primarily entitled to it, or, where they do not take it, provides a substitute for a renunciation on their part (*g*).

Effect of failure by executor to appear to citation.

Section 5 of the Administration of Estates Act, 1925 (*h*), provides that upon an executor failing to appear to a citation to accept probate his rights to a grant of probate wholly cease, and the representation to the testator and the administration of his effects devolve as if such person had not been appointed executor (*i*).

Executors who have proved the will may cite their co-executors to whom power has been reserved (*i*).

Person entitled to administration or administration (will) must again be cited when a grant *de bonis non* is made

The failure of persons, who are entitled to grants of administration or administration with the will annexed, to appear to a citation to accept or refuse a grant is not conclusive. It does not bind their representatives. And where a grant has been made to a legatee or creditor after citation of the residuary legatee and devisee or the persons entitled to share in the estate upon an intestacy, on the death of the administrator the residuary legatee and devisee or the persons entitled upon an intestacy must again be cited or must renounce, before administration *de bonis non* is granted to the representatives of the former administrator or to another creditor or legatee. But a person who does not appear to a citation to accept letters of administration and who, on the death of the administrator desires to come in and take a grant *de bonis non*, is in no better position than a person who has formally renounced his right (*k*).

(*e*) *Vide ante*, pp. 277, 452, 464. The rule may be relaxed in certain cases: *vide ante*, pp. 277, 278, 404 *et seq.*

(*f*) Swinb., Part VI, s. 12.

(*g*) Wms. on Exors. (11th ed.), p. 221.

(*h*) This section replaces, where death occurred after the commencement of the Act, section 16 of the Court of Probate Act, 1858; *vide ante*, p. 229.

(*i*) Failure to appear to a citation to *propound* the will has not the same effect; *vide post*, p. 545. By section 8 of the Administration of Estates Act, 1925, proving executors may exercise all the powers conferred on the personal representative as effectually as if all the persons named as executors had concurred. It is thus no longer necessary to clear off by citation executors to whom power has been reserved before the proving executors can convey the fee-simple in real estate. Th clearing off of such executors was formerly necessary following the decision in *Re Pawley and the London & Provincial Bank*, [1900] 1 Ch. 58.

(*k*) *Vide ante*, pp. 499, 500.

A person having an inferior interest, but unable to procure the renunciation of persons with a superior interest, cites, therefore, all such persons to take the required grant (*l*).

All persons having a superior right to the grant to the citor must be cited.

Thus, in the case of a will, the residuary legatee or residuary devisee in trust cites the executor to accept or refuse probate of the will.

Examples.

A beneficial residuary legatee or devisee for life, similarly cites both the executor and the residuary legatee and devisee in trust, to accept or refuse probate or letters of administration with the will annexed; and a legatee or creditor cites both the executor and the residuary legatees and devisees in trust or beneficially entitled, and all other persons having a superior right to the grant (*m*).

In cases of intestacy, a person entitled to share in the estate cites all other persons so entitled who have a superior right to the grant. A creditor cites all the persons entitled to share in the estate (*n*).

Where intestate dies without known relations, the citations to be served on Procurator-General.

In the case of a person dying intestate on or after January 1, 1926, leaving no known person entitled to share in the estate, a citation must be issued against the kin (if any) and all persons having or pretending to be entitled to share in the estate, and the service thereof is effected as required by Rule 70, N. C. B. Such citation must also be served on His Majesty's Procurator-General or upon the Solicitors for the Duchies of Lancaster or Cornwall as the case may require (*o*).

Where the intestate died before 1926 the citation is addressed to the next-of-kin (if any), the heir-at-law (if there be real estate), and all persons having or pretending to have any interest in the estate. In such cases the grant is limited to the personal estate of the deceased.

Section 2.

CITATIONS TO PROPOUND A TESTAMENTARY INSTRUMENT (*p*).

Purposes served by citations to propound a testamentary instrument.

When the persons entitled to a grant of administration in the event of an intestacy know of the existence of a will of the deceased which they desire to have set aside, and the executors or beneficiaries thereunder neglect or decline to

(*l*) Wms. on Exors. (11th ed.), p. 221.

(*m*) The priority of right will differ in accordance as to whether the deceased died on or since January 1, 1926, or before that date. *Vide ante*, pp. 335 *et seq.*

(*n*) A creditor, in cases of death before 1926, must cite the widow, heir-at-law, next-of-kin, and all persons entitled in distribution to the estate. But if a husband survived the intestate he alone need be cited, unless there be real estate; *Brown* v. *Wildman* (1859), 28 L. J. P. 54. See also *ante*, pp. 308 *et seq.*, 333, 334.

(*o*) Rule 76, N. C. B. *Vide ante*, pp. 333, 463.

(*p*) For form of citation to propound a testamentary instrument, *vide* App. VII, Form 82.

propound such will, the persons so entitled may cite the executors and all persons interested under the will to enter an appearance and to propound the same.

Where document is not propounded the Court will grant administration as to an intestate.

If an appearance is entered, and the will propounded, the citors are thus afforded an opportunity of attacking the will. If, however, the parties cited neither appear nor propound the will, the Court may on motion (*q*), without requiring evidence as to the invalidity of the will, grant administration to the persons entitled in the event of an intestacy (*r*).

Similarly probate of an earlier will in common form will be granted.

The same process may be adopted by persons interested under an earlier will, if a later will exists which they believe to be invalid, or they may themselves propound the earlier will, making the parties interested under the later will defendants to their writ (*s*).

Procedure when appearance is entered.

If the person cited, having entered an appearance, desires to prove, in solemn form, the will which he supports, he should issue a writ of summons propounding such will, and make the party citing defendant thereto.

Position of executor who has proved in common form.

An executor who has proved a will in common form cannot, as such executor, question the validity of that will. He has no right, therefore, merely in his capacity as executor, to cite the persons interested under it to propound it in solemn form (*t*).

Whether executors of a will can cite beneficiaries under a codicil to propound the codicil.

Where the executors of a will desired to cite the beneficiaries under a codicil, which they believed to be invalid, to propound the codicil, it was said that there was no precedent for such a citation, but that the executors might proceed to prove the will in solemn form, and to cite the beneficiaries under the codicil to see proceedings (*u*).

(*q*) The usual affidavits of search for appearance and of non-appearance must be filed (App. VII, Forms 27, 29).

(*r*) This procedure was first laid down by Sir H. J. Fust in *Palmer* v. *Dent* (1850), 2 Rob. 284; and was followed in certain unreported cases cited 3 S. & T., at p. 180. In *Morton* v. *Thorpe* (1863), 3 S. & T. 179, Sir C. Cresswell, after pointing out that Sir H. J. Fust in *Watts* (1837), 1 Curt. 594, refused to set aside a will on the consent of the parties interested, observing that no person's consent can make a will no will, said: "I think there is a substantial distinction between citing persons interested to appear and propound a will and merely bringing in their consents to the will being passed over." In *Quick* v. *Quick*, [1899] P. 187, the rule seems to have been extended to cover cases where the persons interested under a will have entered no appearance to a writ of summons claiming an intestacy, although no citation to propound the will had been issued, but the headnote to that case makes this conclusion doubtful. In *Dennis*, [1899] P. 191, the rule in the text was followed, apparently on the authority of *Crosby* v. *Noton* (1867), 36 L. J. P. 55; but *Crosby* v. *Noton* was a case of a citation to bring in a grant: *vide post*, p. 513; and in *Bootle* (1901), 84 L. T. 570, the case of *Morton* v. *Thorpe* (*ubi supra*) was expressly followed.

(*s*) *Vide post*, p. 548.

(*t*) *Chamberlain* (1867), 1 P. & D. 316; *vide post*, p. 551. The executor of an executor is in the same position in this respect as the original executor: *Chamberlain* (1867), 1 P. & D. 316.

(*u*) *Benbow* (1862), 2 S. & T. 488. *Sed quære;* see Wms. on Exors. (11th ed.), p. 237, note (*g*), and the cases there cited. There seems to be no reason why such a citation should be refused.

Section 3.

CITATIONS TO BRING IN A GRANT (*x*).

Object and nature of citations to bring in a grant.

When probate in common form has issued to an executor, and a person whose interest is adversely affected thereby desires to compel proof of the will in solemn form, or on any ground to have such probate called in and revoked, the executor is cited to bring the probate into the principal registry in order that the citor may proceed in due course of law for the revocation of the same (*y*).

At whose instance they may issue.

Such a citation will issue at the instance of any person interested in an intestacy, or under an earlier will, who claims that the proved will is invalid, or at the instance of a person alleging an interest under a later will (*z*).

There must be an adverse interest.

But no person is entitled to claim revocation of the probate unless he has an interest adversely affected thereby (*a*).

Where a grant of administration on intestacy has issued, a citation to bring in the grant, with a view to revocation, will issue at the instance of any person who claims to be an executor of, or a beneficiary under, an alleged will of the deceased, or at the instance of an interested person who alleges that the grant was made to a person not entitled thereto or was irregularly or unlawfully made (*b*).

Citation to bring in grant must precede every action for revocation.

A citation to bring in the grant must precede every action for the revocation of the grant. The person so cited must bring in the grant and lodge it at the Contentious Department within the time limited in the citation, under pain of proceedings for contempt of Court (*c*).

Procedure where party cited resists revocation.

The party cited, if an executor or administrator with the will, must, if he wishes to resist revocation (*d*), either issue

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(*x*) For forms of citations to bring in grants, *vide* App. VII, Forms 83—86.

(*y*) If administration with the will annexed has been granted, the administrator (with will) may be similarly cited. (*z*) *Vide post*, pp. 550—552.

(*a*) *Vide post*, pp. 550—552. An executor, who has proved the will, cannot as such executor call on the persons interested under the will to propound it in solemn form : *vide ante*, p. 551. He has no interest, merely as executor, in showing that the will is invalid, and therefore cannot call for the grant to be brought in with a view to revocation. And an executor of an executor is in the same position in this respect as the original executor : *Chamberlain* (1867), 1 P. & D. 316. (*b*) *Vide post*, pp. 550—552.

(*c*) The citation should be endorsed with a notice under R. S. C., Order XLI, r. 5 : *vide post*, p. 527.

(*d*) If the party cited is willing to consent to the revocation of the grant, application, supported by affidavit, is made for a registrar's order at the Notation Department, or at the district registry where the grant issued : *vide ante*, pp. 488, 489. Where a citation had been personally served on the executor and universal legatee named in a will, to bring in the probate and to show cause why it should not be revoked and the will declared null and void, on the probate being brought into the registry, but no appearance entered to the citation, the Court, on motion, without requiring evidence as to the

a writ against the citor propounding the will, or enter an appearance to the writ which is usually issued by the party citing concurrently with the citation. An administrator on intestacy must similarly enter an appearance to the writ, issued with the citation, if he wishes to resist revocation (*e*).

Where citor takes no step to revoke grant.

If, after the grant has been brought in, the citor takes no step to have it set aside, the person cited may issue a summons for the discontinuance of proceedings and for the re-delivery out to him of the grant.

Section 4.

CITATIONS TO SEE PROCEEDINGS (*f*).

Object of citations to see proceedings.

When an action is instituted in the Probate Division, only the parties to the action, or those persons who have an opportunity of taking part in the contest, are bound by the decree therein (*g*). Both parties should, therefore, see to it that all persons whose interests are or may be adversely affected by the decree should have notice of the proceedings. This is effected by the issue of a citation (*h*) against such persons to appear in the action, should they think it for their interest so to do, at any time during the dependence of the action.

Effect of citation to see proceedings

The citation, which is known as a citation to see proceedings, does not make the persons cited parties to the action. But whether they appear and take part in the proceedings, or whether they allow the action to be determined in their absence (*i*), they are bound by the decree, unless the action terminates in a compromise to which they are not made parties (*j*).

Procedure where party cited wishes to take part in the action.

A party cited, who desires to take part in the action, enters an appearance (*k*), and if he wishes to adopt the pleadings already delivered by one of the parties, he gives notice to this effect to the opposing party. An order of the registrar, obtained upon summons, is necessary if it is desired to deliver separate pleadings.

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invalidity of the will, revoked the probate, and ordered probate in common form of an earlier will to issue to the executor therein named: *Crosby* v. *Noton* (1867), 36 L. J. P. 55, on the authority of *Edwards* v. *Martyn* (1850), 2 Rob. 285; see also *Palmer* v. *Dent* (1850), 2 Rob. 284; *Dennis*, [1899] P. 191; and the cases cited *ante*, p. 512, note (r).

(*e*) *Vide post*, pp. 550—552.

(*f*) For form of citation to see proceedings, *vide* App. VII, Form 87.

(*g*) *Ratcliffe* v. *Barnes* (1862), 2 S. & T., at p. 487. See *Newell* v. *Weeks* (1814), 2 Phill. 224; *Bell* v. *Armstrong* (1822), 1 Add., at p. 372; *Wytcherley* v. *Andrews* (1871), 2 P. & D. 327; and *vide ante*, pp. 240, 241; *post*, pp. 554, 556.

(*h*) Citations to see proceedings may be extracted on the application of any party to the cause: Rule 16, C. B.

(*i*) *Kennaway* v. *Kennaway* (1876), 1 P. D. 148.

(*j*) *Vide ante*, p. 241; *post*, p. 611.

(*k*) The appearance is entered at the Central Office, Royal Courts of Justice.

If no appearance is entered by the party cited, the citor files an affidavit of service of the citation and a certificate of no appearance. If no appearance entered.

Notwithstanding the provisions of Rule 78, C. B., it is since the Land Transfer Act, 1897, no longer necessary to obtain an order before issuing a citation to see proceedings against persons having or claiming interest in the real estate affected by a will when proceedings are taken in which the validity of that will is disputed (*l*). Position of persons interested in real estate.

Section 5.

PRACTICE AS TO CITATIONS.

Sub-section 1.—*Practice in extracting Citations.*

Citations can only be extracted from the principal registry (Rule 13, C. B.). Where extracted.

Before any citation can issue in respect of a will, that will must have been lodged at the registry. The party extracting the citation, therefore, if the will in question is in his possession, must lodge it at the Contentious Department. Before a citation can issue in respect of a will the will must have been filed,

If the will is at a district registry, application should be made to the district registrar for its transmission to the principal registry.

If it is in the possession of a person who refuses to part with it, the citor must issue a subpœna to bring in script (*m*).

A caveat must be entered before a citation may issue (*n*). and a caveat must be entered.

A draft citation is prepared and left at the Contentious Department. Typical forms will be found in the Appendix (*o*), and must be varied to suit the particular circumstances of the case, the respective interests of citor and party cited being clearly indicated. This draft is to be accompanied by the will, if any, and any other necessary papers—*e.g.*, in the case of a citation to accept or refuse a grant, the renunciations or consents of persons interested, and the nomination (*p*), if the grant is to be made to a nominee. The draft citation, having been settled, is given out to the practitioner, on his application, to be engrossed. Draft citation to be settled at the registry.

(*l*) See Court of Probate Act, 1857, s. 61, repealed by the Judicature (Consolidation) Act, 1925, but re-enacted by Sched. 5, Part 2 of that Act in the case of persons dying before the commencement of the Act.

(*m*) *Vide ante*, p. 502.

(*n*) Rule 66, N. C. B. In the case, however, of a citation to see proceedings a caveat has already been entered in the action, and therefore the entry need not be repeated.

(*o*) *Vide* App. VII, Forms 72—88. (*p*) App. VII, Form 56.

Affidavit verifying citation must be sworn by citor.

Citations are not, like the writs issued at common law, at the service of any one who cares to ask for them (*q*). Rule 13, C. B., provides that no citation is to issue until an affidavit in verification of the averments which it contains has been filed. Therefore, *after the citation has been settled, but not before* (*r*), an affidavit (*s*) verifying the averments in the citation clause by clause must be sworn by the party, or one of the parties, extracting the citation (*t*).

Necessary averments.

If the party extracting a citation to accept or refuse a grant is a creditor, the affidavit should state the value of the estate (*u*) and the amount and character of the debt, and should contain an averment, if such be the case, that the applicant holds no security for the debt (*x*).

The affidavit verifying a citation to see proceedings must show how the interest of the persons cited is adversely affected by the claim of the citor.

It is convenient so to frame the affidavit verifying a citation to bring in a grant that, if a writ is subsequently issued, the same affidavit may serve as the affidavit to lead the writ. The affidavit should set out the interests of the respective parties and those of any other persons whom it is proposed subsequently to make defendants (*y*).

If the party cited be abroad, his address should be stated, if known, or a statement made that his address is unknown. The affidavit should also state whether he has any agent in England (*z*).

If it is alleged that there are no known kin the affidavit should state in detail what efforts have been made to trace them.

Procedure on extracting citations.

The citation, draft citation, and affidavit, together with a *præcipe* (*a*), are taken to the Contentious Department in order

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(*q*) *Chamberlain* (1867), 1 P. & D., at p. 318.

(*r*) Because an alteration in the draft citation may entail an alteration in the affidavit.

(*s*) For forms, *vide* App. VII, Forms 36, 37. Other affidavits follow the averments in the citation.

(*t*) Where the party extracting the citation was abroad, the Court allowed a citation to issue on an affidavit sworn by a person authorised by power of attorney to institute the suit on his behalf : *Hutley* (1869), 1 P. & D. 596. But in *Luke* (1909), 25 T. L. R. 825, an application for leave for the plaintiff's *solicitor* to swear the affidavits to lead the citation and writ in an action for revocation of probate, the plaintiff being temporarily out of the jurisdiction, was refused; *vide post*, p. 561.

(*u*) This is not absolutely necessary where there has been personal service of the citation on the parties entitled to the administration in the first instance, but otherwise the Court always requires it : *Martineau* v. *Rede* (1825), 2 Add. 455. (*x*) For form of affidavit, *vide* App. VII, Form 37.

(*y*) *Vide post*, p. 561.

(*z*) See Rule 19, C. B.; and see *Kenworthy* v. *Kenworthy* (1863), 3 S. & T. 64; *Evans* v. *Burrell* (1859), 4 S. & T. 185.

(*a*) The address for service given in the *præcipe*, a form of which is obtainable in the Contentious Department, must be within three miles of the General Post Office : Rule 17, C. B.

that the citation may be signed and sealed (*b*). It will be handed out at the Sealer's Department on application.

Citations on behalf of minors or infants.

If the party *citing* is a minor or infant, the citation must be extracted on his behalf by his guardian. The same rules as to election or assignment, and as to the persons entitled to be elected or assigned, apply as in the case of guardians for the purpose of taking administration *durante minoritate* (*c*). If, however, the interests of the person ordinarily entitled to be elected or assigned conflict with those of the minor or infant, the former cannot act as guardian. In such a case, and in cases where the nearest of kin renounces, or is not a fit or proper person, some other person may be elected or assigned on an affidavit of the facts and of the fitness of the proposed guardian being filed.

Form of citation and affidavit.

The citation should contain an averment of the minority of the citor (his age need not be shown in the citation), and should state the name of the guardian (*d*). In the affidavit verifying the citation the age of the minor or infant should be given.

Citations against minors or infants.

If the party *cited* is a minor or an infant, the fact should be stated in the citation, which should also state the name of the person who, in accordance with the appropriate rules (*e*) is entitled to represent the minor or infant (*f*). The affidavit should state the age of the minor or infant. If the minor or infant is a bastard, or without known relations, notice must be given to His Majesty's Procurator-General (*g*).

Citations on behalf of lunatics.

If the party *citing* is a lunatic or person of unsound mind, the citation must be extracted on his behalf by the committee of his estate, or the person in the position of a committee (*h*), failing whom the citation is extracted by the nearest of kin of the lunatic. If the interests of the nearest of kin conflict with those of the lunatic, the citation may be extracted by a more distant relative or stranger on filing an affidavit of facts and of fitness (*i*).

Citations against lunatics.

If the party *cited* is a lunatic or person of unsound mind, the fact should be stated in the citation, which should show whether there is a committee or person appointed under the Lunacy Act, 1890, or, in default of these, should show who are the nearest of kin. If the lunatic has no known relations, the

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(*b*) Rule 17, C. B.
(*c*) *Vide ante*, pp. 363—369, 469—471.
(*d*) App. VII, Form 82.
(*e*) *Ante*, pp. 363—369, 469—471.
(*f*) App. VII, Form 78.
(*g*) Or the Solicitors of the Duchies of Lancaster or Cornwall. *Vide ante*, p. 471. The notice to the officials in question in the case of a minor or infant who has a mother, is subject to the provisions of section 9, sub-section 2 of the Legitimacy Act, 1926: *vide ante*, p. 367.
(*h*) *Vide ante*, p. 371.
(*i*) *Vide ante*, p. 373.

citation should be directed to the lunatic and his "nearest of kin, if any" (*k*). In such a case, and in cases where the lunatic is a bastard, it is advisable to serve His Majesty's Procurator-General (*l*).

Sub-section 2.—*Service of Citations.*

Personal service, how effected.

Citations are to be served personally, when that can be done, by leaving a true copy with the party cited, and showing him the original, if required so to do (*m*). A certificate of service should be endorsed on the citation after service (*n*).

Service on parties resident abroad.

No special leave is necessary to serve a citation on a person resident abroad, but if the person cited has an agent within the jurisdiction, such agent must be served with a copy of the citation. Where there is no such agent, the affidavit of service must state the fact (*o*). In the case of countries in which service of a writ of summons is not allowed, it is advisable to apply to the Judge for leave to serve notice of the citation instead of attempting to serve the original citation (*p*).

Service by advertisement.

If personal service cannot be effected, the registrar may, if satisfied by affidavit that personal service is not possible, direct service by advertisement in newspapers, or in such manner as he thinks fit (see Rules 18 and 19, C. B.). The affidavit (*q*) should state in detail what efforts, if any, have been made to effect personal service.

Procedure where service by advertisement is permitted.

Where service is to be effected by advertisement, a draft abstract (*r*), a form of which may be obtained at the Contentious Department, is left with the original citation at the registry for settlement by the registrar, who decides in what papers and at what intervals it shall appear, and the time to be allowed for appearance to the citation.

Citations to see proceedings must be personally served.

It should be observed that a citation to see proceedings, owing to its nature, does not bind the party cited unless personally served upon him.

Service on minors or infants.

Citations are to be served upon a minor or infant in the presence of his natural or legal guardian, or the person or persons upon whom the actual care and custody of the minor

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(*k*) *Vide ante*, p. 373.
(*l*) Tristram & Coote (16th ed.), p. 305.
(*m*) Rule 18, C. B. The penal notice (Order XLI, r. 5) should be endorsed on a citation to bring in a grant.
(*n*) *Goodburn* v. *Bainbridge* (1860), 2 S. & T. 4. For form of certificate, see App. VII, Form 71.
(*o*) *Kenworthy* v. *Kenworthy* (1863), 3 S. & T. 64.
(*p*) Tristram & Coote (16th ed.), p. 356, note.
(*q*) App. VII, Form 33.
(*r*) For form of abstract, *vide* App. VII, Form 89.

or infant for the time being properly devolves (*s*), and must also be served upon his nearest of kin.

Where a citation was served upon two minors in the house where they resided, but their custodian declined to be present at the service, and the process server was not allowed to see their nearest of kin, the Court held the service to be sufficient (*t*).

Service on lunatic.

If a committee of a lunatic's estate has been appointed, the citation should be served upon him as well as upon the lunatic (*u*). If there is no committee, the lunatic is, in accordance with the practice of the Court, to be served in the presence of some medical man (*x*). The nearest of kin of the lunatic must also be served (*y*).

Order IX, r. 5, of the Rules of the Supreme Court, provides that service of a writ of summons on the committee of a lunatic, or on the person with whom a person of unsound mind resides or under whose care he is, shall, unless the Court or a Judge otherwise orders, be deemed to be good service, and it has been held (*z*) that service of a probate citation in accordance with the provisions of this rule was a sufficient service, although not strictly the correct practice.

Endorsement of service.

The endorsement of service of the citation on a minor, infant or lunatic, should show that special service has been effected in accordance with the foregoing rules, and, in the case of a minor or infant, the affidavit of service should also show how the guardian, in whose presence the minor or infant was served, became such guardian (*a*).

Sub-section 3.—*Entry of Appearance.*

Appearance to citations, where entered.

Appearances (*b*) to citations, other than those to see proceedings, are entered at the Contentious Department of the principal registry. Appearances to citations to see proceedings are entered at the Royal Courts of Justice (*c*).

(*s*) *Cooper* v. *Green* (1825), 2 Add. 454; *Brown* v. *Wildman* (1859), 28 L. J. P. 54. But where a minor was living in service at a distance from her mother, her natural guardian, and a copy of the citation had been sent to the minor by post, and she had acknowledged receipt of it, the Court held the service on her to be sufficient : *Lainson* v. *Naylor* (1860), 2 S. & T. 7.

(*t*) *Lean* v. *Viner* (1864), 3 S. & T. 469.

(*u*) *Surtees* (1859), 28 L. J. P. 89. In *McCormick* v. *Heyden* (1886), 17 L. R. Ir. Ch. D. 338, the Court directed that the citation on the lunatic should be served in the presence of the proprietress of the asylum where he was confined.

(*x*) The practice in this respect was, however, referred to by Sir C. Cresswell as a mere unmeaning formality : *Surtees* (1859), 28 L. J. P. 89.

(*y*) *Windeatt* v. *Sharland* (1871), 2 P. & D. 217; *vide ante*, p. 373.

(*z*) *In the Goods of Price* (1904), 20 T. L. R. 540.

(*a*) *Johnson* v. *Weldy* (1861), 2 S. & T. 313.

(*b*) App. VII, Form 54.

(*c*) *Vide post*, p. 566.

Time for entry of appearance.

The usual time limited for appearance is eight days, exclusive of Sundays, Christmas Day, and Good Friday (*d*). If the party cited is abroad, or the citation is advertised, the time is fixed by the registrar.

The party cited may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the Judge or one of the registrars (*e*).

Interest of party cited to be set forth.

Appearances must set forth the interest in the estate of the deceased of the party cited, and must be accompanied by an address within three miles of the General Post Office (*f*).

Appearance by minors and lunatics.

Minors and lunatics appear to a citation by the person named in the citation as their guardian, or by any other person entitled by the practice of the Court to represent them (*g*).

Sub-section 4.—*Procedure in Default of Appearance.*

Procedure in default of appearance.

Before a party citing can proceed in default of appearance, there must be filed an affidavit of service and of non-appearance (*h*), together with the citation, duly endorsed with a certificate of service, and exhibited to the affidavit of service.

When the citation has been advertised, the newspapers containing the advertisement, together with the original citation, the settled abstract, and an affidavit of non-appearance, must be filed (*i*). The citation, newspapers, etc., should be annexed as exhibits to the affidavit of service (*k*).

Where party cited is abroad.

If the person cited is abroad, the affidavit should state that he has no agent resident in England (*l*).

In cases of citations to accept or refuse a grant, after these requirements have been complied with, the person citing will proceed to move the Court for the grant (*m*).

Renunciation after service.

If the person cited renounces after service of the citation, the party citing should apply on summons for an order for the grant, notwithstanding the caveat and citation.

(*d*) Rule 87, N. C. B.

(*e*) Rule 29, C. B. But a party cited to see proceedings may, as stated in the citation, enter an appearance at any time during the dependence of the action before final judgment has been given therein.

(*f*) Rules 26, 27, C. B. In the case of citations to see proceedings, within three miles of the Royal Courts of Justice.

(*g*) *Vide ante*, p. 517.

(*h*) App. VII, Forms 27, 29.

(*i*) Rule 20, C. B.

(*k*) *Harenc* v. *Dawson* (1863), 3 S. & T. 50.

(*l*) *Evans* v. *Burrell* (1859), 4 S. & T. 185; *Kenworthy* v. *Kenworthy* (1863), 3 S. & T. 64.

(*m*) Where, however, the citation, issued by the proving executors against those to whom power has been reserved, has been *personally* served, the registrar will make the order on affidavits of service and non-appearance. But if the citation has been served by advertisement, a motion is necessary: Tristram & Coote (16th ed.), p. 358, note; and *vide ante*, pp. 495, 496.

If no appearance is entered to a citation to propound a testamentary instrument, the party citing may apply on motion for a grant as on intestacy or under an earlier will (*n*). Motion to the Court.

If no appearance is entered to a citation to see proceedings, the action proceeds in its ordinary course. Citations to see proceedings.

SUB-SECTION 5.—*Procedure after Appearance has been entered.*

If the party cited to accept or refuse a grant enters an appearance and is willing to accept the grant, he should apply *ex parte* to the registrar, showing by affidavit that he has been cited, has appeared, and is willing to take the grant, that due notice of appearance has been given to the party citing, and that since the receipt of such notice the citor has taken out no summons or other proceeding for the grant to go to himself (*o*). Where person cited is ready to accept a grant.

If the party cited enters an appearance, but takes no further step, the citor may apply on summons for an order directing the party cited to take the grant within a stated time. In the event of the latter neglecting to do so, the grant will be ordered to be made to the citor. Where party cited takes no step after appearance.

The procedure to be followed after appearance to citations to propound a will and to see proceedings is dealt with in the earlier part of this chapter, where these citations are discussed in detail (*p*).

If contentious proceedings arise from the service of a citation, the expenses of the citation and service thereof are, upon taxation, considered as costs in the cause (*r*). Costs of citation.

(*n*) *Vide ante*, pp. 512, 513, note (d).
(*o*) For form of order see App. VII, Form 215.
(*p*) *Vide ante*, pp. 513, 514.
(*r*) Rule 22, C. B.

CHAPTER III.

SUMMONSES, APPLICATIONS IN CHAMBERS, ORDERS, AND ENFORCEMENT OF ORDERS.

SECTION 1.

SUMMONSES.

SUB-SECTION 1.—*What Applications are made on Summons.*

In what cases a summons is the appropriate procedure.

A SUMMONS may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding (*a*).

Among the more important applications dealt with upon summons are those below enumerated (*b*), the application being made, except where otherwise indicated, in the first instance to the registrar :—

(1) To discontinue contentious proceedings.

(1) A summons to discontinue contentious proceedings (*c*). The registrar may order the proceedings to be discontinued by consent at any time before trial, and may direct that terms be filed but not that they be made a rule of Court (*d*). Apart from consent, the registrar may order contentious proceedings to be discontinued and a grant to issue to the applicant :—

(i) Where a caveat has been entered, and the caveator has entered an appearance to the warning disclosing an interest insufficient to entitle him to oppose the grant (*e*);

(ii) Where the defendant gives notice of abandoning his opposition, either before or after writ issued;

(iii) Where the party having issued the writ, to which no appearance has been entered, or to which no defence has been delivered, does not desire to prove the will in solemn form.

(2) Where persons equally entitled to administration contend *inter se*.

(2) Applications to determine which of two or more applicants, whose interests are equal, shall be allowed, on the ground of fitness, to take a grant of administration (*f*).

(*a*) Rule 98, C. B.

(*b*) Applications which may be made under the summons for directions are dealt with in Part IV, Chap. VI, pp. 569 *et seq.*

(*c*) Form of summons : App. VII, Form 264; form of order : App. VII, Form 216.

(*d*) *Vide post*, p. 611.

(*e*) *E.g.*, where an executor who has entered a caveat appears to a warning by another executor in respect of the same will : *vide ante*, p. 508.

(*f*) The respective claims are supported by affidavits to be read at the hearing of the summons.

(3) Applications for an order that the executor or administrator shall exhibit an inventory and account (*g*). (3) For an inventory and account.

(4) An application by an administrator in circumstances which do not bring the case within the conditions laid down in the President's direction of October 14, 1925 (*h*), to give sureties other than persons resident in Great Britain, Northern Ireland, the Isle of Man, or the Channel Islands, is made to the Judge on summons. (4) For leave to give bond with foreign sureties.

(5) Applications for an order to assign an administration bond (*i*). (5) For assignment of bond.

(6) Applications for an order that the sureties to the administration bond shall justify (*k*). (6) For justification of sureties.

(7) Applications to review a taxation are made to the Judge (*l*). (7) To review taxation.

(8) Applications for directions by an administrator *pendente lite* are made to the registrar or, in matters of importance, to the Judge (*m*). (8) For directions by administrator *pendente lite*.

(9) Applications to vacate the registration of a writ of sequestration or to vacate the registration of a *lis pendens*. (9) To vacate writ of sequestration or *lis pendens*.

(10) Applications to obtain a garnishee or charging order or an order appointing a receiver by way of equitable execution, are made to the registrar, but applications for a charging order under the Solicitors Act, 1860, s. 28, are made to the Judge (*n*). (10) Garnishee and charging order.

(11) Applications under section 160, sub-section 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, for the appointment of an additional personal representative during the minority of a beneficiary or the subsistence of a life interest (*o*). (11) Additional personal representative.

(12) Applications under Rule 122, N. C. B., where it is sought to join, with a person entitled to a grant, a person not equally or next entitled, in the absence of renunciation (*p*). (12) Joint grant where person to be joined is not equally or next entitled.

Sub-section 2.—*Jurisdiction of the Registrar.*

R. S. C., Order LIV, r. 12, provides that a registrar may transact all such business and exercise all such authority and jurisdiction as may be transacted or exercised by a Judge at chambers, except in respect of the following proceedings and matters :— Registrar to have the same powers as a Judge at chambers, except in certain matters.

(*g*) *Vide ante*, p. 501.
(*h*) The direction provides that it shall be sworn that the deceased was resident abroad, and left no debts in this country. *Vide ante*, p. 457.
(*i*) *Vide ante*, p. 461; and see *Cope* v. *Bennett*, [1911] 2 Ch. 488.
(*k*) *Vide ante*, p. 459.
(*l*) *Vide post*, p. 635.
(*m*) *Vide ante*, p. 381.
(*n*) *Vide post*, p. 529.
(*o*) See Rule 115, N. C. B.
(*p*) Rule 122, N. C. B.

(1) All matters relating to criminal proceedings or to the liberty of the subject;
(2) Granting leave for service out of the jurisdiction of a writ or notice of a writ of summons (*r*);
(3) Appeals from district registrars;
(4) Prohibitions;
(5) Injunctions and other matters under section 45 of the Act (*s*), other than orders for the appointment of receivers by way of equitable execution and injunctions so far, and so far only, as the same are ancillary or incidental to equitable execution and charging orders (*t*);
(6) Reviewing taxation of costs (*u*);
(7) Acknowledgments of married women or applications to dispense with the concurrence of a husband in a disposition by a married woman.

Sub-section 3.—*Practice as to Summonses.*

By what rules the practice is regulated.

The practice as to summonses in the Court of Probate was originally regulated both in contentious and non-contentious business by the Probate Contentious Rules, 1862, and it has been held (*x*) that the Judicature Acts (*y*) have no effect upon the *non-contentious* branch of the jurisdiction of the Probate Division. The Rules referred to, therefore, still apparently govern the practice as to summonses in non-contentious business, and still apply to summonses in contentious business unless altered and annulled by the Rules of the Supreme Court. It has been expressly held that Rule 100, C. B., has not been altered or annulled by R. S. C., Order LIV, r. 4E (*z*).

Originating summonses.

Provision is made by R. S. C., Order LIV (*a*) for the adoption in the Probate Division of "originating summonses," *i.e.*, every summons other than a summons in a pending cause or matter. But, in practice, it will generally be found that summonses of this character, in issue, form and hearing, are not distinguished from other summonses.

Issue of summons.

The party issuing a summons (*b*) takes two copies to the Contentious Department, in order that the date and hour of

(*r*) *Vide post*, p. 565. A registrar has power to add parties out of the jurisdiction, though he cannot give the necessary leave to issue a concurrent writ and serve it, or notice of it, on the added parties: *Burt* v. *Bowen* (1891), 8 T. L. R. 28.
(*s*) *I.e.*, the Supreme Court of Judicature (Consolidation) Act, 1925.
(*t*) *Vide post*, pp. 529, 607. (*u*) *Vide post*, p. 635.
(*x*) *In the goods of Tomlinson* (1881), 6 P. D. 209.
(*y*) These acts have been for the most part repealed by, and their provisions re-enacted in, the Supreme Court of Judicature (Consolidation) Act, 1925.
(*z*) *Hopkinson* v. *Carter*, [1909] P. 118.
(*a*) Order LIV, rr. 4B, 4C, 4D and 4F.
(*b*) For form of summons, see App. VII, Form 262.

return and the number may be inserted. One copy is retained by the registry, with the fee stamps duly affixed thereto; the other is stamped with the signature of the President and returned to the applicant.

Service. A copy must be served on the party summoned one clear day at least before the summons is returnable (*c*). If counsel are to appear, the summons should be marked "Counsel."

Hearing. Summonses are heard during the sittings by the registrars every day, except on Mondays and Saturdays.

Summonses to the Judge are heard by the Judge in chambers once a week during the sittings, usually on Mondays (*d*).

Certificate for counsel. Summonses attended by counsel are heard before those attended by solicitors. Counsel should not omit to ask the registrar to certify for counsel, otherwise his fees may not be allowed on taxation. On summonses before the Judge, the attendance of counsel is usually allowed as of course, but if only one side is represented by counsel, application for a certificate should be made.

Default in attendance. If the party summoned does not attend, the order may be made subject to an affidavit of service and non-attendance (*e*).

Consent. If the party summoned consents to the order, the summons, with the consent endorsed upon it, is taken to the Clerk of the Rules, if the summons is a Judge's summons, or to the registrar's clerk, if a registrar's summons, for the purpose of the order being drawn up.

Hearing of summonses in vacation. Summonses are heard by the registrars daily in the vacation, except on Saturdays. Summonses before the vacation Judge are issued at the Contentious Department by leave of a registrar, and must then be entered in the list kept at the Royal Courts of Justice.

Appeal. The mode of appeal from an order made on summons, whether by the registrar or the Judge, is dealt with in a later chapter (*f*).

Section 2.

EX PARTE APPLICATIONS.

To Judge in chambers. *Ex parte* applications to a Judge in chambers for leave to issue a writ for service out of the jurisdiction are made, upon affidavit, in the first instance to the Judge's clerk (*g*). Other

(*c*) Rule 100, C. B., which is in force notwithstanding the provision of Order LIV, r. 4E, R. S. C.: *Hopkinson* v. *Carter*, [1909] P. 118. The time of day within which the summons must be served is now probably fixed by R. S. C., Order LXIV, r. 11, and not by Rule 100, C. B.

(*d*) The summons must be issued not later than the previous Thursday.

(*e*) See Rules 101—104, C. B. For form of affidavit, see App. VII, Form 30.

(*f*) *Vide post*, pp. 613, 614.

(*g*) *Vide post*, pp. 563, 565.

ex parte applications to the Judge in chambers may be made either by *ex parte* summons returnable on the next summons day, or upon affidavit simply, in which case notice is given to the Contentious Department to enter the application in the Judge's *ex parte* list.

To a registrar.

Ex parte applications may be made to a registrar at any convenient time.

Section 3.

ORDERS.

How obtained.

The original order made on motion and decrees of the Court are not given out, but copies may be obtained on application at the Copy Department. Original orders made on summons or on *ex parte* applications can be obtained on application at the Contentious Department two days after they are made (*h*).

Sub-section 1.—*Service of Orders.*

How regulated.

Service of orders is regulated by Order LXVII, rule 1 of which provides : " Except in the case of an order for attachment [*i.e.*, an order non-compliance with which may involve an application for an attachment], it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited."

Mode and time of service when not personal.

All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite (*i*) shall be sufficiently served if left within the prescribed hours (*k*) at the address for service of the person to be served as defined by Orders IV and XII, with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at such address for service as aforesaid; provided that where service under this rule is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof (Order LXVII, r. 2).

Service where no appearance or no address for service.

As to service where no appearance has been entered or where no address for service is given, see Order LXVII, r. 4.

(*h*) Where an order is made simply enlarging the time for taking any proceeding or doing any act, no order is drawn without special direction, but a memorandum, signed by the registrar or Judge, is, in accordance with Order LII, r. 14, endorsed upon the summons.

(*i*) For cases in which personal service is required, see note to Order LXVII, r. 2, in the Annual Practice. In addition, personal service of citations is obligatory, unless a direction for service by publication is obtained.

(*k*) For the prescribed hours, see Order LXIV, r. 11.

Where personal service is required, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons (*l*) (Order LXVII, r. 5). Personal service.

For substituted service of orders, etc., required to be served personally, see Order LXVII, r. 6. Substituted service.

Affidavits of service shall state when, where, and how and by whom such service was effected (Order LXVII, r. 9). Affidavits of service.

Order XLI, r. 5, provides: Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz.:— Time to be stated for doing any act ordered to be done and memorandum to be endorsed.

"If you, the within-named A B, neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]" (*m*).

Sub-section 2.—*Enforcement of Orders.*

Applications for attachment are made to the Court on motion (Rule 107, C. B.). For the practice as to writs of attachment, the notes to Order XLIV in the Annual Practice should be consulted. Writ of attachment.

In the Probate Division the Court may direct an attachment to issue against an executor who has intermeddled with the estate, and has failed to comply with a peremptory order to take probate (*n*); against an executor or administrator who has not complied with an order to file an inventory (*o*); against a person who has disobeyed a subpœna to bring in a will or a citation to bring in a grant (*p*); and generally for non-compliance What orders may be enforced by attachment.

(*l*) *Vide post*, pp. 564, 565.

(*m*) See *Evans* v. *Evans* (1893), 67 L. T. 719, where it was held that a citation to bring in a grant could not be enforced by attachment unless so endorsed, and *Bristowe* (1892), 66 L. T. 60, where an attachment was refused on the ground that this rule had not been complied with.

(*n*) See *Mordaunt* v. *Clarke* (1868), 1 P. & D. 592; *Bristowe* (1892), 66 L. T. 60; *Lister* (1894), 70 L. T. 812; *Coates* (1898), 78 L. T. 820.

(*o*) *Baker* v. *Baker* (1860), 2 S. & T. 380; *Marshman* v. *Brookes* (1863), 32 L. J. P. 95.

(*p*) *Simmons* v. *Deane* (1858), 27 L. J. P. 103; *Parkinson* v. *Thornton* (1867), 37 L. J. P. 3. As to citations to bring in a grant, in *Evans* v. *Evans* (1893), 67 L. T. 719, Barnes, J., said that he doubted whether a citation could be said to be a "judgment or order." But in *Sage* (December 12, 1910) an attachment was ordered for default in complying with a citation to bring in a grant, the writ to lie in the registry for seven days. No question was raised as to whether a citation is a "judgment or order."

with any order of the Court, except an order to pay money only (*q*).

Practice.

Writs of attachment (*r*), when ordered to issue, are prepared by the party at whose instance the order has been obtained and taken to the registry with an office copy of the order and a *præcipe*, and when approved and signed by one of the registrars shall be sealed with the seal of the Court (*s*).

Application for discharge.

Any person in custody under a writ of attachment may apply for his or her discharge to the Judge if the Court be then sitting, or in the vacation to the vacation Judge (*t*).

The application should be supported by an affidavit setting forth the facts and a certificate by the proper officer of the Court as to the performance of the act, the non-performance of which was the ground of attachment. Notice must be given to the party at whose instance the writ of attachment issued. Since the Debtors Act, 1869, the Court cannot make the payment of the costs occasioned by his contempt a condition precedent to his discharge (*u*).

Writs of sequestration, *fi. fa.*, or *elegit*.

Writs of sequestration, *fi. fa.*, or *elegit*, issue from the Contentious Department on production of the order, affidavits of service, and of non-compliance with the order, and of the draft writ and *præcipe* (*x*).

Garnishee orders.

Application for a garnishee order *nisi* is made *ex parte* to a registrar, upon production of an affidavit of service of the order for payment and an affidavit that such order is still unsatisfied and that some person within the jurisdiction is indebted to the party against whom the order was made. The order *nisi*, which should be drawn up in triplicate by the solicitor, and taken to the registrar's clerk, attaches the debt and fixes a date for the attendance of the garnishee. The order is served on the judgment debtor and the garnishee.

Order *nisi*.

Order absolute.

On the day appointed, the parties and the garnishee attend at the registry, when the registrar, unless cause is shown to the contrary, will make the order absolute. The costs of obtaining the order may be inserted in the order absolute (*y*).

(*q*) An attachment issued to enforce payment into Court by an administratrix of money received by her in that capacity : *Tinnuchi* v. *Smart* (1885), 10 P. D. 184.

(*r*) For form, see App. VII, Form 269.

(*s*) Rule 108, C. B.

(*t*) For form of order of discharge, see App. VII, Form 204.

(*u*) *Ayres* v. *Ayres* (1901), 85 L. T. 648.

(*x*) For the practice, see Orders XLII and XLIII, and the notes thereto in the Annual Practice.

(*y*) For further information as to garnishee orders reference should be made to Order XLV, and, as to the costs allowed, to the note "Garnishee Order" in the Annual Practice under Order LXV, costs section. It may

Charging orders.

Applications for a charging order *nisi* are made in the same manner as those for garnishee orders *nisi*. The order absolute can now be made by a registrar.

The practice is dealt with in Order XLVI and notes thereto in the Annual Practice. The application should be supported by evidence of the title of the applicant to the debt and of the debtor's title to the property sought to be charged.

An application for a charging order under the Solicitors Act, 1860, s. 28, is made by summons before the Judge (*z*).

Appointment of receiver by way of equitable execution.

To obtain an order for a receiver by way of equitable execution application is made *ex parte* to a registrar, supported by affidavit of service of the order, of the amount by which the debt is unsatisfied, and of the nature of the property in respect of which the receiver is to be appointed. The affidavit should also state that the debtor has not any property which can be recovered by *fi. fa.*, *elegit*, or other ordinary process of execution. The practice of the King's Bench Division has been adopted by the Probate Division in regard to these orders (*a*).

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be noted that where under Order XLV, r. 4, an issue has been referred to a registrar, an appeal from the decision of the registrar is taken to the Divisional Court, not to a Judge in chambers: *Blair* v. *Clark*, [1908] K. B. 548.

(*z*) By a direction of the President, the practice of the King's Bench Division is to be followed. And see *The Birnam Wood*, [1907] P. 1.

(*a*) See section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, and Order L, rr. 15A—22.

CHAPTER IV.

MOTIONS.

SECTION 1.

WHAT APPLICATIONS ARE MADE ON MOTION.

What applications are made on motion.

APPLICATIONS in certain matters should or may be made to the Court on motion both in non-contentious and contentious business. The chief of these are the following :—

(1) Motions on behalf of the Crown for administration to an intestate leaving no known person entitled to a share of the estate.

(1) Application on behalf of the Crown for administration of the estate of a person dying intestate leaving no known person entitled to share in his estate (*a*).

In such cases the Court will, after citation (*b*), grant administration of the estate to the solicitor to His Majesty's Treasury, or to the Solicitors to the Duchies of Lancaster or Cornwall, according as the intestate had his fixed place of abode without or within the two respective duchies (*c*). Strictly, such an application falls under the next heading.

(2) For a grant to persons having inferior title after citation.

(2) Applications for a grant to persons possessing an inferior title, those with a prior right having been cited (*d*), and having failed to appear and accept or refuse the grant (*e*). Affidavits of service of the citations and of search for an appearance thereto must be filed.

(*a*) It is not necessary to apply on motion in respect of the estate of a bastard dying without spouse or issue and, in the case of death after 1925, without mother. Grants in such cases now issue without order : Direction of the President, November 22, 1917.

(*b*) In cases of death after 1925 the citation issues against " the kin (if any) entitled to share and all persons having or claiming an interest in the estate." Where death occurred before 1926 " the next-of-kin (if any) and heir-at-law," etc., are cited. In the latter case the grant is limited to the *personal* estate, for the Land Transfer Act, 1897, does not bind the Crown, and accordingly the grant, when made to its representative, does not extend to the real estate, which vests in the Crown without a grant : *Hartley*, [1899] P. 40; *Best*, [1901] P. 333. In Duchy of Lancaster cases, also, the grant was as to the personal estate only : Direction of the President, 1900. But by section 45 of the Administration of Estates Act, 1925, there is abolished, in respect of the estates of all persons dying after 1925, escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall, and consequently a grant of the whole estate is made.

(*c*) *Vide ante*, p. 314. For revocation of a grant to the Treasury Solicitor, or for the recision of an order for such grant, upon discovery of kin, application is made to the registrar on summons : President's direction, October 17, 1923.

(*d*) *Vide ante*, p. 520. Form of order : App. VII, Form 201.

(*e*) No motion is necessary if they have formally renounced : *vide ante*, p. 542.

(3) Where persons interested in an alleged will have been cited to propound it, and have not appeared and propounded it (*f*), the Court on motion may grant administration to a person entitled upon an intestacy, or probate in common form of an earlier will, as the case may be (*f*).

(3) For a grant where persons interested in an alleged will have been cited to propound the same.

(4) Where the applicant for a grant is unable to swear to the precise day on which the deceased died, and the fact of the death is merely presumptive, application must be made for leave to depose that the presumed deceased died on or since the last date on which he is known to have been alive (*g*). Such applications are made to the Court on motion, except in the two following cases, where the order may be made by a registrar of the principal registry :—

(4) For a grant where proof of death is presumptive.

(i) Where the gross value of the estate does not exceed £250 (*h*).

When application may be made to registrar.

(ii) Where the testator or intestate is presumed to have perished in a shipwreck, and a similar motion has already been granted by the Court in the estate of some other person who has died in the same wreck (*i*). In such cases, an office copy of the order already made must be lodged with the affidavits in support.

Where the disappearance or departure from home of the presumed deceased, coupled with the fact that he has not since been heard of, is the basis of the application, the affidavit of the applicant should state (*k*)—

Facts to be shown in affidavit of applicant.

(i) The description, circumstances and age of the presumed deceased, the details of his disappearance or departure, and the date on which he was last heard of.

(ii) The belief of the applicant in his death (*l*).

(iii) What advertisements have been inserted, and with what result. The newspapers should be annexed to the affidavit.

(iv) Whether any letters have been received from the deceased. If so, they must be annexed to the affidavit, or their absence explained (*m*).

(*f*) *Vide ante*, p. 512.

(*g*) But where the fact of death is certain, though the precise day of death cannot be stated, it is not necessary to obtain an order. See *Long-Sutton*, [1912] P. 97.

(*h*) President's Non-contentious Probate Directions, 1925.

(*i*) A list of lost ships in respect of which orders have been made is kept in the Contentious Department of the Principal Registry.

(*k*) Assistance in drafting the affidavits will be derived from the precedent of the case on motion : App. VIII, Precedent 47. The observations of Lord Merrivale, P., in *John Keay* presumed deceased (1926) (161 L. T. Journal, 299) should be noted. He said : " It is obvious that it is very desirable that the formality of presumption of death should not be resorted to where the presumption is not practically conclusive. The business of this Court is to see that effect is not given to a presumption on mere superficial grounds."

(*l*) *Hurlston*, [1898] P. 27. This is essential.

(*m*) *Clarke*, [1896] P. 287.

(v) What other inquiries have been made (*n*); and other facts rendering his death probable, *e.g.*, that he was aware that he was entitled to a fund, and has never claimed it.

(vi) Whether he was insured. If so, notice of the motion must be given to the insurance office concerned (*o*). The reply must be filed (*p*), or in the absence of reply, an affidavit of service of the notice of motion must be filed (*p*).

(vii) Whether the deceased died intestate or testate, in the first case stating the names of the persons entitled to a share of his estate upon an intestacy. If there is a will, it must be filed.

(viii) Particulars of the value and nature of the estate.

Corroborative affidavits.

This affidavit should be corroborated by some other member of the family, and also by some disinterested person who can speak to the facts (*q*).

Where deceased is presumed lost at sea.

Where the presumed deceased is supposed to have been lost at sea, besides the above averments, the affidavits must prove—

(i) That the deceased was on board when the vessel left port;

(ii) The date and place where the vessel was last seen, her non-arrival at the port for which she was bound, and the fact that no tidings have been received of the vessel.

(iii) Whether the vessel and cargo were or were not insured. If insured, proof of the payment by the underwriters of the amount for which the ship was insured is very strong evidence in support of the application (*r*).

An affidavit by the owner of the ship or a person able to depose to the material facts as to the loss should be filed.

(5) For a grant under section 73 of the Court of Probate Act, 1857, or section 162 of the Judicature (Consolidation) Act, 1925.

(5) Applications for grants under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or under section 73 of the Court of Probate Act, 1857 (*s*), are made on motion, except where the gross estate does not exceed £500 (*t*).

For particulars as to the class of cases dealt with under these sections reference should be made to an earlier chapter (*u*).

(*n*) An order of an inferior Court finding the death in question in a matter in which such death was in issue, and in regard to which that Court had jurisdiction, will be accepted and followed without the production of the evidence usually required to be produced in support of such applications: *Rishton* (1921), 125 L. T. 863.

(*o*) *Barber* (1886), 11 P. D. 78.

(*p*) *Saul*, [1896] P. 151.

(*q*) *Clarke*, [1896] P. 287. Each affidavit should state in terms the belief of the deponent in the death of the presumed deceased: *Hurlston*, [1898] P. 27.

(*r*) *Main* (1858), 1 S. & T. 11. See also *Doad* (1897), 77 L. T. 137.

(*s*) For forms of order, see App. VII, Forms 209, 210.

(*t*) *Vide infra*, p. 533.

(*u*) *Vide ante*, pp. 401 *et seq.* Upon application being made for a grant under one of these sections it must be shown in the oath and bond that the applicant has been appointed under the authority of the section: see Rule 31, N. C. B. Form of oath: App. VII, Form 147. Form of bond: App. VII, Form 65. The applicant files a declaration of the estate and his sureties justify.

Motions of this description are not heard by the registrars in vacation.

But where the gross estate does not exceed £500, applications for grants under these sections in term time and vacation may be made *ex parte* to the registrar, who may make an order or refer the matter to the Court on motion.

(6) For revocation of grants.

(6) Applications for the revocation of grants on the ground that they have been obtained by an erroneous suggestion or have been granted *per incuriam* to the wrong person, or otherwise irregularly, are made on motion, unless the parties interested consent to their revocation by order of the registrar.

But where it is sought to obtain revocation of probate in common form on the ground of the invalidity of the will, or of letters of administration on the ground of the administrator's want of interest, and the revocation is resisted by the grantee, an action becomes necessary (*y*).

(7) For probate of a lost will.

(7) Applications for probate in common form of the contents of a will which has been lost or destroyed *sine animo revocandi* may be made on motion (*z*); but, as a general rule, the Court will require that all persons whose interests are adversely affected by the will shall be of full age and consent. Where this consent is not given, or, owing to some of the persons interested being under age, cannot be given, it is the practice to require the will to be propounded in an action (*a*), though this is sometimes modified in cases where the estate is small (*b*).

Probate (*c*) is granted of the contents of the lost or destroyed will as contained in a draft or a copy (*d*), or the substance thereof as set out in an affidavit, and is limited until such time as the original shall be discovered and deposited at the registry.

The affidavits in support of the application, which in a clear case may be made *ex parte* to the registrar (*e*), instead of to the Court on motion, should prove the due execution of the will, and its existence and loss after the death of the testator, and show the efforts made to find it, and the accuracy of the copy or draft, and state that all persons prejudiced have consented and are *sui juris*. The Court may direct advertisements to be published for the

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(*x*) President's Non-contentious Probate Directions, 1925, No. 4, and President's Direction, May 5, 1926.

(*y*) *Vide post*, pp. 550—552.

(*z*) *Vide ante*, pp. 269—271. Form of order: App. VII, Form 202.

(*a*) *Barber* (1866), 1 P. & D. 267; *Pearson*, [1896] P. 289; and see *Carter* (1908), 52 Sol. Jo. 600.

(*b*) *Apted*, [1899] P. 272; *O'Brien*, [1900] P. 208; *Brassington*, [1902] P. 1.

(*c*) Or letters of administration with the will annexed.

(*d*) The draft should be lodged: *Riley*, [1896] P. 9. It should also be exhibited to the affidavits or one of them.

(*e*) Form of order: App. VII, Form 219.

missing will, and if no reply is received that fact should be stated on affidavit (*f*).

A complete copy of the document which the Court is asked to admit to probate should be annexed to the affidavits or one of them.

(8) For a grant *de novo* owing to the incapacity of one of several co-executors or co-administrators.

(8) A motion may be necessary in cases where one of several executors or administrators, who has taken a grant, becomes insane, and it is desired that a fresh grant shall be made to the same executors or administrators after revocation of the existing grant (*g*).

Except in special cases, however, it will be found that a registrar will make the necessary order upon application at the Notation Department.

(9) For grant for the use and benefit of executor or administrator who becomes insane.

(9) Applications for a grant of administration for the use and benefit of a sole executor or administrator who has become insane after taking the grant, limited until such time as he shall become of sound mind, may be made on motion (*i*). But in this case also an application to the Notation Department for a registrar's order is now the usual procedure.

(10) Where applicant's title in doubt.

(10) Where there is a doubt as to the capacity in which an applicant should take the grant, application may be made on motion. The matter is usually, however, dealt with in the first instance by the registrar.

(11) Question whether a paper is entitled to probate.

(11) In cases in which it is doubtful whether a paper is entitled to probate—whether, for example, it is intended to be testamentary (*l*), or is or is not a contingent will (*m*), or the privileged will of a soldier or seaman (*n*)—the applicant may take the opinion of the Court on motion. But unless the interested parties consent to the question being determined on motion, the Court may order the document to be propounded in an action.

Applications under this and the succeeding heading usually come before the Court only after the registrar's opinion has been taken.

(12) To exclude words or clauses in the will from probate.

(12) Applications may be made to exclude some portion of a testamentary paper from probate, either as having been introduced by mistake (*o*), or as being scandalous, offensive,

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(*f*) *Entichnap* (1876), 35 L. T. 427.
(*g*) *Vide ante*, p. 373—375.
(*i*) *Vide ante*, pp. 373—375. For form of order, see App. VII, Form 225.
(*l*) *Vide ante*, pp. 117—123.
(*m*) *Vide ante*, pp. 248—252.
(*n*) *Vide ante*, pp. 256—266.
(*o*) *Vide ante*, pp. 86—92. In such cases the consent of the persons interested to the matter being disposed of on motion, is necessary.

and libellous, while in no way affecting the disposition of the testator's property (*p*).

But the Court's power to exclude is exercised with caution, and only in a very strong case (*q*).

(13) Application is made on motion for a grant in cases referred to the Court by a registrar of the principal registry, to whom application for a grant has been made in the first instance, or to whom a district registrar has applied for directions under rule 20, D. R., or where the registrar has refused to allow a grant to issue (*r*). (13) Cases referred by the registrar, or where he has refused to allow grant to issue.

(14) Applications for a limited grant to a person entitled to a general grant, except in cases expressly provided for in the Administration of Estates Act, 1925 (*s*). (14) For a limited grant to person entitled to general grant.

(15) Applications for limited grants of administration after citation of persons entitled to the general grant (*t*). (15) For limited grant of administration after citation.

An exception to the general rule that the Court must be moved for a limited grant, unless the persons entitled to a general grant have renounced, occurs where application is made for a grant limited to the only portion of the estate left unadministered. In such a case the registrar, upon an affidavit as to the facts, reports the application to the Judge, and the limited grant will issue by order of the registrar under the Judge's direction without a motion. But unless the procedure directed by rules 29 and 30, N. C. B., has been complied with, the application must be made to the Court on motion (*u*).

(16) Applications for a temporary grant of administration, during the absence abroad of the executor or administrator, under section 164 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*x*), or under 38 Geo. 3, c. 87 (*y*), as amended by section 74 of the Court of Probate Act, 1857 (*y*), and section 18 of the Court of Probate Act, 1858 (*y*), are made to the Court on motion (*z*). (16) For a temporary grant of administration.

(17) Applications for a grant *ad colligendum bona* (*a*). (17) For grant *ad colligendum bona*.

(*p*) *Wartnaby* (1846), 1 Rob. 423; *Marsh* v. *Marsh* (1860), 1 S. & T. 528, at p. 536. See *Curtis* v. *Curtis* (1825), 3 Add. 33; *White*, [1914] P. 153; *Heywood*, [1916] P. 47 (portions of a letter excluded at the request of the military authorities).

(*q*) *Honywood* (1871), 2 P. & D. 251; *Caie* (1927), 43 T. L. R. 697.

(*r*) For the procedure as to transmission of papers, etc., when the application for the grant was originally made in a district registry, see *Rules* 90—92, D. R. For form of order, see App. VII, Form 198.

(*s*) *Vide ante*, pp. 386—391, and Rule 30, N. C. B. See also *Patteson* v. *Hunter* (1860), 30 L. J. P. 272; *von Brentano*, [1911] P. 172.

(*t*) *Vide ante*, pp. 386—391, and Rule 29, N. C. B.

(*u*) Tristram & Coote (16th ed.), p. 381.

(*x*) Applicable to cases where death occurred on or since January 1, 1926.

(*y*) Repealed except in respect of cases where death occurred before 1926.

(*z*) *Vide ante*, pp. 395—399. See also Rule 117, N. C. B.

(*a*) *Vide ante*, pp. 394, 395; see form of order: App. VII, Form 207. These applications are now not frequently made, the more usual course being

(18) To allow a bond to be executed by a person other than the administrator.

(18) Applications to allow an administration bond to be executed by a person other than the administrator should be made to the Court on motion (*c*).

But applications for the reduction of the penalty of the bond (*d*), to limit the liability of a surety to a part of the sum at which the estate is sworn (*e*), or to dispense with sureties (*f*), are now made in the first instance to the registrar (*g*).

(19) Motions to bring in a testamentary paper.

(19) Applications under section 26 of the Court of Probate Act, 1857, for an order against a person to bring a testamentary paper into the registry (*h*).

(20) Applications by executor to retract renunciation.

(20) Applications by an executor, who has renounced probate, for leave to withdraw his renunciation. In this case the probate or letters of administration with the will annexed must be lodged with the motion papers (*i*).

(21) Attachment.

(21) Applications for attachment (*k*).

(22) For appointment of administrator *pendente lite*.

(22) Applications for the appointment of an administrator pending suit (*l*).

(23) For injunctions.

(23) Applications for injunctions and other orders under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45 (*m*), other than orders for the appointment of receivers by way of equitable execution and injunctions so far as the same are ancillary or incidental to equitable execution and charging orders (*n*).

SECTION 2.

PRACTICE AS TO MOTIONS.

Practice as to motions.

Applications to the Court on motion are made by counsel in open Court. In addition to the necessary affidavits, there must be filed a "case on motion," setting out in summary form the substance of the affidavits and the nature of the order

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to resort to section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (where death occurred since 1925), or section 73 of the Court of Probate Act, 1857 (where death occurred before 1926).

(*c*) See *Ross* (1877), 2 P. D. 274. *Vide ante*, p. 455.

(*d*) *Vide ante*, pp. 460, 461.

(*e*) *Vide ante*, pp. 460, 461.

(*f*) *Vide ante*, p. 458.

(*g*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 167. As to administration bonds generally, *vide ante*, pp. 455—463.

(*h*) *Vide ante*, p. 503.

(*i*) Rule 112, N. C. B. *Vide ante*, pp. 229—231, 498, 499.

(*k*) Rule 107, C. B. *Vide ante*, pp. 527, 528.

(*l*) *Vide ante*, pp. 376—382, 473, *post*, pp. 605, 606; see form of order: App. VII, Form 205.

(*m*) *Vide post*, pp. 606, 607.

(*n*) *Vide* R. S. C., Order LIV, r. 12, *ante*, pp. 523, 524. Injunctions have been granted by a Judge in chambers, but a motion appears to be the correct procedure.

prayed (*o*). When the motion arises out of or is made during the pendency of an action, the opposite parties must be served with notice of motion. Case on motion.

If an order be obtained on motion without due notice to the opposite parties, such order may be rescinded with costs against the party who obtained the order (*p*). Due notice to opposite parties to be given

And the Court, if it is of opinion that any person to whom notice has not been given, ought to have had such notice, may either dismiss the motion, or adjourn the hearing (*q*).

In drafting the case on motion the practitioner will find the precedents in the Appendix (*r*) of assistance.

All papers for motions on the Monday, the day upon which motions are usually heard, must be left in the Contentious Department before 2 o'clock p.m. on the preceding Tuesday. If the motion is to be made to a registrar in the Long Vacation, the papers must be left before 2 p.m. on the Friday preceding the Wednesday on which the motion will be heard. Entering motions for hearing.

All original documents referred to in the affidavits, or to be referred to by counsel on the hearing of the motion, must also be left; or, where the affidavits or documents have been already filed or deposited in the registry, notice must be given, in order that they may be looked up (*s*). Where the will has been proved, arrangements must be made with the Record Keeper for its production in Court, and where it has been proved in a district registry, the district registrar must be requested to arrange for its transmission to the principal registry.

Where the affidavits or papers lodged are defective or incomplete, the registrar may refuse to put the motion into the list until the irregularities are rectified (*t*). If it is considered that his refusal is unreasonable, an application should be made to the Judge. Registrar may refuse motion where papers are defective.

Additional affidavits, which have not been filed with the papers, are handed to the registrar on the hearing of the motion.

A form of notice of motion will be found in the Appendix (*u*). It should state in general terms the grounds of the application, and a copy of any affidavit intended to be used should be Notice of motion.

(*o*) See Rule 124, C. B. (*p*) Rule 112, C. B.

(*q*) See Order LII, r. 6.

(*r*) App. VIII, Precedents 47, 48. The case on motion is headed, as are the affidavits and notice of motion, "In the estate of A. B. deceased," and, when there is an action, the name of the parties—*e.g.*, "*C. D.* v. *E. F.*" follow. The facts are set out in chronological order in short numbered paragraphs, the concluding one of which should state: "The above averments are proved by affidavits." Then follows: "The Court will be moved by counsel on behalf of C. D. (the applicant) for an order that," etc.

(*s*) Rule 126, C. B. (*t*) Rule 125, C. B.

(*u*) App. VII, Form 109. In drafting the notice of motion the practitioner will find the forms of orders in App. VII (Forms 197—210) of assistance.

served with the notice (*x*). Unless special leave to the contrary be given, there must be at least two clear days between the service of the notice and the day for hearing the motion (*y*). If leave to serve short notice of motion is obtained, the fact should be stated in the notice.

Service of notice of motion.

Notices of motion are served in the modes prescribed by Order LXVII. For service of notice of motion with the writ of summons, see Order LII, r. 9. The practice of the Chancery Division is to be followed.

A copy of the notice of motion should be filed with the case on motion, but no proof of service will be required unless by direction of the Judge (*z*).

Vacation.

During the Long Vacation motions by counsel are heard by the registrars at Somerset House on days, generally alternate Wednesdays, named in the cause list published at the end of the Trinity term (*a*).

Adjournment of motion.

If the motion is adjourned, the solicitor must in due course restore the motion to the list, and file a notice of adjourned motion.

Order.

The order is entered in the Court minute book, and copies can be obtained at the principal registry on application.

Appeal.

The time for appeal is governed by Order LVIII, rule 15.

(*x*) This *must* be done in motions for attachment; it *should* be done in all cases : see Order LII, r. 4.

(*y*) Order LII, Rule 5. See *Donovan* v. *Donovan* (1891), 91 L. T. Jour. 56. Rule 111, C. B., is superseded in this respect.

(*z*) Rule 111 C. B.

(*a*) Motions for grants under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, and section 73 of the Court of Probate Act, 1857, are not dealt with by the registrars during the vacation, except as stated on p. 533, *ante*.

PART THE FOURTH.

THE PRACTICE OF THE COURT IN CONTENTIOUS BUSINESS.

CHAPTER I.

INTRODUCTORY.

Section 1.

CONTENTIOUS BUSINESS DEFINED.

Contentious business distinguished from non-contentious business.

The non-contentious or common form business of the Court, it has previously been pointed out (*a*), is defined by section 2 of the Court of Probate Act, 1857, and also by section 175, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (*b*).

By Rule 3, C. B., all proceedings in the Court of Probate, or in the registries thereof, in respect of business not included under the expression "common form business" in the Court of Probate Act, 1857, shall, with the exception of the warning of caveats, be deemed to be contentious business.

Contentious business includes all proceedings in action.

Contentious business includes all proceedings in an action from its commencement—which since the Judicature Act, 1873, dates from the issue of the writ of summons (*c*)—to its termination.

Section 2.

SOURCES OF PRACTICE.

Court of Probate, except where otherwise provided, to follow practice of Prerogative Court.

The Court of Probate Act, 1857, s. 29 (*d*), provided that the practice of the Court of Probate should, except where otherwise provided by that Act, or by rules to be made under that Act,

(*a*) *Vide ante*, p. 433.
(*b*) *Vide post*, pp. 664, 797. The definitions are substantially the same.
(*c*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291. *Vide ante*, p. 508.
(*d*) Repealed by Judicature (Consolidation) Act, 1925; see now section 32 of that Act.

and so far as the circumstances of the case should permit, be according to the practice of the Prerogative Court.

Probate Rules and Orders, Contentious Business, 1862.

Rules and orders regulating the practice and procedure of the Court in contentious business were made in the year 1862 under the powers conferred by section 30 of the Court of Probate Act, 1857 (*e*), and these rules, as altered and added to from time to time (*f*), governed the practice of the Court until the coming into operation of the Judicature Acts, 1873 and 1875.

Jurisdiction transferred to High Court.

The Judicature Act, 1873, transferred the jurisdiction of the Court of Probate to the High Court; and section 17 of the Judicature Act, 1875 (*g*), contained provision for making rules for regulating the practice and procedure in the High Court, but by section 18 it was provided that the rules in force in the Court of Probate should remain in force in the High Court until altered or annulled by any Rules of Court made after the commencement of that Act. And now, by section 103, sub-section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that, save as is otherwise provided by the Act or by Rules of Court, all forms and methods of procedure which were formerly in force in any of the Courts, the jurisdiction of which is now vested in the High Court, may, so far as they are not inconsistent with the Act or with Rules of Court, continue to be used in the like cases and for the like purpose as those in and for which they would have been applicable in the former respective Courts.

Rules of the Supreme Court, 1883.

Probate Rules, 1862, Contentious Business, unless expressly overridden, remain in force.

In the year 1883, Rules of the Supreme Court were framed. These rules, by Appendix O, repealed many rules therein specified, but among them were not included the Probate Rules of 1862. The Rules of the Supreme Court contain many provisions which apply expressly to the Probate Court, and to that extent they override the Probate Rules. But it has been held that when distinct rules exist in the Probate Court, dealing with a particular subject-matter, they remain in force notwithstanding that there may be a different rule dealing generally with that subject-matter in the Rules of the Supreme Court (*k*).

How present practice is regulated.

Practice in contentious business, therefore, is now regulated by the Rules of the Supreme Court and by the Probate Rules of 1862 in so far as these have not been superseded, altered, or annulled by the Rules of the Supreme Court.

Mode of citation.

The Rules of the Supreme Court are cited thus: Order I,

(*e*) The section is now repealed and replaced by sections 99 and 100 of the Judicature (Consolidation) Act, 1925.

(*f*) These rules are printed in App. III, Part 2.

(*g*) Repealed and now replaced by section 99 of the Judicature (Consolidation) Act, 1925.

(*k*) *Hopkinson* v. *Carter*, [1909] P., at p. 120.

r. 1 (*l*). The Probate Rules, Contentious Business, are thus cited : Rule 1, C. B. (*m*).

Section 3.

GENERAL OUTLINE OF AN ACTION IN THE PROBATE DIVISION.

General outline of a typical action for probate in solemn form.

It is now proposed to give a general sketch of the forms to be observed in the conduct of an action in the Probate Division, an action for probate in solemn form having been selected for the purpose of illustration.

John Styles, executor named in the will of William Roe, deceased, lodges papers at the registry for a grant to him of probate in common form. He finds that Richard Roe, the second son and one of the persons entitled, upon an intestacy, to share in the deceased's estate, has entered a caveat. John Styles proceeds to warn the caveat as sole executor of the will, and in due course Richard Roe appears to the warning as the lawful son and one of the persons entitled to a share of the estate in the event of an intestacy. The respective interests of the parties are thus disclosed.

Entry of caveat.

Warning.

Appearance to warning.

Writ of summons.

John Styles thereupon issues a writ of summons propounding the will and making Richard Roe, in the capacity disclosed in his appearance, defendant (*n*).

Summons for directions.

The writ having been served and an appearance entered thereto by Richard Roe, John Styles takes out a summons for directions. Upon this summons the registrar orders the indorsement on writ to stand for statement of claim, and directs the time within which the statement of defence is to be delivered, within which the affidavits of scripts and the affidavits of documents are to be filed, and within which inspection of the documents is to be given. He also fixes the place and mode of trial and grants liberty to apply to either party (*o*).

Affidavits of scripts.

The next step is the filing of the affidavits of scripts, each party stating what scripts—*i.e.*, testamentary papers, whether wills, codicils, drafts, or written instructions for the same—have at any time come to his possession or knowledge, and annexing to his affidavit any script in his possession or under his control.

(*l*) *I.e.*, Rules of the Supreme Court, Order I, r. 1.

(*m*) *I.e.*, Probate Rules of 1862 as to Contentious Business, r. 1. Contrast "Rule 1, N. C. B.," by which abbreviation the Probate Rules as to Non-contentious Business are cited.

(*n*) Precedents of indorsement of claim on the writ will be found in App. VIII, pp. 1031—1034.

(*o*) For the form of the order made upon the summons for directions, see App. VII, Form 226. The summons for directions is discussed in detail *post*, pp. 569 *et seq*

The affidavit of either party may be inspected by the other, but not until his own affidavit is filed.

Delivery of defence.

The production of these documents not infrequently puts an end to the action, but in the imaginary case under discussion Richard Roe delivers his defence, alleging that the will propounded was not duly executed; that the testator at the time of its execution was not of sound mind, memory, and understanding, and did not know and approve of its contents; that the will was procured by the undue influence of John Styles; and claiming that the Court shall pronounce against the said will.

Substance of the case.

As happens in many cases in practice, it shall be assumed that the defendant neglects to comply with Order XIX, r. 25A: "In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely." Accordingly, John Styles applies by notice under the summons for directions for an order that the defendant shall furnish the substance of the case on which he intends to rely under specified paragraphs of the defence (*p*).

Reply.

In the case under consideration no reply is necessary, for if no reply is delivered, all the allegations in the defence are put in issue. If it is desired to deliver a reply, the leave of the registrar under the summons for directions must be obtained.

Motion for the appointment of an administrator *pendente lite*.

At this stage (he might have taken this step at any time after the issue of the writ) Richard Roe applies to the Court on motion for the appointment of an administrator *pendente lite*, and serves notice of the motion on John Styles (*q*). If his affidavits show that his application is a reasonable one, having regard to the character and amount of the estate, it is granted.

Citations to see proceedings.

In order to bring all the necessary parties before the Court, and so to cause them to be bound by the decree, each party will now (if he has not already done so) cite to see proceedings all persons having a contrary interest to his own. Thus the plaintiff will cite the testator's widow, and all other persons entitled upon an intestacy to share in the deceased's estate (*r*). If there had been an earlier will, it would have been advisable to cite the executor and beneficiaries thereunder. The defendant, on his part, will cite all the beneficiaries under the will which he is attacking.

(*p*) As to the particulars that should be given under the substance of the case, *vide post*, pp. 577—579.

(*q*) In cases of death before 1926, where it is proposed to apply for the appointment of a receiver of the real estate, the notice of motion is also served on the heir-at-law.

(*r*) Where death occurred before 1926, and the deceased died possessed of real estate, it will be necessary to cite to see proceedings the heir-at-law in addition to the next-of-kin.

Notice giving particulars of specific instances of delusion.

Since the defendant intends to adduce evidence, in support of his plea of incapacity, to show that the testator suffered from delusions, he must comply with the second part of Order XIX, r. 25A, which provides that "specific instances of delusion must be delivered before the case is set down for trial, and, except by leave of the Court or a Judge, no evidence shall be given of any other instances at the trial."

Action set down for trial.

It shall be assumed that none of the persons cited to see proceedings enters an appearance, and that they are content to leave the question as to the validity of the will to be litigated between the original plaintiff and defendant. Accordingly, the pleadings having been closed, the action is set down for trial.

Hearing.

When it comes on for hearing, counsel on behalf of the plaintiff opens his case, and the plaintiff's witnesses, included amongst whom must be at least one of the attesting witnesses, to prove due execution, are examined, cross-examined, and re-examined. Counsel for the defendant then opens his case, calls the witnesses for the defendant, and addresses the jury. After counsel for the plaintiff has addressed the jury in his turn, and the judge has summed up, the jury return their verdict, which, since a normal case has been chosen for illustration, is against the defendant on all the issues. The Court pronounces for the will. The defendant is condemned in costs (*s*).

Verdict.

Decree.

Costs.

Actions for the revocation of grants.

The preliminary steps in an action for the revocation of a grant are somewhat different (*t*), but after the issue of the writ the proceedings take a course in many respects similar to that indicated above.

Administration actions.

Administration actions (*u*), of which only interest suits are now of importance, commence by the entry of a caveat, warning and appearance thereto, and the issue of a writ of summons.

(*s*) The plaintiff's counsel should not ask for costs in this case. Costs follow the verdict of the jury, unless the Court otherwise orders.

(*t*) *Vide post*, pp. 550—552.

(*u*) *Vide post*, pp. 548, 549.

CHAPTER II.

ACTIONS IN THE PROBATE DIVISION.

Suits in the Ecclesiastical Courts commenced by citation or caveat.

THE ordinary mode of commencing a suit in the Ecclesiastical Courts was by a process known in the Consistorial Courts as a citation, in the Prerogative Court as a decree; or the suit might be commenced by the entry of a caveat (*a*).

But actions in the Probate Division are now commenced by writ of summons.

This practice was, however, put an end to by the Judicature Acts (*b*). For Order I, r. 1, of the Rules of the Supreme Court provides that all suits, which immediately before November 1, 1875, were commenced by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action; and by section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, an action is defined to mean "a proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court."

Actions in the Probate Division, therefore, are now commenced by writ of summons. The entry of a caveat and the appearance of the caveator to the warning, do not constitute the "institution" of an action (*c*).

Probate actions defined.

By Order LXXI, r. 1, the words "probate actions" are to include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business.

Forms of action.

Probate actions are of three kinds: (1) actions for probate in solemn form, (2) administration actions (including interest suits), and (3) actions for the revocation of probate or of letters of administration.

SECTION 1.

ACTIONS FOR PROBATE IN SOLEMN FORM.

Actions for probate in solemn form defined.

Actions for probate in solemn form include all actions in which the Court is called upon to determine whether a testamentary paper is or is not, in whole or in part, a valid testamentary instrument.

(*a*) See 3 Burn, E. L., pp. 187, 192 (9th ed.).

(*b*) *Vide ante*, p. 509, note (*a*). The Judicature Acts are now for the most part repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, in which they are in substance re-enacted.

(*c*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291.

A testamentary paper is said to be proved in solemn form when it has been propounded in an action and has received the sentence of the Court pronouncing for its force and validity in whole or in part (*d*). Following the decree (*e*) of the Court, probate or letters of administration with the will annexed will issue in the registry to the person entitled thereto, on his filing a copy of the decree, and lodging the necessary documents to lead a grant.

A will is proved in solemn form when propounded in an action and pronounced for.

If the testamentary instrument is found to be invalid, the Court will pronounce against its validity (*f*), upon which a grant of probate of a valid will or of administration as on an intestacy, as the case may be, will issue on the person entitled thereto filing in the registry a copy of the decree (*g*) and lodging the necessary papers.

Will pronounced against.

Sub-section 1.—*Persons entitled to propound a Will.*

The proper person to propound a will for proof in solemn form is the executor named therein, or, if there is no executor, the person entitled to administration with the will annexed.

The proper person to propound a will is the executor.

An executor, however, is not bound to propound a will; he may, in fact, be condemned in the costs of the action if he attempts to obtain the sanction of the Court to a document which he must have known could not be supported (*h*). He may renounce probate, if he chooses, unless he has intermeddled in the estate (*i*). But he may, though indisposed to be a party to an action, be quite prepared to accept probate if the will is, in the event, established. In such a case, he will, if served with a citation to propound the will, or if made defendant to a writ of summons in which the validity of the will is put in issue, enter no appearance, and will allow the persons interested under the will to propound it, if they choose. If the will is pronounced for by the Court, he may still accept probate; for it has been held that the failure of an executor to appear to a citation to propound and prove a will *in solemn form* is not equivalent to a renunciation by him, as would have been the case had he failed to appear to a citation to accept or refuse probate *in common form* (*k*). A person entitled to administration with the will

But he may stand aside and allow the question of the validity of the will to be litigated by others,

and accept probate if in the event the will is pronounced for.

The person entitled to administration with

(*d*) As to the distinction between probate in solemn form and probate in common form, and as to the binding effect of a decree on the parties and privies to the suit, *vide ante*, pp. 238—241.

(*e*) For forms of decree, see App. VII, Forms 93—96.

(*f*) The Court will *not*, as a general rule, pronounce that the deceased died intestate; still, for some reason, this finding is often claimed.

(*g*) For form of decree, see App. VII, Form 93.

(*h*) *Vide post*, pp. 627, 628.

(*i*) *Vide ante*, p. 225.

(*k*) *Bewsher* v. *Williams* (1861), 3 S. & T. 62.

the will annexed is in the same position.

annexed may also stand aside, and yet accept a grant if in the result the will is established.

Any person interested under the will may propound it.

If the executor refuses to propound the will, any person interested under it, whether as residuary legatee or residuary devisee, legatee or devisee, or the representative of any such person, is entitled to propound it *loco executoris*.

A person interested under a will may propound it, if he chooses, although his interest in the deceased's estate is greater in the event of an intestacy or under an earlier will.

Sub-section 2.—*Persons entitled to compel Proof in Solemn Form.*

Who may demand proof of will in solemn form :

The following persons are, on account of their interest, entitled to demand that a will be proved in the first instance (*l*) in solemn form of law :—

(1) All persons entitled under an intestacy.

(1) Any person entitled to share in the deceased's estate in the event of an intestacy, or the representative of any of such person;

(2) H.M. Procurator-General in certain cases.

(2) His Majesty's Procurator-General (*m*) in cases where, owing to the deceased dying a bastard or without known kin, the estate in the event of an intestacy would lapse to the Crown;

(3) Executors and beneficiaries under any other will or codicil.

(3) The executor, devisees, and legatees named in any other will or codicil of the deceased, and their representatives, if their interests are adversely affected by the will in question;

(4) A creditor to whom administration has been granted.

(4) A creditor, to whom administration has actually been granted, if proceedings are taken to revoke the grant on the ground of the existence of an alleged will (*n*). The creditor, in this case, has the right to compel proof in solemn form as the appointee of the Court, in common with any person to whom administration has been granted (*o*). But a creditor, who has not obtained a grant, has no such right, for it is immaterial to him whether he shall receive his debt from an executor or administrator (*p*).

Sub-section 3.—*Preliminary Steps in an Action for Probate in Solemn Form.*

Action by the executor for his own protection.

(1) The executor, or, if there is no executor, the person entitled to administration with the will annexed, may desire,

(*l*) For those persons, who are entitled to cite the executor, or the person to whom administration with the will annexed has been granted, to bring the grant into the registry, and so, in effect, to compel him to prove the will in solemn form, see *post*, pp. 550, 551.

(*m*) Or the Solicitor of the Duchy of Cornwall or of Lancaster, if the deceased died domiciled in Cornwall or Lancaster respectively.

(*n*) *Dabbs* v. *Chisman* (1810), 1 Phill., at pp. 159, 160.

(*o*) *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 851.

(*p*) *Burroughs* v. *Griffiths* (1754), 1 Lee 544; *Menzies* v. *Pulbrook* (1841), 2 Curt. 845. *Vide ante*, p. 309.

for his own protection (*q*), to prove the will in solemn form in the first instance. For should probate in common form be taken, the grantee may at any time be called upon to prove the will in solemn form—maybe where the material witnesses are all dead (*r*). But if the will is proved in solemn form, and there is no irregularity in the process, the will cannot be set aside afterwards, unless, indeed, the sentence of the Court was obtained by fraud or a later will is found (*s*).

Procedure

The executor, in these circumstances (*t*), should issue a writ propounding the will and making all persons adversely affected by the will—*e.g.*, all persons entitled to share in the estate in the event of an intestacy, and the executors and beneficiaries under any earlier will,—defendants, or, adopting the usual and more convenient course (*x*), making some only of such persons defendants, and citing the others to see proceedings (*y*).

If none of these persons enters an appearance, or if some appear, but none delivers a defence, the action may be entered as a "short cause" (*z*). But if defences are delivered, the action proceeds to trial in the usual way (*a*).

Where executors of the will question the validity of a codicil.

If the executors of a will have reason to believe that a codicil thereto is invalid, their right course seems to be to propound the will (*b*), and to cite those entitled under an intestacy and legatees under the codicil to see proceedings. It is doubtful whether they can cite the beneficiaries under the alleged codicil to propound and prove the codicil (*c*).

Where persons adversely affected by the will desire to compel probate in solemn form.

(2) But, in most cases, an action for probate in solemn form is commenced in consequence of a challenge by persons whose interests are adversely affected by the will. This challenge is effected by the entry of a caveat. The consequential procedure has been indicated in an earlier chapter (*d*).

Where persons interested on

(3) There is also a third mode, by which an action for probate in solemn form commences, appropriate where persons

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(*q*) *Vide ante*, pp. 429—431.
(*r*) *Vide ante*, p. 238.
(*s*) *Vide ante*, p. 240.
(*t*) And also an executor who has proved in common form, and desires subsequently to prove in solemn form on his own initiative. In this case the probate must be brought in and lodged in the registry.
(*x*) *Vide ante*, p. 514; *post*, p. 554.
(*y*) If the deceased was a bastard, His Majesty's Procurator-General should be served with the citation.
(*z*) *Vide post*, pp. 548, 610.
(*a*) See the outline of an action for probate in solemn form, *ante*, pp. 541—543.
(*b*) See App. VIII, Precedent No. 3.
(*c*) See *Benbow* (1862), 2 S. & T. 488; but see *ante*, p. 512, note (*u*).
(*d*) *Vide ante*, pp. 541—543.

an intestacy desire to have set aside a will which the executors and beneficiaries refuse to bring forward for probate,

interested under an intestacy know of the existence of a will, which they have reason to believe is invalid, but the executor and beneficiaries thereunder refuse to bring it forward for probate. Two courses are open in such a case.

A subpœna having been issued against the executor to bring the will into the registry, and a caveat having been entered, the executor and beneficiaries may be cited to prove the will in common form (*e*). If no appearance is entered to the citation, a grant of administration as on intestacy will be ordered, on application on motion by the persons entitled to such grant (*f*). If any of the persons cited appear to the citation, they will issue a writ propounding the will and making the citors defendants.

The alternative course is for the person entitled to a grant in the event of an intestacy to issue a writ, making the executors and beneficiaries under the alleged will defendants, and claiming a sentence against the will on the ground of its invalidity. If any of the defendants appear to the writ, they will in their pleadings set up the will, and an action for probate in solemn form is thus instituted (*h*). If no one appears, the action may be set down as a "short cause" (*i*), and the Court, on the production of sufficient evidence to justify the sentence, will pronounce against the will. Whereupon a grant of administration will issue at the registry to the person entitled thereto, on his filing a copy of the decree and the necessary papers to lead the grant.

or where the beneficiaries under an earlier will know of the existence of a later will.

What has been said as to the procedure to be adopted by persons interested under an intestacy, applies, *mutatis mutandis*, to that to be followed by executors or beneficiaries under an earlier will, when the executors and beneficiaries under a later will neglect or refuse to bring it forward for probate.

Section 2.

ADMINISTRATION ACTIONS, INCLUDING INTEREST SUITS.

Administration actions described.

Administration actions include all actions in which the Court is called upon to determine which of two or more claimants is entitled to a grant of administration. Actions of this description which arise after administration has actually been granted are dealt with in the next section (*k*).

(*e*) *Vide ante*, pp. 511, 512.
(*f*) *Vide ante*, p. 512.
(*h*) An executor may appear and pray for time to consider whether he will or will not propound the will. See Williams on Executors (11th ed.), p. 192.
(*i*) *Vide post*, p. 610.
(*k*) *Vide post*, p. 552.

No longer brought where persons equally entitled contend *inter se*, or to obtain an order passing over the person primarily entitled.

Administration actions are no longer brought where two or more persons, admittedly equally entitled to the grant, contend *inter se* for administration, the question of their relative fitness being decided by a registrar on summons (*l*). And where the Court is asked, in special circumstances, to pass over a person having admittedly a superior legal right to the grant, in favour of a person having an inferior title, the application is made on motion under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (*m*), or section 73 of the Court of Probate Act, 1857 (*n*).

Now necessary only where the issue is one of legitimacy or pedigree.

But when the interest of the applicant for administration, as a person entitled to share in the estate of the deceased, is disputed on grounds of legitimacy or of pedigree, the question is determined in an administration action, known as an interest suit (*o*). The form of the writ of summons issued by the plaintiff in an action of this description will be found in Appendix VIII, Precedents Nos. 11 and 12.

Denial of defendant's interest.

In interest actions where the plaintiff disputes the defendant's interest, he must say so in his statement of claim (*p*), and the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant (*q*).

In a testamentary cause, after delivery of the declaration (*r*), the interest of the party to whom it has been delivered cannot be disputed by the party declaring except by leave of the Judge (*s*).

Estoppel.

When a question of fact, as to which of two persons is nearest-of-kin of a deceased, has been determined in an administration action, the parties to such action, or persons claiming through them, are estopped from afterwards reopening the same question in the Probate or any other Court. This restriction does not, however, extend to other persons who were neither parties to the suit nor actually claim through one of the parties, even though their interest is almost identical with that of one of such parties (*t*).

(*l*) *Vide ante*, pp. 452, 453, 522.

(*m*) Applicable where death occurred since 1925. *Vide ante*, pp. 412—415, 532.

(*n*) Repealed except in respect of cases where death occurred before 1926. *Vide ante*, pp. 401—412, 532.

(*o*) It should be noted that a declaration of legitimacy can only be made by way of petition, and therefore cannot be joined with the claim on a writ in a probate action: *Warter* v. *Warter* (1890), 15 P. D. 35.

(*p*) Order XX, r. 9.

(*q*) Rule 62, C. B.

(*r*) The term "declaration" is equivalent to "statement of claim."

(*s*) Rule 37, C. B. But see *Inkson* v. *Jeeves* (1863), 3 S. & T. 39, as to subsequent denial.

(*t*) *Barrs* v. *Jackson* (1845), 1 Phillips Ch. R. 582; *Spencer* v. *Williams* (1871), 2 P. & D. 230; and cases there cited.

SECTION 3.

ACTIONS FOR THE REVOCATION OF GRANTS.

Actions for revocation of grants described.

Actions for revocation of grants may be classified according as the question at issue is the validity of a will, or the interest of the person appointed administrator.

A. By whom actions for revocation of probate may be brought.

A. An action for the revocation of probate (or administration with the will annexed) may be brought by persons, whose interests are adversely affected by the will which has been proved, for the purpose of having the grant revoked and the will pronounced against, in order that they may obtain probate of an earlier will or a grant of administration on intestacy, as the case may be. The contest is as to the validity of the will, and the action differs from an action for probate in solemn form only in this respect, that the will in question has already been proved in common form.

Will pronounced for and grant redelivered out.

If, in the event, the will is found to be valid, the Court will pronounce for its validity, and will direct that the probate be handed out to the executors.

Will pronounced against and probate revoked.

If the will is found to be invalid, the Court will pronounce against its validity, and for the validity of such other will, if any, as is satisfactorily proved. The Court will also revoke the original grant of probate. Thereupon probate of the valid testamentary instrument, or administration as on intestacy, as the case may be, will be granted in the registry, on the person entitled thereto filing a copy of the decree, and the necessary papers.

Preliminary steps.

The preliminary steps to be taken by a party who desires to obtain revocation of probate, or to compel an executor who has proved the will in common form, to propound it for proof in solemn form, are the entry by him of a caveat, followed by the extraction of a citation against the executor to bring the grant into the registry (*x*), and the issue of a writ (*y*) making the executor defendant and alleging the invalidity of the will. The executor thereupon lodges the grant in the registry, enters an appearance to the writ, and an action commences (*z*).

Who are entitled to institute action:

The following persons in particular are entitled, on account of their interest, to commence an action for the revocation of probate :—

(*x*) The citation must either precede or issue simultaneously with the writ : *vide post*, p. 561.

(*y*) App. VIII, Precedents Nos. 5, 6 and 7.

(*z*) The executor who, on his own initiative, desires to prove in solemn form a will already proved in common form, must lodge the probate in the registry : see *Riley*, [1896] P. 9, and *ante*, pp. 546, 547.

(1) Persons interested in the event of an intestacy.

(1) Any person entitled to share in the deceased's estate in the event of an intestacy or the representative of any such person. Any such person who has acquiesced in probate of a will being taken in common form, and has even received a legacy thereunder, may still put the executor to proof of the will in solemn form (*a*), but he must bring into Court the amount of the legacy paid to him, to abide the result of the suit (*b*).

(2) Legatee, etc., if prejudiced by probate as granted.

(2) A legatee or devisee (or his representative) named in the will whose legacy or devise has been omitted from the probate in common form—*e.g.*, as given by an interlineation not sufficiently attested (*c*); or a legatee or devisee under a codicil, where the will only has been proved (*d*).

(3) Executors and beneficiaries under another will.

(3) The executors, legatees, and devisees named in any other will or testamentary paper of the deceased, and the representatives of any of such persons.

Secus the executor who has proved in common form.

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will (*dd*). But an executor, who is also next-of-kin and has obtained probate with full knowledge of the facts of the case, is not debarred from subsequently contesting the will on offering a reasonable explanation for his action (*e*).

B. Actions for revocation of administration by persons interested under an alleged will.

B. An action for the revocation of letters of administration (*f*), granted on an intestacy, may be brought by persons claiming an interest under an alleged will of the deceased, the issue being as to the validity of the will propounded.

If, in the event, the will propounded is found to be invalid, the Court will pronounce against the will, and direct that the grant of administration be delivered out to the administrator.

If, however, the will is found to be valid, the Court will pronounce for its validity, the grant of administration will be revoked, and a grant of probate of the will may be taken on

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(*a*) *Merryweather* v. *Turner* (1844), 3 Curt. 802; *Bell* v. *Armstrong* (1822), 1 Add. 365. As to what *shall* amount to waiver of his rights by the next-of-kin, see *Hoffman* v. *White* (1805), reported 2 Phill. 230, n.; *Braham* v. *Burchell* (1826), 3 Add, at p. 257. See *Goddard* v. *Smith* (1873), 3 P. & D. 7; and *vide ante*, p. 239.

(*b*) *Braham* v. *Burchell* (1826), 3 Add., at p. 256; *Bell* v. *Armstrong* (1822), 1 Add. 365. *Secus* when the legatee is a minor: *Goddard* v. *Norton* (1846), 5 N. C. 76. And see *ante*, p. 238.

(*c*) See App. VIII, Precedent No. 6.

(*d*) See App. VIII, Precedents Nos. 8, 25.

(*dd*) *Vide ante*, p. 513, note (*a*).

(*e*) *Williams* v. *Evans*, [1911] P. 175.

(*f*) For forms of writ, see App. VIII, Precedents Nos. 9, 10. The preliminary steps will be the entry, by the party claiming under the will, of a caveat and the extraction of a citation to bring in the grant of administration. These steps will be followed by the issue of a writ, propounding the will, which must have been lodged in the registry before the citation issued, and claiming revocation of the grant of administration.

the person entitled thereto filing a copy of the decree and the necessary papers in the registry.

Creditor in possession of administration may oppose probate.

A creditor in possession of administration can both deny an interest and oppose a will (*h*). This right he has, in common with any person who has been actually appointed administrator, as appointee of the Court and apart from any question of interest (*i*).

C. Action for revocation of administration on the ground of the administrator's lack of interest.

C. An action for the revocation of letters of administration may be brought on the ground that it has been made to a person without sufficient interest in the estate of the intestate. The contest between the parties is as to the relationship of the administrator to the intestate, and involves a question of legitimacy or pedigree.

In these circumstances, the grant having been brought in by citation, the writ is issued, the plaintiff therein setting out his interest, and claiming the revocation of the grant made to the defendant, whose relationship to the deceased he denies (*k*).

(*h*) *Dabbs* v. *Chisman* (1810), 1 Phill., at pp. 159, 160: *vide ante*, pp. 309, 546.

(*i*) *Ibid.*; *Menzies* v. *Pulbrook* (1841), 2 Curt., at p. 851: *vide ante*, pp. 309, 546.

(*k*) For form of decree, see App. VII, Form 94.

CHAPTER III.

PARTIES TO PROBATE ACTIONS (*a*).

SECTION 1.

WHO MAY BE A PARTY.

Basis of right to be a party is interest.

IN the preceding chapter it is shown that the basis of right to be a party to the various forms of probate action is interest. As Lord Stowell said with reference to the civil action in the Ecclesiastical Court, so it may be said of an action in the Probate Division, that such an action is open to every one showing an interest (*b*). But the interest must be an interest in the estate of the deceased such as can be affected by the decree in the suit (*c*). Any interest, however slight, will suffice, even, it seems, the bare possibility of an interest; but some interest, however remote, there must be (*e*).

Next-of-kin as such may oppose all, but not some only, of the testamentary papers.

A person entitled to share in the estate upon an intestacy, as such, may oppose *all* the testamentary dispositions of the deceased, for he has an interest in having them set aside as a whole, but he cannot oppose one testamentary paper, leaving others unassailed, unless he has some interest, however small or remote, in having that particular paper set aside (*f*).

The positions in this respect of an executor (*g*) and of a creditor (*h*) have been discussed in an earlier chapter.

(*a*) Here and elsewhere the term "probate action" is used as a generic term, including the three forms of action.

(*b*) *Turner* v. *Meyers* (1804), 1 Hagg. Consist. 415, n.

(*c*) *Wright* v. *Rutherford* (1756), 2 Lee 266. A legatee found guilty of the murder or manslaughter of the testator forfeits all interest under the will, and is not entitled to join as a party in a suit in which the validity of the will is in issue: *Hall* v. *Knight*, [1914] P. 1.

(*e*) *Kipping* v. *Ash* (1845), 1 Rob. 270, at p. 273; *Dixon* v. *Allinson* (1864), 3 S. & T. 572. But see *Crispin* v. *Doglioni* (1860), 2 S. & T. 17, where Sir C. Cresswell, referring to the case of *Kipping* v. *Ash* (*ubi supra*), said: "The possibility of interest alluded to in that case did not apply to the possibility of a party filling a character which would give him an interest, but to the possibility of his having an interest in the result of setting aside the will." An interest acquired subsequently to the testator's death by purchase of part of the estate from the administrator was held sufficient to entitle a person to intervene in a suit for revocation: *Lindsay* v. *Lindsay* (1873), 42 L. J. P. 32. An apparent exception to the rule is an administrator, appointed under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or section 73 of the Court of Probate Act, 1857, without any interest in the estate, but such administrator sues and is sued as the appointee of the Court: *vide ante*, p. 546.

(*f*) *Baskcomb* v. *Harrison* (1849), 2 Rob. 118. But see *Kipping* v. *Ash* (1845), 1 Rob. 270.

(*g*) *Vide ante*, pp. 545, 551.

(*h*) *Vide ante*, pp. 309, 546.

None may propound a will save the executor or a person interested under it.

No person may propound a will unless he be executor or have an interest under it (*i*).

Procedure where party propounding a will denies the interest of another to oppose probate.

Before a party is permitted to contest a will, the party propounding the will may call upon him to show his interest; but when two persons are contesting a will, the one cannot call upon the other to show his interest (*k*). In practice the interest of the plaintiff in an action is disclosed in his warning of the caveat, and that of the defendant in his appearance to the warning.

If a plaintiff disputes the interest of the defendant, he must allege in his statement of claim that he denies the kinship of the defendant to the deceased (*l*). Application should then be made to the Court that, before the question of the validity of the will is tried, the defendant should propound and prove his relationship to the deceased (*m*). An interest suit then commences.

A deed executed by the deceased, in which the defendant was described as his sister, was held to be sufficient evidence of relationship to entitle her to contest his will (*n*).

Importance of bringing all necessary parties before the Court.

When a probate action is instituted, it is a matter of the utmost importance that all persons who are entitled to be parties to the action should be bound by the decree. Each party will, therefore, cite to see proceedings all persons not already parties to the action who have a contrary interest in the action to that of the party citing (*o*). If he omits to do so, he runs the risk of the suit being ineffectual to bind some necessary person, though if the latter is aware of the existence of the action and knows of his right to intervene, and refrains from doing so, he is bound by the result, even though not cited to see proceedings, unless the action terminates in a compromise to which he is not a party (*p*).

Any person entitled to be a party to the action may intervene either in the character of plaintiff or defendant.

Rules as to parties which obtained in the Prerogative Court retained.

The practice as to parties which obtained in the Prerogative Court was retained in the Court of Probate under Rules 4, 5 and 6, C. B. (*q*), while with regard to the Probate Division, Order XVI, r. 10, provides : " Subject to the provisions of the Act and these rules, in all probate actions the rules as to parties in use in the

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(*i*) *Parton* v. *Johnson* (1868), 1 P. & D. 549.
(*k*) *Hingeston* v. *Tucker* (1862), 2 S. & T. 596.
(*l*) Order XX, r. 9.
(*m*) See Order XXXVI, r. 7.
(*n*) *Smith* v. *Tebbitt* (1867), 1 P. & D. 354.
(*o*) *Vide ante*, pp. 514, 515, *post*, p. 562.
(*p*) *Wytcherley* v. *Andrews* (1871), 2 P. & D. 327. See *ante*, pp. 240, 241, *post*, pp. 610—612.
(*q*) *Vide* App. III, Part 2.

Court of Probate immediately before November 1, 1875, shall continue to be in force."

Section 2.

PARTIES IN GENERAL.

Parties to probate actions are either plaintiffs, defendants, parties cited, or interveners.

Plaintiffs.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, provides that the term "plaintiff" shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

For the rules as to joinder of plaintiffs, see Order XVI, rr. 1 *et seq.*

Defendants.

The term "defendant" includes every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings (*r*).

As to joinder of defendants, see Order XVI, r. 4.

Interveners.

Who may intervene in a suit.

Interveners in a suit are unknown to the common law, but according to the practice of the Prerogative Court, any person whose interest might be affected by the decree might intervene in a suit at any time before the decree had been pronounced (*s*). For it was said, "*tertius intervenire potest pro interesse suo in omni causa quæ tangit bona aut personam suam*" (*s*).

By Rule 6, C. B., parties who previously to the passing of the Court of Probate Act, 1857, had a right to intervene may do so, with leave of the Judge or one of the registrars; and the same right is retained in Order XII, r. 23, which directs that an affidavit showing his interest shall be filed by the intending intervener (*t*).

Pleadings by an intervener.

The old rule as to pleading by an intervener was that he must take the cause as he found it at the time of his intervention. An intervener who intervened after the pleadings had been closed could not, therefore, without the leave of the Court, deliver a plea (*u*).

Present practice.

By the present practice, leave to intervene is obtained on summons before a registrar, supported by an affidavit setting

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(*r*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 225. It should be borne in mind that, in probate actions, the person propounding the will may often be defendant in the suit: *vide post*, p. 633.

(*s*) Oughton, Ordo. Judic., p. 28, tit. xiv. See 3 Burn, E. L., p. 186 (9th ed).

(*t*) If, being cognisant of the proceedings, he fails to intervene, he is bound by the proceedings: *vide ante*, pp. 240, 241.

(*u*) *Clements* v. *Rhodes* (1825), 3 Add., at p. 40.

out the intervener's interest (*x*). The summons should be served on the parties to the action. Any question of the intervener's right to plead is dealt with on such summons.

Parties cited.

By the practice of the Probate Court, inherited from the Prerogative Court, a party to a suit, whether plaintiff or defendant, might cite to see proceedings persons *whose interest was adverse to his own*, and it has been held that the practice in this respect remains unaltered in the Probate Division (*y*).

A party cited, who has appeared and wishes to adopt the pleadings of one of the parties to the action, should notify the other party to this effect. An application to the registrar by notice under the summons for directions is necessary if he wishes to deliver separate pleadings.

Party cited allowed to carry on the opposition to a will on appeal.

After a verdict had been found establishing a will, and a rule *nisi* had been granted for a new trial, the next-of-kin who opposed the will abandoned his opposition. Two other next-of-kin, who had been cited to see proceedings, and had entered an appearance, but had not pleaded, were allowed to plead and to adopt the proceedings up to the time of the order, in order to carry on the opposition (*z*).

SECTION 3.

PARTIES UNDER A DISABILITY.

Infants and minors.

Infants and Minors.—When it is desired to institute an action or enter an appearance on behalf of a minor or an infant, the procedure prescribed by Rule 74, C. B. (*a*), is to be adhered to (*b*).

Who may be appointed guardian *ad litem*

In the absence of a testamentary or statutory guardian or a guardian appointed by the Chancery Division, a minor (*c*) elects his guardian *ad litem* in the same manner, and subject to the same rules, as in respect of non-contentious business (*d*). He must therefore elect his nearest-of-kin as his guardian *ad litem*, unless the nearest-of-kin be disqualified because of an interest in the action conflicting with that of the minor, or unless the

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(*x*) An interest acquired subsequently to the testator's death by purchase of part of the estate from the administrator is sufficient to entitle a person to intervene in an action for revocation: *Lindsay* v. *Lindsay* (1873), 42 L. J. P. 32.

(*y*) *Kennaway* v. *Kennaway* (1876), 1 P. D., at p. 149. For practice as to citations to see proceedings, *vide ante*, pp. 514—521. Persons interested in the real estate may, since the Land Transfer Act, 1897, be cited to see proceedings without an order, notwithstanding Rule 78, C. B.

(*z*) *Boulton* v. *Boulton* (1867), 1 P. & D. 456.

(*a*) See App. III, Part 2.

(*b*) Direction of President, 1883. The effect of this direction is that Order XVI, r. 18, does not apply to probate actions.

(*c*) *I.e.*, a person over seven and under twenty-one years of age: *vide ante*, p. 365.

(*d*) *I.e.*, Rules 33—36, N. C. B. *Vide ante*, pp. 469—471.

nearest-of-kin renounces, or is under any disability—*e.g.*, a married woman (*e*) or an infant. The same persons, with the same reservations, will be assigned as guardians *ad litem* to an infant (*f*).

If the nearest-of-kin be disqualified for, or renounces, the guardianship, any other fit person may be elected or assigned.

Where there are both minors and infants.

If there are both minors and infants, the guardians elected by the minors may act for the infants without assignment, provided the interests of the minors and the infants do not conflict (*g*).

No assignment or election is required in cases where the *surviving* father or mother, or his or her appointee under the Guardianship of Infants Act, 1925, is the proposed guardian, but the affidavit filed must show that there is not any contrary interest (*h*).

Practice.

The consent of the proposed guardian *ad litem* should be exhibited to an affidavit by the solicitor, which should show that the guardian (1) is a fit and proper person, (2) has no contrary interest, (3) that he is nearest-of-kin of the minor or infant, or that the nearest-of-kin has renounced or is under a disability, and (4) that no testamentary guardian or guardian appointed by the Chancery Division exists.

The affidavit, consent, and election, if any, must, when it is desired to institute an action, or to enter an appearance, on behalf of a minor or infant, be taken to the registrar, who will, in the case of an infant, make an order (*i*), or, in the case of a minor, indorse his fiat on the writ or appearance.

The Court may inquire whether a suit is for the benefit of minors, and may pass over the next-of-kin in a proper case.

The Court has power to inquire whether an action prosecuted by a guardian *ad litem* is for the benefit of the minors or infants on whose behalf he acts, and may appoint a new guardian *ad litem* should it think fit (*k*). The Court may pass over the nearest-of-kin in a proper case (*l*), but before appointing some other as guardian *ad litem* will usually require notice to be given to the nearest-of-kin (*m*).

Default of appearance by minors or infants.

Where a minor who is a necessary party to a suit refuses to elect a guardian and to have anything to do with the proceedings, the official solicitor may, under Order XIII, r. 1, be appointed the minor's guardian *ad litem* (*n*).

(*e*) See *Re Somerset* (1887), 34 Ch. D. 465. Notwithstanding the Sex Disqualification (Removal) Act, 1919, the practice, except in special cases, remains unaltered: see note to Order XVI, r. 16, in the Annual Practice.
(*f*) *I.e.*, a child under the age of seven years.
(*g*) *Vide ante*, p. 471. (*h*) *Vide ante*, p. 366.
(*i*) App. VII, Form 214. (*k*) *Percival* v. *Cross* (1882), 7 P. D. 234.
(*l*) *Quick* v. *Quick* (1864), 33 L. J. P. 177.
(*m*) *Jenkins* (1869), 1 P. & D. 690.
(*n*) *White* v. *Duvernay*, [1891] P. 290. *Vide post*, pp. 567, 568.

Compromise on behalf of minors or infants.

Special procedure, designed to safeguard the interests of minors and infants, must be followed when such persons are to be bound by a compromise in an action (*o*).

Married women.

Married Women.—Married women may sue and be sued as provided by the Married Women's Property Act, 1882 (*p*). The husband of a married woman need not be joined with her as plaintiff or defendant, or be made a party to any action brought by or taken against her (*q*).

Procedure where persons of unsound mind sue or defend.

Lunatics.—Order XVI, r. 17, provides : " Where lunatics and persons of unsound mind not so found by inquisition might respectively immediately before November 1, 1875, have sued as plaintiffs, or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose."

Who may be appointed guardian *ad litem* of lunatic.

According to the practice of the Probate Division in such cases, the guardian *ad litem* shall be the person who would be entitled to a grant of administration for the lunatic's use and benefit—*i.e.*, the committee, or the person appointed under the Lunacy Acts, or failing such person, the husband, wife, or the nearest-of-kin of the lunatic (*r*), provided that such person has no interest contrary to that of the lunatic, and is under no disability.

Practice.

Where there is no committee or person appointed under the Lunacy Acts to control the estate of the lunatic, application for the appointment of a guardian *ad litem* should be made *ex parte* to a registrar, supported by an affidavit stating these facts, and otherwise in similar form to that required when a guardian is assigned to an infant (*s*).

Consent by infant or lunatic as to procedure.

Consent of Persons under Disability to Procedure.—Order XVI, r. 21, provides : " In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall if given with the consent of the Court or a Judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the

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(*o*) *Vide post*, pp. 611, 612.

(*p*) Order XVI, r. 16.

(*q*) As to the extent of her liability for costs, see the Married Women's Property Act, 1882, s. 1, sub-s. 2; the Married Women's Property Act, 1893, s. 2; and *Crickitt* v. *Crickitt*, [1902] P. 177; *post*, pp. 631, 632.

(*r*) *Vide ante*, pp. 370—373, 472.

(*s*) *Vide ante*, p. 557. Proof of the incapacity must be given in the affidavit. See also note to Order XVI, r. 17, in the Annual Practice.

same force and effect as if such person were under no disability and had given such consent: Provided that no such consent by any committee of a lunatic shall be valid between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy."

Section 4.

PROCEEDINGS BY OR AGAINST POOR PERSONS.

Suits *in forma pauperis* regulated by Poor Person Rules.

Suits *in forma pauperis* were formerly regulated by Rules 23—25, C. B., but these rules are now superseded by the Poor Person Rules set out in Order XVI, rr. 22 to 31G, to which reference should be made for details of the necessary procedure. It is only necessary to state here that a person, in order to be admitted to take or defend or to be a party to any legal proceedings in the High Court, must obtain from the Poor Persons Committee of the Law Society, or a similar committee of a provincial law society, a certificate showing :—

Certificate of Law Society.

(a) That he is not worth a sum exceeding £50 (excluding wearing apparel, tools of trade, and the subject-matter of the proceedings), or in special circumstances a sum not exceeding £100;

(b) that his usual income from all sources does not exceed £2 a week, or in special circumstances a sum not exceeding £4 a week,

(c) that he has reasonable ground for taking or defending or being a party to the proceedings; and

(d) the name and address of the solicitor who has been nominated, and has consented, to conduct the proceedings.

Compromise or discontinuance of proceedings only by leave.

Proceedings must not be discontinued, settled or compromised by a party admitted as a poor person without leave of the Court or a Judge (*t*).

Section 5.

CHANGE OF PARTIES BY DEATH, ETC.

Procedure where it becomes necessary to join new parties.

Order XVII, r. 4, provides : " Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any

(*t*) Order XVI, r. 30 (1).

person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence " (*u*).

Order to carry on proceedings.

Practice.

The application in the Probate Division is made to a registrar by notice under the summons for directions, supported by an affidavit of facts showing clearly the interest of the applicant (*x*).

Where person entitled to proceed fails to proceed.

Order XVII, r. 8, provides for cases in which the plaintiff or defendant dies, and the person entitled to proceed fails to proceed.

(*u*) Where a defendant is added or substituted, the writ is to be amended, a copy of the amended writ is to be filed, and the new defendant is served in the same manner as the original defendants : see Order XVI, r. 13. But this procedure in probate actions is not frequently employed, it being usual to cite other interested parties to see proceedings : *vide post*, p. 562.

(*x*) See note to Order XVII, r. 4, in the Annual Practice. As to service of the order so obtained, see Order XVII, r. 5.

CHAPTER IV.

WRIT OF SUMMONS.

SECTION 1.

FORM AND ISSUE OF WRIT.

Probate actions commenced by writ of summons.

EVERY action in the Probate Division is commenced by a writ of summons (*a*), " which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action " (Order II, r. 1) (*b*).

This indorsement must show the plaintiff's interest, and also the interest of the defendant.

The writ must be headed " In the Estate of A B, deceased," preceding the names of the plaintiffs and defendants (*c*).

Caveat should be entered.

According to the practice of the registry, the entry of a caveat is a necessary precedent to the issue of the writ.

Affidavit to lead writ must verify the indorsement on the writ.

The issue of the writ must also be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs (*d*) in verification of the indorsement on the writ both as to the plaintiff's claim and as to the interests of the defendants (*e*).

The interest and names of parties whom it is intended to cite to see proceedings may be included.

If, in addition to the defendants, there are other persons whose interests are or may be affected by the decree claimed, whom it is proposed to cite to see proceedings at a later date, the names and interests of all of them may be included in this affidavit, which will then serve as the affidavit to lead any subsequent citation to see proceedings.

Certificate that affidavit has been filed.

No writs are to be issued in probate actions unless on a certificate that the required affidavit has been filed (Practice Master's Rules, 5).

Writ of summons in a revocation

The issue of the writ in actions for revocation of a grant must also be preceded by or contemporaneous with the issue of

(*a*) If a plaintiff desires a declaration of legitimacy, it cannot be joined with the claim on a writ in a probate action, the procedure to obtain it being by petition : *Warter* v. *Warter* (1890), 15 P. D. 35.

(*b*) The Division of the High Court, to which it is intended that the action should be assigned, must also be specified.

(*c*) Senior registrar's direction, June 13, 1907.

(*d*) An application for leave for the plaintiff's solicitor to swear the necessary affidavits to lead the citation and writ in an action for revocation of probate, the plaintiff being temporarily out of the jurisdiction, was refused : *Luke* (1909), 25 T. L. R. 825 ; *vide ante*, p. 516.

(*e*) Order V, r. 15. For form of affidavit, see App. VII, Form 47.

action must be preceded by a citation to bring in grant.

a citation against the executor or administrator to bring in the grant (*f*). The averments in the citation must be verified by affidavit, which should be so framed as to serve as the affidavit to lead the writ.

Indorsement of claim.

The indorsement of claim must be made on every writ of summons before it is issued (*g*).

Must state the capacity in which the plaintiff claims,

By Order III, r. 5, in probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next-of-kin, heir-at-law, devisee, or in any and what other character (*h*).

and the interest of the defendant.

The interest of the defendants must also be indorsed on the writ. When the defendant has entered a caveat, the indorsement should set out his interest as disclosed in his appearance to the warning, and should state that the writ is issued against him because he has entered a caveat. In all cases the grounds should be shown for bringing the defendants into the action by stating their interest or alleged interest, whether as persons entitled to share in the deceased's estate upon an intestacy, or as executor, residuary legatee, legatee, devisee, etc., under another will. In the latter case the date of the will should be given.

Who should be made defendants.

There has already been occasion to point out (*i*) that, while all persons whose interests are or may be affected by the decree claimed should have an opportunity given to them of becoming parties to the action, it may be, and often is, impossible to ascertain at the time when a writ issues the names, residences, and precise interests of all persons whose interests may be so affected. In such cases some only of the proposed defendants, preferably the executors of an earlier will or the person who has entered a caveat, should be made parties to the writ, and the remainder brought in at a later stage, by issuing a citation against them to see proceedings (*k*). The procedure laid down by Order XVI, r. 13, is seldom adopted in probate actions (*l*).

Parties may be cited to see proceedings, or added as defendants at a later stage.

Nature of the claim.

The claim made in the writ may be either (1) for probate of a will in solemn form, or (2) for probate of a will (or letters of administration) and revocation of probate of a pretended will, or (3) for probate of a will and revocation of a grant of administration, or may be (4) for a grant of administration by a person whose interest is disputed (*m*).

(*f*) *Vide ante*, pp. 513, 514, 515—521.
(*g*) Order III, r. 1.
(*h*) In Appendix VIII will be found precedents of indorsements of claim which may be adapted to meet requirements in most cases.
(*i*) *Vide ante*, p. 514.
(*k*) *Vide ante*, pp. 514—521.
(*l*) *Kennaway* v. *Kennaway*, 1 P. D. 148.
(*m*) App. VIII, Precedents 1—12.

The claim may be in the alternative, *e.g.*, for probate of a will and in the alternative for probate of an earlier will.

The claim may be in the alternative.

Attention is directed to Order IV, r. 1, which requires the address of the plaintiff and his solicitor to be indorsed on the writ, and also an address for service within three miles of the Royal Courts of Justice, when the solicitor's place of business is beyond that limit. Where a solicitor is acting as agent of another solicitor, the name and place of business of both principal and agent must be indorsed.

Indorsement of address.

A plaintiff suing in person must indorse his place of residence and occupation, and also an address for service (*n*).

The practice as to the issue of writs in the Probate Division is as follows: The affidavit to lead the writ (*o*) should be taken with the writ (*p*) to the registrar, who, if satisfied, will sign the certificate printed on the writ, that a sufficient affidavit in verification of the indorsement has been produced to him.

Practice as to the issue of writs of summons.

The writ is then taken to the Action Department (*q*), Royal Courts of Justice, where a sealed copy is issued by the proper officer (*r*). A copy of the writ is to be filed at the Contentious Department of the registry.

Further information as to the issue of writs of summons will be found in the rules under R. S. C., Order V.

The plaintiff may, at the time of or at any time during twelve months after the issuing of the original writ, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked "Concurrent" (*s*). Such writs are issued for service within or without the jurisdiction (*t*).

Issue of concurrent writs.

In probate proceedings notice of change of solicitor (*u*) must be filed at the Central Office (Order VII, r. 3), and a copy of the notice must be lodged by the incoming solicitor in the Contentious Department of the registry.

Change of solicitor.

An original writ is in force for twelve months, but may be renewed for six months by leave (*x*).

Renewal of writ.

An affidavit is required showing (1) the date of issue of the original writ; (2) that the defendant is not yet served, and what efforts have been made to serve him, and stating the grounds on which renewal is asked; (3) means of knowledge.

(*n*) Order IV, r. 2.
(*o*) *Vide ante*, p. 561.
(*p*) For forms, see App. VII, Forms 266—268.
(*q*) A to K, Rooms 126—128; L to Z, Room 127.
(*r*) A probate writ cannot issue out of a district registry. See note to Order V, r. 2, in the Annual Practice; and see Order V, r. 11.
(*s*) See Order VI, r. 1.
(*t*) Order VI, r. 2.
(*u*) For forms, see App. VII, Forms 105—108.
(*x*) See Order VIII, r. 1.

The writ, together with the affidavit, is taken to the registrar for his indorsement, and the writ is then taken to the Writ Department, where it is sealed "Renewed" (*y*).

Section 2.

SERVICE OF WRIT OF SUMMONS.

Undertaking to accept service.

No service is required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance (Order IX, r. 1).

When service required, how effected.

When service is required, the writ must, wherever it is practicable, be served in the manner in which personal service is now made (Order IX, r. 2), that is, by delivering to and leaving with the defendant a copy of the writ, and showing the original writ to him at the same time, if he so requires (*z*).

Service on particular defendants.

Defendant in prison.

Personal service on a defendant in prison is effected by means of an order to visit the prisoner, which is granted on application to the Home Office (*z*).

Husband and wife.

When husband and wife are both defendants, they must both be served unless the Court otherwise orders (*a*).

Infant.

Order IX, r. 4, provides: "When an infant is defendant in an action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a Judge otherwise orders, be deemed good service on the infant; provided that the Court or Judge may order that service made or to be made on the infant shall be deemed good service."

Lunatic.

Service on the committee of a lunatic defendant, or on the person with whom a defendant of unsound mind resides or under whose care he is, shall, unless otherwise ordered, be deemed good service on such defendant (*b*).

Partners and corporations.

As to service on partners, attention is directed to Order XLVIIIA, rr. 1, 3 and 4, and as to service on corporations, to Order IX, r. 8.

Indorsement on service.

Order IX, r. 15, provides: "The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every

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(*y*) See note to Order VIII, r. 1, in the Annual Practice.
(*z*) See note to Order IX, r. 2, in the Annual Practice.
(*a*) Order IX, r. 3.
(*b*) Order IX, r. 5; but as to service of citations on a lunatic, *vide ante*, p. 519.

affidavit of service (*c*) of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service."

Substituted service.

If it be made to appear that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just (*d*). Every application for such an order (*e*) shall be supported by an affidavit setting forth the grounds upon which the application is made (*f*), and may be made to a registrar. Reference to the notes under Order X in the Annual Practice will be of assistance in drawing the affidavit (*g*).

Service out of the jurisdiction.

In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or a Judge be allowed out of the jurisdiction (*h*). The application is supported by affidavit (*i*) or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made (*k*). The affidavit is taken in the first instance to the Judge's clerk, who will obtain the necessary indorsement. The order (*l*) is drawn up at the registry upon production to the registrar's clerk of the indorsed affidavit. The time limited for appearance is inserted in the order, which must be produced at the Writ Department (*m*), in order that the writ should be marked for service out of the jurisdiction.

Practice.

Notice in lieu of writ.

When the defendant is neither a British subject nor in British dominions, notice of the writ (*n*), and not the writ itself, is to be served upon him (Order XI, r. 6).

Service abroad by letters of request.

For service abroad by letters of request, and for the foreign countries in which this form of service may be applied, reference should be made to Order XI, r. 8, and notes thereunder in the Annual Practice (*o*).

(*c*) For forms of affidavit: App. VII, Form 31.
(*d*) Order IX, r. 2.
(*e*) Form of order: see App. VII, Form 228.
(*f*) Order X, r. 1.
(*g*) Form of affidavit: App. VII, Form 33.
(*h*) Order XI, r. 3. (*i*) Form of affidavit: App. VII, Form 32.
(*k*) See Order XI, r. 4.
(*l*) App. VII, Forms 227, 229; forms of writ: App. VII, Form 267.
(*m*) See note to Order XI, r. 3, in the Annual Practice; and see the Table of Times for Appearance after Service out of the Jurisdiction in the Yearly Practice. (*n*) App. VII, Form 268.
(*o*) Form of letter forwarding request for service abroad: App. VII, Form 253; of request for service abroad: App. VII, Form 254; of letter forwarding request for substituted service: App. VII, Form 255.

CHAPTER V.

APPEARANCE.

Appearances entered at the Central Office.

APPEARANCES to writs of summons, to citations to see proceedings, and appearances by interveners are entered in the Writ Department at the Central Office (*a*). Notice of the entry of appearance is given by the Central Office to the principal probate registry (*b*).

Person cited to see proceedings and intervener.

Appearance to a citation to see proceedings is entered on production of the copy citation, an appearance by an intervener on production of the order giving leave to intervene.

Practice on entering appearance.

An appearance (*c*) to a writ of summons is filled up in duplicate. The original, duly stamped for a fee of 2s. 6d. for each defendant, is filed, and the duplicate is sealed and returned to the party entering an appearance (*d*). Notice of appearance must be given to the plaintiff's solicitor on the day that appearance is entered, and such notice must be accompanied by the sealed duplicate memorandum (*e*). There must be an address for service within three miles from the Royal Courts of Justice (*f*).

Appearance by persons under a disability.

Minors or infants appear by their guardian *ad litem*, having first obtained the order or fiat of a registrar (*g*); lunatics by their committee (*h*); persons of unsound mind not so found by inquisition appear as if adults of sound mind, an order appointing a guardian *ad litem* being subsequently applied for (*i*), but where the facts are known, the order should be obtained before the entry of appearance.

Solicitor cannot act for both plaintiff and defendant.

The same solicitor cannot appear on both sides in a probate action without the leave of a Judge.

For further information as to entry of appearance, the practitioner is referred to Order XII, and the notes thereto in the Annual Practice.

(*a*) See Order XII, r. 2. Appearances to warnings, to citations to accept or refuse a grant, and to subpœnas to bring in scripts are entered in the Contentious Department of the registry.
(*b*) Order XII, r. 3.
(*c*) App. VII, Form 52.
(*d*) Order XII, r. 8.
(*e*) Order XII, r. 9. Form of notice of appearance : App. VII, Form 53.
(*f*) Order XII, r. 10.
(*g*) *Vide ante*, pp. 556, 557.
(*h*) *Vide ante*, p. 558.
(*i*) Note to Order XII, r. 1, in the Annual Practice; *vide ante*, p. 558.

Time for appearance.

A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ (Order XII, r. 22).

A party cited to see proceedings may appear at any time during the dependence of the action, before final judgment.

Proceedings in default of appearance to the writ.

By Order XIII, r. 12, which applies to probate actions, it is provided that, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party had appeared.

In an action to prove a will in solemn form (*k*) where no defendant has entered an appearance, the plaintiff, having filed his affidavit of scripts and two copies of the writ, together with an affidavit of service of the writ and of the citations to see proceedings, if any, and having obtained at the Central Office a certificate of non-appearance, may apply to the Judge for leave that the action be heard as a "short cause." It is usual for counsel to make these applications at the sitting of the Court (*l*). The present practice is, as a general rule, to hear short causes on Mondays after motions (*m*), the date of hearing being fixed in the order.

Action entered as "short cause."

Proceedings in default of appearance by infants and persons of unsound mind.

Application for assignment of guardian *ad litem*.

Where no appearance has been entered to a writ for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff shall, before further proceeding with the action against the defendant, apply for an order that some proper person be assigned guardian, by whom such defendant may appear and defend the action. But no such order shall be made unless the writ was duly served, and notice of the application was, after the expiration of the time allowed for appearance, and at least six clear days before the day named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving the writ. In the case of an infant defendant not residing with or under the care of his father or guardian there shall also be service of the notice at the dwelling-house of the father or guardian, if any, unless such service be dispensed with. (See Order XIII, r. 1) (*n*).

(*k*) Or to obtain a decree pronouncing against a will; *vide ante*, p. 548.

(*l*) See *Sugden*, [1904] W. N. 70. Form of order: App. VII, Form 211.

(*m*) *Vide post*, p. 610.

(*n*) This rule, and not Rule 74, C. B., governs the practice in default of appearance by an infant or person of unsound mind in a probate action: *White* v. *Duvernay*, [1891] P. 290.

The application, should, it seems, be made to the registrar (*o*).

Position of official solicitor if appointed guardian *ad litem*.

If the official solicitor of the Court is appointed guardian *ad litem*, he has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, save that he will probably be allowed out of the estate costs properly incurred in the conduct of the defence (*p*).

(*o*) See *White* v. *Duvernay*, [1891] P. 290.
(*p*) *Gill* v. *Gill*, [1900] P. 157 : *vide post*, p. 632.

CHAPTER VI.

SUMMONS FOR DIRECTIONS AND MATTERS DEALT WITH THEREUNDER.

SECTION 1.

SUMMONS FOR DIRECTIONS.

Plaintiff to take out summons for directions after appearance.

In every probate action, to which an appearance has been entered, the plaintiff, before taking any fresh step in the action other than an application for an injunction, or for an administrator *pendente lite*, must issue a summons for directions (Order XXX, r. 1).

Form, place of issue, and service.

The form of summons (*a*) may be obtained at the Contentious Department of the registry, where the summons is issued. It is returnable before a registrar, and must be served not less than four days before the return day (*b*).

Vacation.

A summons for directions may be taken out during the Long Vacation by consent.

Plaintiff failing to take out summons within fourteen days from appearance.

If the summons is not taken out by the plaintiff within fourteen days from the entry of the defendant's appearance, the defendant may apply for an order to dismiss the action, and upon such application the registrar may either dismiss the action on such terms as may be just, or may deal with such application as if it were a summons for directions (*c*).

Affidavits not allowed on hearing without leave.

Affidavits are not allowed to be used on the hearing, except by leave (*d*); but upon applications for security for costs, for trial at a County Court or assizes, and for the examination of witnesses out of Court before the trial, affidavits are allowed, and indeed required.

Subsequent applications by notice under the summons for directions.

Any application subsequently to the original summons *and before judgment* (*e*) for any directions as to any interlocutory matter or thing by any party shall be made under the summons for directions by two clear days' notice (*f*) to the other party stating the grounds of the application (Order XXX, r. 5). As to costs of subsequent applications which might have been made at the hearing of the original summons, see Order XXX, r. 6.

Costs of subsequent applications.

(*a*) App. VII, Form 261.
(*b*) Order XXX, r. 1, and note thereto in the Annual Practice.
(*c*) See Order XXX, r. 8.
(*d*) Order XXX, r. 3.
(*e*) In applications after trial or after judgment a separate summons must be taken out: *Brown* v. *Haig*, [1905] 2 Ch. 379, 382.
(*f*) For form, see App. VII, Form 263.

Actions in which the summons is unnecessary.

No summons for directions need be taken out in default of appearance by the sole defendant or by all the defendants (*g*).

SECTION 2.

MATTERS DEALT WITH UNDER THE SUMMONS FOR DIRECTIONS.

What matters are dealt with under the summons for directions.

Upon the hearing of the summons the Court or a Judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters :—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial (Order XXX, r. 2).

In the following sub-sections the interlocutory matters which are dealt with under the summons for directions will be discussed in detail.

SUB-SECTION 1.—*Affidavit of Scripts.*

Definition of " script."

In testamentary actions both plaintiff and defendant must file what is known as " an affidavit of scripts "; that is, an affidavit as to all testamentary papers of the deceased, executed or unexecuted, which have at any time come to the possession *or knowledge* of the parties. Such affidavit is filed by each of them with the scripts in their possession annexed.

Term " script " defined.

The term " script " is a technical term used to include any paper writing which is or purports to be, or has the form or effect of a testamentary disposition of the testator, or instructions (*h*) for or the draft of any testamentary disposition. If the will be destroyed or lost, a copy or any paper embodying its contents, whether made by or at the direction of the testator or not, is a script, and should be disclosed as such.

Both parties are to file an affidavit of scripts.

Rules 30 and 31, C. B. (*i*), which deal with the practice as to the affidavits of scripts, are still in force except that the time for the delivery of the affidavits is now fixed by the order made under the summons for directions.

Affidavit to be filed though party has no scripts to disclose.

It should be noted that the affidavit of scripts must be filed even though the party filing it alleges that he has no script in his possession, and that a script is to be specified in the affidavit, and described in sufficient detail to identify it, even though it be not in the possession of the party filing the affidavit. If any

(*g*) *Vide ante*, p. 567, *post*, p. 610.

(*h*) As to the necessity of specifying these, see *Foxwell* v. *Poole* (1862), 3 S. & T. 5.

(*i*) App. III, Part 2.

such paper is known to be in the possession of another person, the name and address of such person should be stated (*k*).

Pencil writing on scripts.

When any pencil writing appears on a will, script, or other document filed in the registry, a facsimile copy of the document or of the pages containing the pencil writing must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by the examiner in the registry (Rule 75, C. B.).

Affidavit of plight and condition.

If any script brought in is torn, or has alterations or obliterations upon it, the affidavit should state its plight and condition when it came into the possession of the party who produces it (*l*).

Where no appearance is entered by any defendant, the plaintiff's affidavit should be filed before the action is entered for hearing.

Practice. Scripts to be marked.

The form of an affidavit of scripts will be found in the Appendix (*m*). *Each script should be identified by reference to a distinguishing letter marked upon it, thus : A, B, C, etc.*

Will already lodged.

If a will, referred to in the affidavit, has already been lodged in a district registry, the district registrar should be notified and requested to forward it to the principal registry for the purposes of the action. If the will has been lodged in the principal registry for a grant, or any other cause, the attention of the clerk in the filing room should be drawn to the fact.

Inspection of scripts.

Scripts may be inspected at the Contentious Department of the registry upon payment of the necessary fee (*n*).

No party, nor his solicitor, may, except by leave, inspect the affidavit of scripts, or the scripts annexed thereto, filed by any other party, unless his own affidavit shall have been filed. (See Rule 32, C. B.).

Who may make the affidavit.

The affidavit should be sworn by the plaintiff or defendant. In special circumstances the Court may allow their solicitor to make the affidavit on their behalf (*o*).

Further affidavit of scripts.

A further affidavit of scripts may be ordered if necessary (*p*).

Sub-section 2.—*Pleadings* (*q*).

Questions as to pleadings dealt with under the summons for directions.

Upon the summons for directions the registrar determines whether the indorsement on the writ shall stand for the state-

(*k*) For the methods by which persons may be compelled to bring in testamentary documents within their control, see *ante*, pp. 502, 503.
(*l*) Form of affidavit : App. VII, Form 11.
(*m*) App. VII, Form 49.
(*n*) App. V, Part 2.
(*o*) See *Walsh* v. *Tallon* (1893), L. R. Ir. 31 Ch. 393.
(*p*) *Peacock* v. *Lowe* (1867), 1 P. & D. 478 n.
(*q*) The rules as to pleadings are dealt with in detail in Chapters VII—X : *vide post*, pp. 587—604.

ment of claim, and fixes the time for the delivery of the statement of claim, if any, and for the delivery of the defence.

No reply without leave.

No reply is to be delivered unless ordered, leave being granted under the summons for directions (*r*).

Sub-section 3.—*Admissions.*

Admissions.

Any party to a cause may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party (*s*).

Notice of admission.

Notice to admit documents.

Notice to admit facts.

Either party may by notice call upon the other party to admit any document (*t*), and any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call upon any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice (*u*).

As to admissions generally see Order XXXII and the notes thereto in the Annual Practice.

Sub-section 4.—*Discovery and Inspection.*

Discovery and inspection of facts and documents bearing on history of deceased.

Discovery will, in a probate action, be ordered of all facts and documents which, throwing light upon the history of the deceased, may possibly become material to the issues raised on the pleadings. For it is evident that in cases where issues of undue influence, fraud, or want of testamentary capacity are raised—and with somewhat less force where want of knowledge or approval is pleaded—the Court will hesitate to regard as irrelevant any facts or documents which bear upon the testator's mode of life and surroundings, particularly in view of the impossibility of determining beforehand what evidence relating to any particular period in the testator's life may or may not prove material at the trial.

and of documents and papers belonging to him.

Further, discovery and inspection, unless some special reason be given to the contrary, will be ordered in most cases of all documents and papers belonging to the deceased, relating to his property and his will. After the death of a testator his papers fall into the hands sometimes of an executor, sometimes of a relative. These papers may be of the highest importance to both sides, and it would be both inconvenient and unjust to

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(*r*) See Order XXIII, r. 1.
(*s*) Order XXXII, r. 1.
(*t*) *Ibid*, rr. 2 and 3.
(*u*) *Ibid*, r. 4. See also Order XXI, r. 9, as to liability for costs of a party who denies or does not admit facts which in the opinion of the Court should have been admitted. For forms of notice, see App. VII, Forms 112, 116.

allow the persons who happen to have possession of them at the time of the death, to retain them until the trial, and to avail themselves of them for their own purposes without giving the other side an opportunity of examining them (*x*).

The Court, in addition to considering the respective interests of the contending parties, has to ensure that justice is done to the deceased, and it is said that in probate actions a greater latitude in ordering discovery is shown than in other actions (*y*).

In *Hunt* v. *Anderson* (*z*) it was held that the Court of Probate, by virtue of section 36 of the Court of Probate Act, 1857, had powers as extensive as the Court of Chancery to compel a discovery, and these powers are, by virtue of sections 20 and 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, retained by the Probate Division (*a*).

Practice.

The right to discovery is regulated by the rules previously existing in the Court of Chancery (*b*), but the practice is now governed by the Rules of the Supreme Court. In cases, however, for which no provision is made by these rules, the procedure previously in force is reverted to, unless it conflicts with that in Chancery (*b*).

Discovery and Inspection of Documents.

Discovery of documents :

When discovery of documents or their production and inspection is desired, the method of procedure varies according to the nature of the document.

(a) of scripts in the possession of the parties ;

If the document is a testamentary paper of the deceased, or a draft of or instructions for a will or codicil, and is in the possession of a party to the action, it is annexed to his affidavit of scripts (*c*).

(b) of scripts in the possession of third persons ;

If the document is a script in the possession of a person not a party to the action, its production may be secured by process under section 26 of the Court of Probate Act, 1857, or under section 23 of the Court of Probate Act, 1858 (*d*).

(c) of documents other than scripts.

In applications for discovery, production, and inspection of documents *other than scripts*, three courses are open to the practitioner (*e*) :—

Notice to produce

(1) Where the document has been referred to in his

(*x*) *Hunt* v. *Anderson* (1868), 1 P. & D., at p. 480.
(*y*) Tristram & Coote (16th ed.), p. 521.
(*z*) (1868), 1 P. & D. 476.
(*a*) See *Harvey* v. *Lovekin* (1884), P. D. 122; *Euston* v. *Smith* (1884), 9 P. D. 57.
(*b*) *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644.
(*c*) *Vide ante*, pp. 570, 571. The affidavit of scripts is open to inspection by the other side after, but not as a general rule before, the latter has filed his affidavit of scripts.
(*d*) *Vide ante*, pp. 502, 503.
(*e*) See, on this subject, Odgers on Procedure, Chapter XVI.

documents referred to in the pleadings or affidavits; or specific documents.

opponent's pleadings or affidavits, he may give notice under Order XXXI, r. 15, to his opponent to produce the document for inspection (*f*).

(2) Where he knows that certain specific documents, clearly identified, are in his opponent's possession, and desires inspection of them, his right course is to proceed under Order XXXI, r. 19A (3).

General discovery of documents

(3) But where, as is generally the case, he has no clear idea as to the documents in his opponent's possession, but wishes to obtain general discovery of all documents relating to the matters in question in the action, he may apply under Order XXXI, r. 12.

usually dealt with in summons for directions.

The order for discovery and inspection by all parties is usually made as a matter of course upon the summons for directions, and the time for compliance with the order is fixed. No affidavit in support of the application is required.

It has been held that one defendant can obtain discovery from his co-defendant, if there is some right to be adjusted between them in the action (*g*).

What affidavit of documents should contain.

The party against whom the order is made, files an affidavit (*h*) specifying the documents material to the issues in the action which are or have been in his possession, and also which, if any, of such documents he objects to produce (Order XXXI, r. 13) and the grounds of his objection. Documents which he is prepared to swear are irrelevant to the issues in the action are omitted from the affidavit, and his oath is as a general rule conclusive on this point until the trial (*i*).

Irrelevant documents omitted.

Irrelevant parts of a relevant document sealed up.

Where a plaintiff produced the pass-books of her banking account, having sealed up parts of them which were, as she deposed, irrelevant to the matters in issue, an application by the opposite parties for inspection of the banker's books containing the plaintiff's banking account was refused, on the ground that such an order would in effect disclose such part of the books as she had sworn to be irrelevant (*k*).

Inspection of bank books.

For leave to inspect entries in the books of a bank under the Bankers' Books Evidence Act, 1879, application, supported by affidavit, is made to the registrar. Notice of the summons should be given to the party whose account is in question (*l*).

(*f*) As to the procedure, Order XXXI, rr. 16—18, and the notes thereto in the Annual Practice should be consulted.

(*g*) *Shaw* v. *Smith* (1886), 18 Q. B. D. 193; *Alcoy* v. *Greenhill* (1896), 74 L. T. 345.

(*h*) App. VII, Form 50.

(*i*) See notes to Order XXXI, in the Annual Practice.

(*k*) *Parnell* v. *Wood*, [1892] P. 137.

(*l*) *Arnott* v. *Hayes*, 36 Ch. D. 731.

When, on application for an order for inspection, privilege is claimed for any document, the Court or a Judge may inspect the document for the purpose of deciding as to the validity of the claim (*m*). This power has been held to extend to cases where a document is alleged to be irrelevant (*n*).

Where privilege claimed, or document omitted as irrelevant, Court may inspect the document.

The following summary of the grounds on which production of a document may be refused is based on Chapter XVI of Mr. Blake Odgers's book on the Principles of Procedure (*o*).

Grounds upon which privilege may be claimed :

Production may lawfully be refused on seven grounds :—

(1) That the document relates solely to the deponent's own title (*p*);

(1) Document of title.

(2) That it relates solely to the deponent's own case, and contains nothing to assist his opponent's case or to impeach his own;

(2) Deponent's own case.

(3) That it was prepared for submission to counsel or to a solicitor for advice on the facts stated therein; but this privilege does not extend to communications made between a client and a solicitor relating to a crime or fraud, or its subject-matter, if such crime or fraud is in issue in the action (*q*) :

(3) Communications between solicitor and client.

(4) That it was prepared solely for the purpose of assisting the deponent or his legal advisers in some actual or anticipated litigation (*r*).

(4) Documents prepared with a view to litigation.

(5) That the document, if produced, would tend to criminate the deponent or to subject him to a forfeiture :

(5) Incriminating documents.

(6) That it is the property of a third person who objects to its production (*s*). But no privilege can be claimed for private letters written to the deponent by strangers to the suit, even though expressed to be written in confidence, and though the writer forbids their production (*t*).

(6) Documents which are the property of a third person.

(*m*) Order XXXI, r. 19A, (2).

(*n*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 826.

(*o*) For further details, and for the authorities (other than probate cases, which alone are here cited), the practitioner is referred to the notes to Order XXXI in the Annual Practice by the learned author of Bray on Discovery.

(*p*) See *Egremont Burial Board* v. *Egremont Iron Ore Co.* (1880), 14 Ch. D. 158; *O'Rourke* v. *Darbishire*, [1920] A. C. 581.

(*q*) *Reynell* v. *Sprye* (1846), 10 Beav. 51; *R.* v. *Cox* (1884), 14 Q. B. D. 153; *Williams* v. *Quebrada*, [1895] 2 Ch. 751; *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A. C. 196.

(*r*) See *Young* v. *Holloway* (1887), 12 P. D. 167; *Curtis* v. *Beaney*, [1911] P 181.

(*s*) Where the solicitor for the plaintiff had acted for many years as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, cash ledgers, bankers' cash books and other memoranda relating to her affairs, it was held that these papers were the private property of the solicitor, and the plaintiff could not be compelled to produce them : *O'Shea* v. *Wood*, [1891] P. 237; *ibid.*, at p. 286, C. A.

(*t*) *Hopkinson* v. *Lord Burghley* (1867), 36 L. J. Ch. 504. Where, during the progress of an action four anonymous letters were received relating to the matters in dispute, two by the plaintiff, one by her solicitor and another by her counsel, it was held that the letters to the plaintiff must be produced, but

(7) State documents.

(7) That the document is a State document.

Order for production.

Facsimile copy.

The registrar has power to order the production by a party of documents in his possession or power which relate to any matter in question in the cause (*u*). In a proper case the party in possession of a document may be ordered to permit a facsimile or photographic copy of it to be taken by his opponent (*x*).

Order for inspection.

Similarly the registrar may make an order for inspection in such place and in such manner as he may think fit (Order XXXI, r. 18). And if privilege from inspection is claimed, he may himself inspect the document (*y*) (Order XXXI, r. 19A (2); see also Order XXXVII, r. 7, and generally the notes to Order XXXI in the Annual Practice).

The party seeking discovery may be, but by the recent practice seldom is (*z*), ordered to lodge as security £5 in Court.

Under Order XXXI, r. 18 (2), an application to inspect documents, other than those referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, is to be founded on an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Further and better affidavit.

A further and better affidavit of documents is applied for on notice under the summons for directions, but the applicant must be able to show *from the affidavit of documents itself, or from the documents disclosed in it* (or from some admission on the pleadings), that the deponent has in his possession other material documents which he has not disclosed (*a*).

Interrogatories (*b*).

Interrogatories in probate actions.

Interrogatories are allowed in probate actions as in any other action in the High Court, the only distinction being that in probate actions interrogatories as to the mode of life and past history of the testator, and his relations with the parties to the suit even at times remote from the period when the will was

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that those to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action, and by reason of their being plaintiff's legal advisers in the action: *Young* v. *Holloway* (1887), 12 P. D. 167.

(*u*) Order XXXI, r. 14.

(*x*) *Davey* v. *Pemberton* (1862), 11 C. B. (N.S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.

(*y*) See *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 826; *ante*, p. 575.

(*z*) See Order XXXI, r. 26, and the note thereto in the Yearly Practice.

(*a*) *Jones* v. *Montevideo Co.* (1880), 5 Q. B. D. at p. 558; *Compagnie Financière* v. *Peruvian Co.* (1882), 11 Q. B. D., at p. 63; *Hall* v. *Truman* (1885), 29 Ch. D. at p. 319; *Lyell* v. *Kennedy* (1884), 27 Ch. D. at p. 19.

(*b*) See App. VII, Form 100; App. VIII, Precedent 46. Form of answer to interrogatories: App. VII, Form 101. Form of order: App. VII, Form 233.

executed, are sometimes allowed when the issues justify them (*c*). Thus in *Young* v. *Holloway* (*d*), which was an action to revoke probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, the plaintiff delivered interrogatories, which were allowed, asking what sums the defendants had received from the testator by way of payment for services, of loan, or of gift, and whether the universal legatee (one of the defendants) had made over any and what part of the property, since the testator's death, to the other defendants.

Rules.

The rules as to interrogatories are Order XXXI, rr. 1—11, and to these, and the notes thereto in the Annual Practice, the practitioner is referred.

Practice.

Leave to deliver interrogatories is obtained from the registrar by notice under the summons for directions. A copy of the proposed interrogatories and of the pleadings must be left in the registry when the summons is issued. A copy of the interrogatories should also be delivered to the other side with the notice at least two clear days before the hearing (*e*).

Security for costs.

Security for the costs of the interrogatories may be ordered under Order XXXI, r. 26 (*f*), but this is now seldom enforced.

Answer.

Interrogatories are to be answered by affidavit to be filed within ten days or within such other time as is ordered (*g*). The time for answer is usually fixed by the registrar.

Interrogatories before defence.

Leave to deliver interrogatories will not, as a general rule, be given to the defendant before his defence is delivered (*h*).

Sub-section 5.—*Particulars and Further Substance of the Case.*

Particulars not often applied for,

Applications for particulars are not common in probate actions. But if occasion should arise for such an application, it should be made to a registrar by notice under the summons for directions (*i*).

the usual course being to apply for further substance of the case.

Order XIX, r. 25A, provides : " In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely, and further where it is pleaded that the testator was not of sound

(*c*) *Vide ante*, p. 572.
(*d*) (1887), 12 P. D. 167. Cotton, L.J., said : " We know nothing about the evidence, but in determining whether answers to interrogatories should be given, we must consider whether the answers given to the plaintiff seeking discovery may not be relevant and assist the plaintiff in completing her evidence."
(*e*) Order XXXI, r. 2.
(*f*) *Vide ante*, p. 576.
(*g*) See Order XXXI, r. 8.
(*h*) See note to Order XXXI, r. 1, in the Annual Practice.
(*i*) A copy of the pleadings must be annexed to the summons.

mind, memory and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial." If the plaintiff considers that the " substance of the case " delivered is incomplete, or not sufficiently detailed, he may apply by notice under the summons for directions for further substance of the case (*i*).

What degree of particularity can be insisted on.

Rule 25A was added to Order XIX in July, 1901, and before the rule it was considered that particulars of unsoundness of mind or of undue influence ought not to be ordered. Thus in *Hankinson* v. *Barningham* (*k*), Sir J. Hannen declined to order particulars of testamentary incapacity to be given. " A plea which depends upon the whole life and conduct of a man," he said, " cannot be made the subject of particulars." And in *Cave* v. *Torre* (*l*) it was stated by Esher, M.R., " there are two facts to be proved : first, that the plaintiff was a lunatic. . . . It is said the defendant must give particulars. What particulars can he give of that? There are no particulars to give. There is *evidence* to give. How is it proved that a man is a lunatic? The evidence may be of some one act, or may also consist of a great many different facts, but there is no law which requires you to give particulars of the evidence which you are going to adduce to prove a particular fact." Again, in *Salisbury* v. *Nugent* (*m*) it was held that the defendants might be ordered to give the names of the persons against whom undue influence was charged, but could not be ordered to give particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place.

Effect of O. XIX, r. 25A on the practice of the Court.

But in *McLeod* v. *The Earl of Shrewsbury* (*n*), Lord Merrivale, P., held that the decisions in *Hankinson* v. *Barningham* (*k*) and *Salisbury* v. *Nugent* (*m*) must be considered to be overruled by Order XIX, r. 25A, and directed that the plaintiff was entitled to have stated in the substance of the case particulars of the nature of the unsoundness of mind, and of the character of the undue influence, and of the acts alleged in the exercise of it, with necessary dates, but that the names of the persons present need not be given. It must not, however, be assumed that detailed particulars will be ordered in every case. A comparison of the particulars asked for and those ordered in *McLeod* v. *Earl of Shrewsbury*, *supra*, will show the degree of particularity required.

(*i*) A copy of the pleadings must be annexed to the summons.
(*k*) (1883), 9 P. D. 62.
(*l*) (1886), 54 L. T., at p. 518.
(*m*) (1883), 9 P. D. 23.
(*n*) [1922] P. 112. *Wallace* v. *McDowell*, [1920] 2 Ir. R. 194, was not followed.

Order XIX, r. 6, provides that where the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, particulars (with dates and items if necessary) shall be stated in the pleading (*o*).

Fraud, etc., must be pleaded with particularity.

By Order XIX, r. 8, the party at whose instance particulars have been delivered shall, unless otherwise ordered, have the same length of time for pleading after the delivery of particulars that he had at the return of the summons.

Time for pleading after delivery of particulars.

Sub-section 6.—*Place of Trial.*

The place of trial is fixed by the registrar under the summons for directions. If any other venue than Middlesex is desired, affidavits stating the facts will be required.

Place of trial fixed by the registrar.

(1) *Middlesex.*

The Probate Division of the High Court is the Court in which a probate action will be tried, unless good cause to the contrary is shown (*p*). A testamentary suit properly belongs to the Court of Probate, and should, unless for special reasons, be tried there (*p*).

Trial in the Probate Division unless good cause shown.

(2) *Assizes.*

The registrar has power to order trial of a probate action at assizes (*q*). The application must be supported by an affidavit (*r*). The consent of the parties is not in itself sufficient (*s*).

Application for trial at assizes to be supported by affidavit.

The only ground on which trial at assizes is directed, is the saving of expense to the parties of bringing the witnesses to London. Where, therefore, the person who opposes an application for trial at the assizes is willing to undertake to pay, in any event, the extra expense to his opponent of bringing witnesses to London, he is entitled to have the action tried in the Probate Court (*t*).

Grounds on which trial at assizes is directed.

(*o*) See *Harley* v. *Russell*, [1917] 2 Ir. R. 103.

(*p*) *Brandreth* v. *Brandreth* (1862), 2 S. & T. 446. See also *Cooper* v. *Moss* (1858), 1 S. & T. 143.

(*q*) *King* v. *Brontoft* (March 20, 1899), not reported, cited in Tristram and Coote (16th ed.), at p. 537, where the contrary decision of Butt, J., in *Lancaster* v. *Brook* (1889), 14 P. D. 80, was overruled by Sir F. H. Jeune as having been made *per incuriam*. The power to cause issues of fact to be tried at assizes was conferred by ss. 35 and 37 of the Court of Probate Act, 1857, repealed by 55 & 56 Vict. c. 19 (S. L. R.).

(*r*) *Brandreth* v. *Brandreth* (1862), 2 S. & T. 446.

(*s*) *Dunn* v. *Dunn* (1860), 1 S. & T. 521; *Bull* v. *Bull* (1860), 30 L. J. P. 40, n.

(*t*) See Dixon on Probate (2nd ed.), p. 425; Tristram & Coote (16th ed.), p. 538; note to Order XXXVI, r. 1, in the Annual Practice; and see *Ridgway* v. *Abington* (1863), 11 W. R. 500.

Grounds on which it is refused.

Applications for trial at assizes have been refused on the ground that such a course would entail unreasonable delay (*u*); that the cause has been the occasion of much discussion and feeling at the place where the assize is to be holden (*x*); that the questions to be decided are peculiar or intricate (*y*).

Mode of trial at assizes.

The Court has power only to direct an issue to be tried at assizes before a Judge with a jury; application for trial without a jury may be made, by consent of both parties, to the Judge of assize (*z*).

Practice when trial at assizes is ordered.

When trial at assizes is ordered notice should be given to the Contentious Department for transmission of the scripts and necessary papers to the district probate registry nearest to the assize town, and arrangements should be made with the district registrar for their production at the trial.

Associate's certificate.

The associate's certificate must be obtained at the conclusion of the trial, and filed at the principal registry, together with a copy of the pleadings, in order that judgment may be entered (*a*). The certificate must show that evidence was called at the trial, and must set out the findings of the Court, or the verdict of the jury on the various issues, and the order as to the costs of the action (*b*).

(3) *County Courts.*

Probate jurisdiction of County Courts in contentious business.

In probate actions, in cases where a registrar of the principal registry is satisfied by affidavit that the gross value of the personal estate of the deceased is under £200, and that the value of the real estate is under £300, the Judge of the County Court having jurisdiction in the place of abode of the deceased has the jurisdiction of the High Court in respect of any contentious matter arising in connection with an application for a grant or revocation (*c*).

Contentious matter may be remitted to County Court.

It is not obligatory on any person to make application for probate or administration through a County Court; but where

(*u*) *Ingram* v. *Fuller*, not reported, cited Tristram & Coote (16th ed.), 538; and see *Esling* v. *Dixon*, not reported, *ibid.*

(*x*) *Cooper* v. *Moss* (1858), 1 S. & T. 143.

(*y*) *Beech* v. *Rathbone* (1865), 35 L. J. P. 26. And see *Ridgway* v. *Abington* (1863), 32 L. J. P. 107; 11 W. R. 500.

(*z*) *Bushell* v. *Blenkhorn* (1866), 1 P. & D. 89.

(*a*) For form of decree see App. VII, Form 96.

(*b*) A fee of £2 is payable at the registry for the decree, in addition to the fee paid for the certificate. There is also a fee of 2s. 6d. to be paid for filing the certificate.

(*c*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 150. The value mentioned is the actual value of the property free from all questions as to mortgages or other charges: *Davies* v. *Brecknell* (1879), 2 P. & D. 177; and see *Thomas* v. *Nurse* (1870), 3 L. J. P. 80. For the procedure, in a case commenced in the County Court, where the property is found to be more than £500, or where it is in dispute whether or not it exceeds £500, see *Sunderland* v. *Glover* (1915), 112 L. T. 128.

in any contentious matter arising out of an application for a grant or revocation of probate or administration, the Court is satisfied that the state of the property and the place of abode of the deceased were such as to give jurisdiction in the matter to a County Court, the Court may remit the matter to that County Court, and the judge thereof shall proceed in the matter as if the application had been made to the County Court in the first instance (*d*).

Mode of application for trial at County Court.

Applications for trial at a County Court are made to a registrar of the principal registry, and must be supported by an affidavit (*e*). The registrar will sign a minute founding the jurisdiction of the Court (*f*).

The application is made *ex parte*, if no appearance has been entered to the warning; after appearance to the warning or to the writ it is made on summons. The matter can be dealt with on the summons for directions (*g*).

Transmission of documents.

The principal registry should be notified to transmit the necessary documents to the nearest district probate registry for production at the trial.

After transfer to County Court the Judge of the Probate Division has no power to give directions.

After transfer the action becomes for all purposes a County Court case; the Judge of the Probate Division cannot give directions as to the mode of trial (*h*), or direct a new trial (*i*), or make any order as to costs, whether incurred before or after the transfer (*k*). Nor can any other order be made in the cause by a Judge of the Probate Division, unless the case is brought before that Court by way of appeal (*l*) from the determination of the Judge of the County Court (*m*).

Procedure in County Court.

Before the entry of any plaint the plaintiff must lodge with the registrar of the County Court an office copy of the minute signed by the probate registrar authorising the commencement of proceedings (*n*).

(*d*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 150. Where proceedings have been commenced in the Court of Probate, the Court will receive evidence from both sides as to the state of the property and the place of abode of the deceased before it determines whether it will or will not send the cause to the proper County Court: *Slater* v. *Alvey* (1870), 2 P. & D. 154. When the County Court has jurisdiction, the Court of Probate may, though application be made on behalf of all the parties for trial at assizes, still, in its discretion, direct it to be tried in the County Court: *Dunn* v. *Dunn* (1860), 1 S. & T. 521.

(*e*) The affidavit, which must show that the conditions, laid down by the statute as necessary to found the jurisdiction of the County Court, are fulfilled, is held to be conclusive, unless disproved while the matter is pending: see Court of Probate Act, 1857, s. 57.

(*f*) For form of minute see App. VII, Form 104.

(*g*) Tristram & Coote (16th ed.), p. 540.

(*h*) *Norris* v. *Allen* (1862), 2 S. & T. 601.

(*i*) *Zealley* v. *Veryard* (1866), 1 P. & D. 195.

(*k*) *Macleur* v. *Macleur* (1868), 1 P. & D. 604.

(*l*) As to appeals from County Court, *vide post*, pp. 618, 620.

(*m*) *Zealley* v. *Veryard* (1866), 1 P. & D. 195.

(*n*) County Court Rules, Order XLIX, r. 4.

County Court Rules, Order XLIX.

Rules of practice have been framed for proceedings in the County Courts, and to these the practitioner is referred (*o*). The rules and practice of the Probate Division should be followed, so far as they apply, in default of provisions in the County Court Rules (*p*).

Certificate of decree to be filed.

When judgment has been pronounced, the certificate of the decree should be filed in the registry with the papers to lead the grant, or in cases of revocation, should be lodged at the Notation Department.

Sub-section 7.—*Mode of Trial.*

Mode of trial ordered on summons for directions.

The registrar, on the summons for directions, orders the cause to be tried before the Court itself or by a common or special jury.

Discretion of the Court as to trial without a jury.

The discretion of the Court in prescribing in what cases trials are to be with or without a jury is exercised in accordance with R. S. C., Order XXXVI., rr. 2—7.

Order XXXVI, r. 4, provides : " The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which immediately before November 1, 1875, could, without any consent of parties, have been tried without a jury."

Former right of heir-at-law to insist on trial by jury.

The effect of this rule is that where the testator or intestate died before January 1, 1926, an heir-at-law, who has been cited or otherwise made a party to the action, retains his right to have any question of fact arising in the action tried by a jury; but the right of an heir-at-law to insist on trial by jury cannot arise in the case of deaths on or after January 1, 1926 (*r*).

In all other cases the question is in the discretion of the Court.

But in all other cases (including the case where the heir-at-law retains his right to trial by jury, but does not insist upon it (*s*)), the mode of trial is in the direction of the Court (*t*). The refusal of the Court to order trial by a jury is subject to an

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(*o*) County Court Rules, Order XLIX : see the Annual County Courts Practice, Vol. II.

(*p*) County Court Rules, Order XLIX, r. 12.

(*q*) Supreme Court of Judicature (Consolidation) Act, s. 99, sub-s. 1 (h).

(*r*) The Court of Probate Act, 1857, s. 35, provided : " It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried by a special or common jury before the Court itself, . . . and such question shall be so tried by a jury in any case where an heir-at-law, cited or otherwise made a party to the suit or proceeding, makes application to the Court of Probate for that purpose." The section was repealed by 55 & 56 Vict. c. 19 (S. L. R.).

(*s*) *Burgoine* v. *Moordaff* (1883), 8 P. D. 205. Note that Order XXXVI, r. 26, referred to in that case, is in substance in the same terms as the present Order XXXVI, r. 4.

(*t*) *Quick* v. *Quick* (1864), 3 S. & T. 460; *Burgoine* v. *Moordaff*, *supra*; Order XXXVI, r. 4.

appeal, but the Court of Appeal will not interfere unless it is clear that the discretion has been wrongly exercised (*u*). Appeal.

It is stated (*x*) that where issues of testamentary capacity, undue influence, or fraud are raised, the practice of the Court is to grant a jury on the application of either party (*y*). In certain cases trial by a jury is usually ordered, and in others usually refused.

Trial by jury will not be ordered when the only issue raised is as to the due execution of a will. And generally when the issues are such that they can more satisfactorily and conveniently (*z*) be disposed of by the Court itself, the cause will be heard without a jury on the application of one of the parties, even though the other (*a*) opposes the application (*b*).

The Court may order certain of the issues to be tried by a jury, reserving others for itself alone (*c*). Trial of some only of the issues by a jury.

The Court may also order that a second trial, occasioned by the disagreement of the jury in the first instance, should be tried by a Judge without a jury (*d*).

Either party may apply (*e*) when a direction for trial by a common jury has been made, for a special jury. Application for special jury.

The plaintiff or defendant in any cause or matter in which he is entitled to a jury may have the issue tried by a special jury, on an application made at the time at which the mode of trial is fixed, or if the Court or Judge thinks fit at any later stage; provided that the Court or Judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just (Order XXXVI, r. 9).

SUB-SECTION 8.—*Examination of Witnesses before Trial.*

As a general rule, witnesses at the trial of any action are to be examined *viva voce* and in open Court (*f*). Witnesses generally examined *viva voce* in open Court.

The Court or a Judge may, however, at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read

(*u*) *Burgoine* v. *Moordaff* (1883), 8 P. D. at p. 208.

(*x*) Tristram & Coote (16th ed.), p. 542.

(*y*) See *Queen's Proctor* v. *Williams* (1862), 31 L. J. P. 86. In this case a question of pedigree was directed to be tried before a jury under s. 35 of the Court of Probate Act, 1857.

(*z*) See Order XXXVI, r. 5.

(*a*) Not being the heir-at-law: *vide ante*, p. 582.

(*b*) See *Smith* v. *Hoad* (1864), 3 S. & T. 462, where the main issue to be decided was the presumptive revocation of a will by the testator, and *Quick* v. *Quick* (1864), 3 S. & T. 462; and *James* v. *Foster* (1867), 36 L. J. P. 46, where the main issue was the contents of a lost will. In the last-mentioned case Sir J. P. Wilde said: "I think it would be unreasonable to ask twelve men to agree as to the details of the contents of a will which is not forthcoming."

(*c*) *Crispin* v. *Doglioni* (1861), 2 S. & T. 493; *James* v. *Foster* (1867), 36 L. J. P. 46. And see, as to the power of the Court to sever the issues Order XXXVI, r. 7.

(*d*) *Burgoine* v. *Moordaff* (1883), 8 P. D. 205.

(*e*) On the summons for directions or by notice thereunder.

(*f*) Order XXXVII, r. 1; *Warner* v. *Mosses* (1880), 16 Ch. D. at p. 101. And see Court of Probate Act, 1857, s. 31.

The Judge may order that affidavit of a witness may be read at the trial.

at the hearing or trial, on such conditions as may be reasonable, but where it appears that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, such an order will not be made (*g*).

Application, how made.

Applications for leave to take evidence by affidavit are made to the Judge on summons.

Affidavit sworn by witness on proving will in common form allowed to be read.

In a suit for revocation of probate, where it appeared that every effort had been made to find one of the attesting witnesses, the Court, with doubt and hesitation, allowed an affidavit, made by him eight years before, when the will was proved in common form, to be admitted as evidence of execution and capacity (*h*).

In *Cook* v. *Tomlinson* (*i*) proof of a will in solemn form by affidavit was not permitted, on the ground that the non-appearance of the parties cited might be through reliance on the examination of the attesting witnesses in open Court. But in *Hayes* v. *Willis* (*k*), an undefended action, in which neither of the attesting witnesses could be found, an affidavit previously sworn by one of them in support of an application for probate in common form was admitted as evidence of due execution.

Power of Court to order examination of witnesses before trial.

Order XXXVII, r. 5, provides that where it shall appear necessary for the purposes of justice, an order may be made for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person.

But by Order XXXVII, r. 18, depositions are not to be given in evidence at the hearing or trial, unless the Court is satisfied that the deponent is dead, or without the jurisdiction, or unable from sickness or other infirmity to attend the trial (*l*).

Order for examination of witness within the jurisdiction.

Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is made to the registrar by notice under the summons for directions, and should be supported by an affidavit, sworn by the applicant's solicitor, stating (1) the name of the witness to be examined; (2) that he is a material and necessary witness, without whose

What the affidavit must state.

(*g*) See Order XXXVII, r. 1, and notes thereto in the Annual Practice. Upon an agreement in writing between the solicitors of all parties, all the evidence at the hearing may be taken by affidavit: see *New Westminster Brewery Co.* v. *Hannah* (1875), 1 Ch. D. 278.

(*h*) *Gornall* v. *Mason* (1887), 12 P. D. 142.

(*i*) (1876), 24 W. R. 851. See also *Brown* v. *White* (1876), 24 W. R. 456; *Re Woolley's Trusts* (1876), 24 W. R. 783.

(*k*) (1906), 75 L. J. P. 86.

(*l*) Where depositions had been taken in an action to perpetuate testimony and subsequently published, and the witnesses, although alive, were proved to be incapacitated by age and infirmity from attending the trial, in contemplation of which the depositions were taken, the Court of Appeal ordered that the depositions (saving all just exceptions) should be admitted at the trial without further evidence, and reversed an order directing the evidence of the witnesses to be taken over again before an examiner: *Beresford* v. *Att.-Gen.*, [1918] P. 33.

evidence the applicant cannot safely proceed to trial; and (3) that he is about to go abroad, or that from age, illness, infirmity, or some other cause he is unlikely to be able to attend at the trial. If the cause be illness or infirmity, an affidavit by a doctor is required.

The witness is examined *viva voce* before a person nominated by the registrar (*m*). Order XXXVII, rr. 10—17 contain provisions as to the mode in which the examination is to be conducted.

Depositions to be filed.

The order appointing the examiner must be annexed to the depositions when these are sent to the registrar. After the depositions have been duly received at the registry, they must be filed by the practitioner.

Commission for the examination of witnesses.

When the witness to be examined is out of the jurisdiction of the Court, the registrar will issue a commission (*n*) for his examination, unless, as indicated below, the appropriate process is by letters of request.

Practice.

The application is made upon notice under the summons for directions and is to be supported by an affidavit showing (1) that the application is made *bona fide*, (2) that the witnesses can give evidence material to the issue, and (3) that there is some good reason why they cannot be examined in England. The affidavit should state the name and address of at least one witness whom it is desired to examine (*o*).

Where the witness is resident in Scotland or Northern Ireland (*p*), the affidavit should disclose special circumstances such as would justify his examination before trial if he were resident in England (*q*).

Countries where allowed.

For the countries which raise no objection to the taking of voluntary evidence on commission before British consuls or other persons empowered by the High Court reference should be made to the notes under Order XXXVII, r. 6, in the Annual Practice.

Foreign Office consent.

Before the name of a British consul is inserted in an order for the issue of a commission, the consent in writing of the Foreign Office must have been obtained (*r*).

Commission to be settled.

The draft commission is left in the Contentious Department

(*m*) For form of order, see App. VII, Form 234.

(*n*) Forms of commission: App. VII, Forms 90, 91; form of order: App. VII, Form 235.

(*o*) It is not necessary that the names of all the witnesses should be mentioned in the commission; *Nadin* v. *Basset* (1883), 25 Ch. D. 21.

(*p*) As to compelling attendance of witnesses in such cases, see 6 & 7 Vict. c. 82, ss. 5—7; 13 Geo. 5, sess. 2, c. 2; the Irish Free State (Consequential Adaptation of Enactments) Order, 1923; 22 Vict. c. 20; 48 & 49 Vict. c. 74; *Campbell* v. *Att.-Gen.* (1867), L. R. 2 Ch. App. 571.

(*q*) *Vide supra.*

(*r*) This consent is not required where an order for the examination of a witness is made under the Conventions of 1922, 1924 and 1926 with France, Belgium and Czechoslovakia respectively.

for settlement by the registrar, with the order directing its issue, and after the commission, as settled, has been engrossed, it is brought in to be signed and sealed.

Letters of request.

If in any case the Court or Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission (*s*).

What countries require letters of request.

The following countries require in all cases letters of request through the diplomatic channel :—Austria, Germany, Jugo-Slavia, Luxemburg, Roumania, Hungary, Switzerland, and Latvia. But reference should be made to the notes in the Annual Practice under Order XXXVII, r. 6A, for periodical addition to and amendment of this list.

Irish Free State.

Letters of request can be issued for the examination of witnesses in the Irish Free State.

Practice as to letters of request.

The draft letters of request are left for settlement by the registrar, and after engrossment are brought into the registry accompanied by a translation, and by copies of all necessary pleadings and interrogatories, with translations thereof (*t*). An undertaking in the required form (*u*) as to the costs to be incurred by the Foreign Office in respect of the letter of request must also be filed. Having been signed by the President, and sealed, the letters of request are transmitted by the registrar to the Foreign Office to be forwarded to the proper tribunal (*x*).

Special procedure in France, Belgium and Czecho-slovakia.

Evidence of witnesses in France, Belgium, and Czecho-slovakia is taken by special procedure under conventions entered into with those countries (*y*).

Special examiner.

A special examiner may be appointed under Order XXXVII, r. 5, for the examination or cross-examination of witnesses abroad (*z*).

Mandamus.

The Court has power under 13 Geo. 3, c. 63, ss. 40, 44 and 45, and 1 Will. 4, c. 22, ss. 1 and 2, to order a mandamus to issue to an Indian or colonial Court to summon before it and examine a material witness resident within the jurisdiction of such Court. See also 48 & 49 Vict. c. 74.

Application for a mandamus is made to the Judge on motion.

(*s*) Order XXXVII, r. 6A. The application for an order for the issue of letters of request is made upon notice under the summons for directions.

(*t*) It is the duty of the practitioner to ascertain what documents will be required in each particular case.

(*u*) See Form No. 37 CC in Appendix K of the Annual Practice.

(*x*) Further details as to the practice with regard to letters of request are set out in the notes to Order XXXVII, r. 6A in the Annual Practice. It should be noted that special requirements have to be observed in the transmission of letters of request to Brazil.

(*y*) Reference should be made to Order XXXVII, r. 6B, for the practice in these cases. The conventions are set out in the Yearly Practice, Vol. II, Part 5.

(*z*) App. VII, Form 236. The application, which is made by notice under the summons for directions, is made less frequently than applications for a commission or letters of request. An affidavit in support of the application will be necessary.

CHAPTER VII.

PLEADINGS IN PROBATE ACTIONS.

SECTION 1.

DISTINCTIVE FEATURES.

Distinctive features.

PLEADINGS in probate actions are now subject to the provisions of Order XIX of the Rules of the Supreme Court, and have the following distinctive features :—

Indorsement on writ may stand for statement of claim.

(1) In actions for probate in solemn form the registrar frequently orders that the indorsement on the writ shall stand for the statement of claim (*a*).

Substance of case with defence.

(2) The forms of defence are stereotyped to a great extent, and it is necessary with regard to each of them to state the substance of the case on which it is intended to rely (*b*).

Revocation actions.

(3) In actions for the revocation of probate the statement of claim is practically a defence, and is governed by the same rule as regards the " substance of the case " (*c*).

Denial of defendant's interest in Interest actions, and clearing off of persons with prior interests.

(4) Where the plaintiff denies the interest of the defendant (*e.g.*, that he is related, in the capacity claimed, to the deceased), such denial must be included in his statement of claim (*d*).

(5) In interest actions the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant (*e*).

SECTION 2.

PLEADINGS GENERALLY.

Pleadings, how headed and endorsed;

Pleadings in probate actions are headed and endorsed thus :—

" In the High Court of Justice, Probate, Divorce, and Admiralty Division (Probate).

" In the estate of A. B., deceased.

" Between C. D., Plaintiff,
and
D. F., Defendant."

A pleading should be marked on the face thereof with the date on which it is delivered, and with the letter and number

(*a*) *Vide post*, p. 592.
(*b*) *Vide post*, pp. 597, 598.
(*c*) *Vide post*, p. 594.
(*d*) Order XX, r. 9; see *post*, p. 594.
(*e*) Rule 62, C. B. *Vide post*, p. 594.

of the action. It should be endorsed with a description of the pleading, and with the name and place of business of the solicitor and agent, if any, who delivers it (*f*).

how drawn.

The pleading should be divided into numbered paragraphs, all dates and numbers being expressed in figures. If the pleading is settled by counsel, he must sign his name at the end; if not so settled, it is signed by the solicitor, or by the party himself, if he is not represented by a solicitor (*g*).

Unnecessary prolixity.

Unnecessary prolixity may involve the pleader in costs (*h*).

Delivery of pleading.

A copy of the pleading is to be delivered at the address for service before 6 p.m. on any weekday, save Saturday, when delivery must be made before 1 p.m. (*i*). Pleadings are not filed, but two copies of the pleadings must be left at the registry when the cause is entered for trial.

Extension of time for delivery.

The time for the delivery of pleadings may be extended by consent, or by leave of the registrar obtained by notice under the summons for directions.

Particulars.

Pleadings are directed to be delivered "with particulars." The degree of particularity required in pleadings will be dealt with under the heading of "Defence" (*k*). Orders for further and better particulars and for further substance of the case have been dealt with in the preceding chapter (*l*).

Sub-section 1.—*Amendment of Pleadings.*

Amendment of pleadings.

The Court or a Judge may, at any stage, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just (*m*).

Statement of claim, when amended without leave.

Whenever a statement of claim is delivered, the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the writ (*n*).

The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any

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(*f*) Order XIX, r. 11. If it contains more than ten folios of seventy-two words it must be printed: Order XIX, r. 9.

(*g*) Order XIX, r. 4.

(*h*) *Ibid.*, r. 2. No technical objection can now be raised to any pleading on the ground of mere informality: Order XIX, r. 26. Further, on the subject of pleadings generally see Order XIX and the notes thereto in the Annual Practice.

(*i*) Order LXIV, r. 11.

(*k*) *Vide post*, pp. 596—602.

(*l*) *Vide ante*, pp. 577—579. The following cases may also be referred to as illustrating the degree of particularity required in pleadings in probate actions: *Glen* v. *Burgess* (1863), 3 S. & T. 43 (destroyed will); *Leake* v. *Hurst* (1860), 30 L. J. P. 39 (date of will omitted); *Queen's Proctor* v. *Williams* (1861), 31 L. J. P. 90; *Queen's Proctor* v. *Wallis* (1862), 31 L. J. P. 97 (particularity in setting out relationship to deceased); *Middlehurst* v. *Johnson* (1860), 30 L. J. P. 14.

(*m*) Order XXVIII, r. 1.

(*n*) Order XX, r. 4.

time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or where defence is delivered, but no order for reply is made, within ten days from delivery of the defence or the last of the defences (Order XXVIII, r. 2). But the indorsement on the writ in a probate action is subject to an affidavit verifying its statements and to a certificate by the registrar. Any amendment, therefore, must be subject to verification by affidavit and to leave of the registrar, which is obtained upon summons, or, after appearance, by notice under the summons for directions.

Leave required to amend indorsement on writ.

A defendant, similarly, may amend his counterclaim or set-off (*not* his defence) without leave, provided he does so before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence (*o*).

Counterclaim, when amended without leave.

In all other cases, application for leave to amend pleadings before trial must be made to the registrar under the summons for directions (*p*).

Leave is sometimes given to amend during the hearing of the action. Thus in an action (*q*) in which the burden of proof lay on the defendant, the plaintiff successfully applied, after the defendant had been cross-examined and his case had been closed, for leave to add a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentation, the evidence in support of such defence to be confined to matters arising out of the defendant's cross-examination (*r*).

Amendment at the trial.

SUB-SECTION 2.—*Striking out Pleadings and Stay of Proceedings.*

The Court or a Judge may at any time order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action (*s*);

Unnecessary and scandalous matter may be struck out.

(*o*) Order XXVIII, r. 3.

(*p*) Order XXVIII, r. 6. See *Ridgway* v. *Abington* (1862), 3 S. & T. 3; *Coke* v. *French* (1897), 76 L. T. 163. For examples of amendments allowed after issue joined, but before trial, see *Ware* v. *Claxton* (1858), 1 S. & T. 251; *Twells* v. *Clarke* (1864), 3 S. & T. 280. Applications to disallow amendment made without leave are also made to the registrar by notice under the summons for directions: Order XXVIII, r. 4.

(*q*) *Riding* v. *Hawkins* (1889), 14 P. D. 56.

(*r*) See also *Betts* v. *Doughty* (1879), 5 P. D. 26. And further, as to amendments during trial, see note to Order XXVIII, r. 1, in the Annual Practice, and Order XXVIII, r. 6.

(*s*) Order XIX, r. 27. If irrelevant matter is pleaded it will be struck out: see *Farlar* v. *Farlar* (1858), 1 S. & T. 124. And see *Rosbotham* v. *Rosbotham* (1860), 2 S. & T. 121; *Powell* v. *Powell* (1865), 1 P. & D. 6; but

Pleadings struck out if claim or defence is frivolous or vexatious.

and may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly (*t*).

Applications in these circumstances are made in the first instance to the registrar under the summons for directions.

Inherent power of the Court to stay frivolous or vexatious proceedings.

The Court acts under Order XXV, r. 4, only if *on the face of the pleadings* it appears that an action is frivolous and vexatious. But the Court has jurisdiction to dismiss an action when, on facts proved to the satisfaction of the Court, it appears that the action is frivolous and vexatious. This jurisdiction is based not upon the Rules of Court, but upon the inherent power which every Court has to prevent abuse of legal machinery (*u*).

Sub-section 3.—*Points of Law, how raised.*

Points of law raised on the pleadings may be disposed of before the trial.

No demurrer is now allowed, but any party is entitled to raise by his pleading any point of law, and the point so raised may be disposed of at the trial, or, by consent or by order of the registrar under the summons for directions, may be set down for hearing and disposed of before the trial (*w*). (See Order XXV, rr. 1—3.)

Estoppel.

Questions of estoppel may be dealt with in the manner indicated by these rules (*x*); or a motion may be made to the Court to stay the action, and to dismiss the proceedings as *res judicata* (*y*).

Special cases as to questions of law.

Questions of law, raised for the opinion of the Court in the form of a special case, are dealt with in Order XXXIV, to

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see *Rigg* v. *Hughes* (1884), 9 P. D. 68, where Fry, L.J., held that a plaintiff is entitled to plead, "If the will propounded by the defendants was validly made, which I do not admit, it was validly revoked by a later will."

(*t*) Order XXV, r. 4.

(*u*) *Willis* v. *Earl Beauchamp* (1886), 11 P. D. 59, where it was held that owing to lapse of time no possible advantage could be obtained by the plaintiff in the action in the event of his success. And see further, as to staying proceedings as frivolous and vexatious, *Peters* v. *Tilley* (1886), 11 P. D. 145; *Young* v. *Holloway*, [1895] P. 87, where applications to dismiss actions upon these grounds were refused; *Mohan* v. *Broughton*, [1899] P. 211; [1900] P. 56, C. A.; *Mahon* v. *Quinn*, [1904] 2 Ir. R. 267, where suits were dismissed on the ground that the plaintiff was debarred by her laches and acquiescence from prosecuting her claim. And see *Birch* v. *Birch*, [1902] P. 130, where it was held that an action might be brought to set aside a decree of the Court pronouncing for a will in solemn form on the ground that the judgment had been obtained by fraud—even though none of the parties to the action had anything to do with the fraud—but that the Court ought to treat as frivolous and vexatious any such action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding.

(*w*) This course was followed in *Williams* v. *Evans*, [1911] P. 175.

(*x*) See *Priestman* v. *Thomas* (1884), 9 P. D. 70, 210.

(*y*) This course was adopted in *Birch* v. *Birch*, [1902] P. 62.

which, with the notes thereunder in the Annual Practice, reference should be made.

Sub-section 4.—*Default of Pleading.*

Default of pleading.

If a plaintiff, ordered to deliver a statement of claim, fails to do so within the time limited, application may be made by the defendant for dismissal of the action for want of prosecution (*z*).

In probate actions, if any defendant make default in delivering a defence, the action proceeds notwithstanding the default (*a*).

As to close of pleadings in default of delivering a reply or subsequent pleading, see Order XXVII, r. 13.

(*z*) Order XXVII, r. 1.
(*a*) *Ibid.*, r. 10. *Vide ante*, p. 567; *post*, p. 610.

CHAPTER VIII.

STATEMENT OF CLAIM.

SECTION 1.

GENERAL RULES.

Statement of claim, time for delivering.

ORDER XX, r. 2, provides for the time in which the plaintiff in a probate action shall, unless otherwise ordered, deliver his statement of claim, but in practice this is a matter determined by the registrar upon the hearing of the summons for directions.

In probate actions, indorsement of writ often ordered to stand for statement of claim.

For statements of claim in probate actions are not delivered as a matter of course. The indorsement of the writ must show the capacity in which the plaintiff claims, and it is frequently ordered to stand for the statement of claim. In fact, unless the circumstances of the case are such as to necessitate a statement by the plaintiff of facts which cannot conveniently be set out in the indorsement of the writ, a statement of claim will generally not be ordered.

Therefore, before drafting a statement of claim, the pleader should satisfy himself that it has been ordered (*a*).

Relief claimed to be stated.

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative (Order XX, r. 6).

Denial of interest.

In probate actions, where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest (*b*).

Statement of claim where there is no appearance.

Order XIX, r. 10, provides that if no appearance has been entered for any party, every pleading required to be delivered to a party shall be delivered by being filed with the proper officer—*i.e.*, in probate actions at the Contentious Department of the probate registry. It is stated that this rule is not enforced, but that it is sufficient if two copies of the pleadings are filed when the action is entered for trial (*c*).

Statement of claim should not anticipate the defence.

It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it.

(*a*) Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ (Order XX, r. 4). *Vide ante*, pp. 588, 589.

(*b*) Order XX, r. 9. In an action which arises from the entry of a caveat, the defendant's interest is disclosed in his appearance to the warning; in actions for revocation it appears upon the grant.

(*c*) Tristram & Coote (16th ed.), p. 478.

SECTION 2.

STATEMENTS OF CLAIM IN PARTICULAR ACTIONS.

SUB-SECTION 1.—*In Actions for Probate in Solemn Form.*

Statement of claim: when required.

In most cases in an action for probate in solemn form the indorsement on the writ will be considered as sufficient to stand for the statement of claim.

But a statement of claim, containing additional averments, will be ordered in certain cases (*d*), the more important of which are the following :—

Foreign will.

Where the will propounded depends for its validity upon its due execution according to the law of the place abroad where the testator was domiciled at the time of his death, the statement of claim should name that place, and should state that the testator died domiciled there, and that the will was duly executed in accordance with the formalities required in the making of a valid will of personal estate by the law of that place (*e*). An averment that the will was admitted to probate by a competent Court of the place of the alleged domicil undoubtedly would, in view of the authorities cited in an earlier chapter, be held good at the present day (*f*), notwithstanding a reported decision to the contrary (*g*).

Will of British subject.

Where the will propounded depends for its validity upon its due execution according to the provisions of Lord Kingsdown's Act, 1861, the statement of claim should contain an averment that the deceased was a British subject, and that the will was duly executed in accordance with the statute 24 & 25 Vict. c. 114 (*h*).

Lost will.

When the action is for probate of the contents of a will which has been lost, it should be stated (*i*) that the will was never revoked or destroyed by the testator, or by any person in his presence or by his direction, with the intention of revoking the same, and that the will was at the time of his death a valid and subsisting will, but that it cannot now be found. A draft or copy, if propounded, should be annexed to the affidavit of scripts, and should be referred to in the statement of claim as containing the contents of the will. Where no copy or draft exists, the contents of the will, so far as they can be proved, should be set out in the statement of claim (*k*).

(*d*) Precedents of statements of claim will be found in App. VIII, Precedents Nos. 13—27.
(*e*) See App. VIII, Precedent No. 18.
(*f*) *Vide ante*, pp. 24, 25. See App. VIII, Precedent No. 44.
(*g*) *Isherwood* v. *Cheetham* (1862), 2 S. & T. 607.
(*h*) See App. VIII, Precedents Nos. 19, 35, 44.
(*i*) See App. VIII, Precedents Nos. 2, 16, 32, 34.
(*k*) See *Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154—158.

Will destroyed.

If the will was destroyed by the testator while of unsound mind, it should be so stated, the date of destruction being, if possible, given (*l*).

In other cases of destruction *sine animo revocandi* the circumstances in which the will was destroyed—*e.g.*, by mistake, with the intention of substituting therefor some other testamentary document (*m*), and so forth—should be set out.

Incorporation of documents.

When documents are propounded as incorporated by reference in a will or codicil, the statement of claim should refer specifically to the words of reference in the incorporating instrument, and should identify by reference to its script letter the document alleged to be incorporated (*n*).

Obliterations and alterations.

Where obliterations or alterations appear on the face of the will or codicil, a specific reference to them should be made, and the claim should be for probate of the will in its original form or in its altered state, as the case may be (*o*).

Sub-section 2.—*In Interest Suits* (*p*).

Statement of claim in interest suits.

In interest actions it is provided by rule 61, C. B., that each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the Judge, adduce proof on one and the same trial of their interests respectively.

The pleading of each party must also show on the face of it that no other person exists having a prior interest to the claimant (*q*).

Where the plaintiff denies the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest (*r*).

Sub-section 3.—*In Actions for the Revocation of Grants* (*s*).

In action to revoke probate.

In actions for the revocation of a grant of probate in common form, the grounds upon which revocation is sought should be stated, and the plaintiff must plead against the will as if he were defendant in an ordinary action for proof in solemn form, stating the substance of the case on which he intends to rely (*t*).

(*l*) See App. VIII, Precedent No. 23.
(*m*) See App. VIII, Precedent No. 17.
(*n*) See App. VIII, Precedent No. 15.
(*o*) See App. VIII, Precedent No. 14.
(*p*) *Vide ante*, pp. 548, 549, and App. VIII, Precedent No. 27.
(*q*) Rule 62, C. B.
(*r*) Order XX, r. 9.
(*s*) App. VIII, Precedents Nos. 24—26.
(*t*) *Vide post*, p. 598. Order XIX, r. 25A, though in terms applicable only to defences, extends, it is submitted, to this case. At all events, in practice it is usual to state the substance of the case.

Where the plaintiff himself relies upon a will which he alleges to be the true last will of the deceased, he should propound it in his statement of claim, otherwise his claim should be that the Court should pronounce against the pretended will, and revoke the grant made to the defendants, and declare that the deceased has died intestate (*x*). Form of claim.

In actions for the revocation of grants of administration, also, the ground on which revocation is claimed should be stated, and if the plaintiff relies upon a will, he should propound that document (*y*). In actions for revocation of administration.

(*x*) See App. VIII, Precedent No. 24. The Court will not declare anything of the sort, for it is obviously impossible for it to say that no other will exists. Nor would any useful purpose be served by such a declaration, if made. But for some unknown reason, this relief is persistently claimed.

(*y*) See App. VIII, Precedent No. 26. As to statements of claim in actions for revocation of probate in solemn form, see *Priestman* v. *Thomas* (1884), 9 P. D., at p. 71; *Birch* v. *Birch*, [1902] P., at p. 131.

CHAPTER IX.

DEFENCE AND COUNTERCLAIM.

SECTION 1.

GENERAL RULES.

Time for delivering defence.

THE time for delivery of defence is fixed by the registrar on the summons for directions. The time may be extended by consent (*a*), or by order of the registrar under the summons for directions (*b*).

Default in delivering.

In probate actions, if any defendant make default in delivering a defence, the action may proceed, notwithstanding such default (*c*). If no defence is delivered, and proof in solemn form is desired, application should be made to enter the action as a short cause (*d*).

Notice of intention merely to cross-examine witnesses.

In probate actions the party opposing a will may, with his defence, give notice that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side unless the Judge shall be of opinion that there was no reasonable ground for opposing the will (*f*). Such notice must be served *with* the defence (*g*).

To what cases such notice does not apply.

A party who seeks to obtain revocation of a grant of probate cannot take advantage of this rule (*h*), nor can a party who pleads undue influence or fraud, such a plea being clearly inconsistent with the notice (*i*).

Notice may be conditional.

The notice, may, however, be conditional—*e.g.*, that, if both attesting witnesses are called, the defendants only intend to cross-examine them (*k*).

(*a*) Order LXIV, r. 8.
(*b*) *Ibid.*, r. 7.
(*c*) Order XXVII, r. 10.
(*d*) *Vide ante*, p. 567, *post*, p. 610.
(*f*) Order XXI, r. 18. *Vide post*, pp. 629, 630, for the effect of this rule upon the discretion of the Court as to costs. For form of notice, see App. VII, Form 117.
(*g*) *Bone* v. *Whittle* (1866), 1 P. & D. 249.
(*h*) *Tomalin* v. *Smart*, [1904] P. 141.
(*i*) *Ireland* v. *Rendall* (1866), 1 P. & D. 194; *Cleare* v. *Cleare* (1869), 1 P. & D. 655; *Harrington* v. *Bowyer* (1871), 2 P. & D. 264.
(*k*) *Leeman* v. *George* (1867), 1 P. & D. 542.

Counterclaim.

Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim (Order XXI, r. 10). Thus if a defendant propounds a will, he does so by way of counterclaim (*l*).

Title of counterclaim against persons other than the plaintiff.

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counterclaim had been enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff (Order XXI, r. 11). If any of such persons are not parties to the action, the defendant should cite them to see proceedings, or he may proceed under Order XXI, rr. 12 and 13 (*m*). As to reply to counterclaim, see Order XXI, r. 14.

Service on persons not parties.

Reply to counterclaim.

Section 2.

PARTICULAR DEFENCES.

Fixed forms of defence in probate actions in the Ecclesiastical Courts.

By the practice of the Ecclesiastical Courts and of the Court of Probate, the forms of defence in probate actions became fixed and stereotyped (*n*). A favourite plea was "That the said alleged will was not the will of the deceased," under which evidence might be given that the will was not duly executed, or that it was a mere sham will, never intended by the testator to operate, or even that the testator's signature had been forged (*o*). But in *Owen* v. *Davies* (*p*) this plea was finally discredited.

Five recognised forms of defence.

Under Rule 40A, C. B., five pleas were recognised—*i.e.*, undue execution, incapacity, undue influence, fraud, and want of knowledge and approval—and no party could plead any other plea, except by leave of a Judge. Only under the last of these pleas were particulars directed to be given, and

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(*l*) A counterclaim is governed by the same rules of pleading as a statement of claim, and the reply to it by the same rules as a defence. It should be headed "counterclaim" so as to distinguish it from the defence. For precedents see App. VIII, Precedents Nos. 32, 33, 34, 36, 37, 38.

(*m*) A citation is the usual method.

(*n*) Innovations were discouraged, and it was for long doubted whether a plea that the testator did not know of and approve of the contents of his will was good in law. See *Hastilow* v. *Stobie* (1865), 1 P. & D. 64.

(*o*) In fact, Dr. Wambey in *Twells* v. *Clarke* (1864), 3 S. & T. 281, stated that this plea involved every plea that could go to the validity of a testamentary instrument.

(*p*) (1864), 3 S. & T. 588.

the mere general statement of the defences above enumerated left the plaintiff in many cases in ignorance of the nature of the case which he would have to meet.

Substance of the case to be stated with regard to every defence.

To mitigate this grievance, Order XIX, r. 25A, now directs that *in probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely.* The degree of particularity required in the "substance of the case" is discussed in an earlier chapter (*q*).

It is proposed to discuss the various forms of defence in some detail.

SUB-SECTION 1.—*Undue Execution* (*r*).

Defence that the will was not duly executed.

That the said will was not duly executed according to the provisions of the statute 1 *Vict. c.* 26.

It is usual to insert this plea in all defences, even if due execution is not seriously disputed.

Issues raised by plea.

Under this plea may be raised the following defences, and in each instance the defendant must state the substance of the case, setting out the specific informality which he alleges :—

(a) That the signature of the testator is not so placed at the foot or end of the will as to satisfy the requirements of section 9 of the Wills Act, 1837, and section 1 of the Wills Act Amendment Act, 1852. The plea should be thus framed : "That the said will was not duly executed in accordance with the statutes 1 Vict. c. 26 and 15 & 16 Vict. c. 24."

(b) That the will was never signed by the testator—*i.e.*, that in fact no signature of the testator appears on the will. Where forgery is alleged, it should be expressly averred in the substance of the case.

(c) That the signature of the testator was not placed upon the will by some other person in his presence and by his direction.

(d) That the two witnesses were not present at the same time when the signature was made or acknowledged.

(e) That, though both witnesses were present, there was no valid acknowledgment.

(f) That the witnesses did not subscribe the will in the presence of the testator.

Substance of the case.

If the defendant merely puts the plaintiff to proof of due execution, the following substance of the case will suffice :—

"Under the above paragraph the defendant puts the plaintiff to proof that the requirements of the statute 1 Vict. c. 26 were complied with." Where the "substance of the case" is so

(*q*) *Vide ante*, pp. 577—579.
(*r*) See App. VIII, Precedents Nos. 29, 31, 36.

framed, it has been held that the defendant is entitled, not merely to cross-examine the plaintiff's witnesses, but also to call witnesses to negative due execution (*s*).

Difficulty of upsetting a will on the ground of undue execution.

It should be borne in mind that it is not an easy matter to set aside a will on the ground of undue execution. The evidence of non-compliance with the requirements of the statute must be clear and cogent, before the Court will set aside the document which the testator intended to be his last will (*t*).

SUB-SECTION 2.—*Unsoundness of Mind* (*u*).

Defence that testator was not of sound mind.

That at the time when the said will purports to have been executed the deceased was not of sound mind, memory, and understanding.

Issues raised.

This issue of testamentary capacity is usually accompanied by a plea of want of knowledge and approval.

Substance of the case.

The pleader should state shortly the nature of the case he intends to prove, whether it be that the testator was a lunatic or hopeless imbecile, or that the testator's mind was so impaired by illness or age that he was unable to form a rational opinion as to the extent of his property or the claims of others upon his bounty. He should also give particulars of the nature of the unsoundness of mind alleged (*w*).

Notice of specific delusions.

Where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion must be delivered before the case is set down for trial, and, except by leave of the Court or a Judge, no evidence shall be given of any other instances at the trial (*x*).

SUB-SECTION 3.—*Want of Knowledge and Approval* (*y*).

Defence of want of knowledge and approval.

That at the time when the said will purports to have been executed the deceased did not know and approve of the contents thereof (or *of the residuary clause in the said will*, as the case may be).

Issues raised.

Strictly, this plea is only appropriate when the capacity of the testator is not disputed, and it is alleged that the contents of the will were never properly brought to his notice. But it is sometimes convenient to plead both testamentary incapacity and want of knowledge and approval, and to frame a common substance of the case to cover both pleas (*z*).

(*s*) *Patrick* v. *Havercroft* (1920), 36 T. L. R. 290.
(*t*) *Vide ante*, pp. 123—129.
(*u*) See App. VIII, Precedents Nos. 29, 31, 32.
(*w*) *McLeod* v. *The Earl of Shrewsbury*, [1922] P. 113; *vide ante*, pp. 577, 578.
(*x*) Order XIX, r. 25A. For form of notice see App. VIII, Precedent No. 45.
(*y*) See App. VIII, Precedents Nos. 30, 31, 32.
(*z*) See App. VIII, Precedent No. 31.

Substance of the case.

Even before Order XIX, r. 25A, came into operation, it was necessary, under Rule 40A, C.B., with this plea to give particulars stating shortly the substance of the case intended to be set up, and it was provided that no defence should be available under this plea which might have been raised under any other plea (*e.g.*, undue influence, fraud, testamentary incapacity) unless such other plea had been pleaded therewith.

The substance of the case should state (if the facts are so) that the deceased gave no instructions for the said will, that it was not read over to him or explained to him, nor did he himself read over the same. If fraud is alleged, it should be separately pleaded. If the defendant's case is that, although the will was read over to or by the deceased, the latter was incapable of appreciating its effect, testamentary incapacity should also be pleaded.

Sub-section 4.—*Undue Influence* (*a*).

Defence of undue influence.

That the execution of the said will was obtained by the undue influence of the plaintiff (and others acting with him whose names are at present unknown to the defendant).

Issues raised.

This plea raises the issue that the will was obtained by coercion, or something which the law treats as equivalent to coercion. It does not raise an issue of fraud, which must, if alleged, be expressly pleaded (*b*).

Substance of the case

The defendant must give particulars setting out the names of the persons against whom the charge of undue influence is preferred, and must state the nature of the conduct which, he alleges, constituted undue influence, *e.g.*, actual physical coercion, such as by force or fear, or importunity upon weakness (*c*). He should also give particulars, with necessary dates, of the acts alleged in exercise of the undue influence (*d*).

Caution to be exercised before raising plea of undue influence.

The issue of undue influence ought not to be raised except on very good grounds (*e*), and failure to establish the charge will almost inevitably entail the defendant's condemnation in costs (*f*).

Sub-section 5.—*Fraud.*

Defence of fraud.

That the execution of the said will was obtained by the fraud of the plaintiff (*g*).

(*a*) See App. VIII, Precedent No. 30.
(*b*) *Vide ante*, pp. 65, 66.
(*c*) See App. VIII, Precedent No. 30.
(*d*) *McLeod* v. *The Earl of Shrewsbury*, [1922] P. 113; *vide ante*, pp. 577, 578.
(*e*) *Spiers* v. *English*, [1907] P., at 124. See also *Low* v. *Guthrie*, [1909] A. C. 278.
(*f*) *Vide post*, pp. 624—626.
(*g*) *Vide ante*, pp. 65, 66; and see App. VIII, Precedent No. 33.

The plaintiff is entitled in the substance of the case to particulars, with dates and items if necessary, of the fraud alleged (*h*). Substance of the case.

SUB-SECTION 6.—*Not a Testamentary Instrument* (*i*).

That the paper writing propounded by the plaintiff is not a testamentary instrument (*k*). Defence that instrument not testamentary.

The substance of the case should contain averments either that the will was executed as a jest (*l*), or as a sham will (*m*), and was never intended by the testator to have any force or effect as a disposition of his property, or that it was intended to operate as a present disposition of his property to take effect during his lifetime, and not after his death (*n*). Substance of the case.

SUB-SECTION 7.—*Revocation.*

The defence of revocation may take three forms :—

(a) *That after the execution of the said will the deceased contracted a valid marriage.* Defence of revocation by marriage.

Set out the date of the marriage and the place where the marriage was celebrated. Substance of the case.

It is, however, important to note in this connection the provisions of the Law of Property Act, 1925, s. 177, with regard to wills made since 1925, and expressed to be made in contemplation of marriage (*o*).

(b) *That the will dated April* 1, 1926, *was revoked by a will dated March* 2, 1927, *duly executed by the deceased* (*p*). By subsequent will or codicil.

The subsequent will should be propounded by way of counterclaim. The substance of the case will then state : " The substance of the defence is contained in the counterclaim." Substance of the case.

(c) *That the said will was revoked by the same having been burnt, torn, or otherwise destroyed by the testator or by some person in his presence and by his direction, with the intention of revoking the same* (*q*). By burning, tearing, etc.

State when, where, and by whom the will was destroyed, and the circumstances in which it was destroyed. If the defendant relies upon the presumption that the will was destroyed by the deceased *animo revocandi*, this should be set out, together with a statement that the will was last known to be Substance of the case.

(*h*) See Order XIX, r. 6; also *ante*, p. 579.
(*i*) See App. VIII, Precedent No. 36.
(*k*) *Vide ante*, pp. 117—123.
(*l*) *Nichols* v. *Nichols* (1814), 2 Phill. 180.
(*m*) *Lister* v. *Smith* (1863), 3 S. & T. 282; *vide ante*, pp. 121, 122.
(*n*) *Vide ante*, p. 121; see App. VIII, Precedent No. 36.
(*o*) *Vide ante*, p. 132.
(*p*) See App. VIII, Precedent No. 42.
(*q*) See App. VIII, Precedent No. 34.

in the possession of the deceased and was not found at his death (*q*).

Sub-section 8.—*Miscellaneous Defences.*

Deceased prevented by threats from altering will.

A plea, that after making an alleged will the deceased was prevented by the force and threats of the plaintiff from executing a further will, prepared by and under his instructions, whereby the plaintiff would have been deprived of his interest under the said alleged will, was allowed in *Betts* v. *Doughty* (*r*).

Infancy.

The defence may also be "That at the time when the said will was executed the deceased was under the age of twenty-one years." (See the Wills Act, 1837, s. 7.)

Estoppel.

Another defence, which may arise in an action for revocation of probate, is estoppel (*s*).

Defence in an interest suit.

The foregoing defences are common to an action for probate in solemn form and an action for the revocation of probate. In the latter case they would be raised in the statement of claim. A form of defence in an interest suit will be found in the Appendix (*t*).

(*q*) See App. VIII, Precedent No. 34.
(*r*) (1879), 5 P. D. 26; *vide ante*, p. 78.
(*s*) See *Priestman* v. *Thomas* (1884), 9 P. D., at p. 72; and *vide ante*, p. 590. As to estoppel by laches and acquiescence, *vide ante*, pp. 239, 240.
(*t*) App. VIII, Precedent No. 38.

CHAPTER X.

REPLY, DEFENCE TO COUNTERCLAIM, AND SUBSEQUENT PLEADINGS.

No reply to be delivered without leave.

No reply shall be delivered unless the same be ordered. Where a reply is ordered it shall be delivered within the time specified in the order, or if no time is so specified, within four days after the delivery of the previous pleading, unless the time shall be extended (*a*).

The registrar, under the summons for directions, may decide whether a reply is necessary, and the time for its delivery, but application may be subsequently made by notice under the summons for directions.

Where reply will be ordered.

If the plaintiff's only object in delivering a reply is to deny the statements in the defence, leave will not, as a rule, be given, for, if no reply be delivered, all material statements of fact in the defence are " deemed to have been denied and put in issue." This does not, however, apply to a counterclaim (*b*), and where there is a counterclaim the plaintiff must deal specifically with every allegation of fact in the counterclaim which he does not admit to be true (*c*).

It may also be necessary for the plaintiff to raise in his reply some plea in confession and avoidance of the allegations in the defence. If the defendant has pleaded revocation, the plaintiff may wish to raise a plea of revival; if the defendant has pleaded that the will is not duly executed in accordance with the law of the foreign country where the testator died domiciled, the plaintiff may wish to reply that, even so, it is executed in accordance with the provisions of the Wills Act, and is therefore a valid exercise of an English power of appointment (*d*) or a valid will of English real estate. It would have been improper for the plaintiff to raise these issues in his statement of claim, for it is no part of the statement of claim to anticipate the defence (*e*).

Defence to counterclaim.

When there is a counterclaim, a reply thereto is subject to the rules applicable to statements of defence. A third person

(*a*) See Order XXIII, r. 1. For precedents of reply see App. VIII, Precedents Nos. 39—44.
(*b*) Order XXVII, r. 13.
(*c*) *Ibid.*, r. 17.
(*d*) See App. VIII, Precedent No. 44.
(*e*) *Per* James, L.J., in *Hall* v. *Eve* (1876), 4 Ch. D., at p. 345.

brought into the action for the first time by the counterclaim, may deliver his reply thereto within the time within which he might deliver a defence if the counterclaim were a statement of claim (Order XXI, r. 14) (*f*).

The usual defence to counterclaim is a plea that, if for any reason the will propounded by the plaintiff is invalid, a former will is entitled to probate (*g*).

Subsequent pleadings.

Pleadings subsequent to reply may not be delivered without leave, and are subject to the same rules which govern the delivery of the reply (*h*).

(*f*) *I.e.*, within ten days from delivery of the counterclaim, or such time as is ordered by the registrar : Order XXI, r. 8. Instead of making such person a party in this manner, the usual course is to cite him to see proceedings.

(*g*) See App. VIII, Precedent No. 43.

(*h*) Order XXIII, r. 1.

CHAPTER XI.

PRESERVATION OF PROPERTY PENDING SUIT.

SECTION 1.

APPOINTMENT OF ADMINISTRATOR PENDENTE LITE.

Application made on motion supported by affidavits.

APPLICATIONS for the appointment of an administrator *pendente lite* of the estate of the deceased are made to the Court on motion (*a*), supported by affidavits showing the nature and value of the estate and any other incidental circumstances relating to the property, which render the appointment necessary and convenient (*b*).

Where deceased died after 1925.

Where an order on motion for the appointment of an administrator *pendente lite* of the estate is made in respect of a person who died after 1925, it will provide for the administration of the real and personal estate, unless the Judge shall otherwise direct (*c*).

The principles upon which the Court acts in granting or refusing applications of this description, and the powers of an administrator *pendente lite*, are dealt with in an earlier chapter (*d*).

Notice of motion.

Notice of motion must be served on all parties to the action (*e*).

Time of application.

The appointment cannot be made before the issue of the writ, for a suit must be pending to justify the appointment (*f*), but application may be made prior to the summons for directions (*g*), or leave may be obtained from the Judge to serve the notice of motion simultaneously with the writ.

Notice of motion with writ.

Who is appointed.

If the parties agree as to the person to be appointed, the Judge will appoint the person nominated, otherwise the matter is referred to the registrar (*h*).

(*a*) For precedent of case on motion see App. VIII, Precedent No. 48.
(*b*) *Vide ante*, p. 378.
(*c*) President's Non-contentious Probate Directions, 1925.
(*d*) *Vide ante*, pp. 376—382.
(*e*) *Wiggins* v. *Hudson* (1899), 80 L. T. 296. Where death occurred before 1926 notice of motion must, if a receiver of real estate be applied for, be served upon the heir-at-law, even though he is not a party to the action. For form of appointment of receiver of real estate, see App. VII, Form 55 : *vide ante*, p. 473, note (*y*).
(*f*) *Salter* v. *Salter*, [1896] P. 291.
(*g*) Order XXX, r. 1.
(*h*) The matter is brought before the registrar on summons.

A person unconnected with the suit is usually appointed (*i*). But there is no general rule forbidding, in the absence of consent, the appointment of a party to the suit (*k*).

Practice.

The practice on extracting a grant by an administrator *pendente lite*, has been dealt with in an earlier chapter (*l*).

Where the administrator *pendente lite* desires the direction of the Court, application should be made by summons to the registrar, or, in important matters, to the Judge.

Passing of administrator's accounts by the registrar.

An administrator *pendente lite*, as soon as the suit terminates (*m*), lodges in the Contentious Department his account of the property which has passed through his hands, in order that it may be passed by the registrar. With it is filed the bill of costs in respect of the appointment of the administrator, and an affidavit verifying the account (*n*). The registrar will fix a day for taxing the bill and vouching the accounts, and the applicant, when he receives the notice of the appointment, must give at least one clear day's notice to the other parties concerned. All persons interested in the estate (or in the residue, if there is a will) should be represented before the registrar.

Who should be represented before registrar.

When the account has been passed and the bill of costs taxed, vouchers and receipts for all payments made must be produced to the registrar's clerk. A certificate is then given by the registrar as to the amount due to the estate remaining in the hands of the administrator. The bond may by order be vacated on this appointment, or a separate summons, returnable before a registrar, may be taken out for this purpose.

Certificate as to sum due to estate.

Vacation of bond.

Remuneration.

The amount of the remuneration to be allowed under section 163, sub-section 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, is fixed by the registrar at the time when the accounts are investigated.

Failure of administrator to hand over certified amount.

If the administrator fails, after the passing of the account, and after receiving his remuneration, to hand over to the person entitled thereto the amount certified as due, application may be made to assign the bond.

Section 2.

INJUNCTIONS AND ORDERS FOR THE PRESERVATION OF PROPERTY.

Power of the Court to grant mandamus or injunction.

By the provisions of section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court may grant a

(*i*) *De Chatelain* v. *Pontigny* (1858), 1 Sw. & Tr. 34.
(*k*) *Griffin* v. *Ackroyd*, [1925] P. 38.
(*l*) *Vide ante*, p. 473.
(*m*) *Vide ante*, p. 382, for commencement and termination of office of administrator *pendente lite*.
(*n*) For form see App. VII, Form 51.

mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it shall appear to the Court to be just or convenient so to do, and such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

Order for sale of perishable goods, etc.; and for detention, preservation, or inspection of property.

Under Order L, r. 2, the Court, on the application of any party, may also order the sale of any goods which may be of a perishable nature; and by Rule 3 of the same Order may make any order for the detention, preservation, or inspection of any property or thing, being the subject of, or likely to be affected by, the cause or matter (*o*).

Applications for injunctions, etc., how made.

An application for an order such as has been indicated is made to the Court on motion (*p*). If the application be by the plaintiff under the said section 45, it may be made either *ex parte* or with notice, and if for an order under rules 2 or 3 of Order L, it may be made after notice to the defendant at any time after the issue of the writ, and if it be by any other party, then on notice to the plaintiff at any time after appearance by the party making the application (*q*).

Applications for receiver by way of equitable execution.

Applications for the appointment of a receiver by way of equitable execution, and for injunctions so far as they are ancillary or incidental to equitable execution are made on summons to a registrar (*r*).

Injunction against intermeddling executor.

Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, an injunction, restraining him from dealing with the estate before probate, was granted on the application of the co-executor, and a receiver was appointed (*s*).

Order prohibiting dealing with share of a ship.

In *Nicholas* v. *Dracachis* (*t*) it was held that the Court may under 17 & 18 Vict. c. 104, s. 65, direct an order to issue prohibiting the dealing in any share of a ship, for a time and on conditions to be named in the order.

(*o*) See the full provisions of Order L, r. 3.

(*p*) There have been cases in which injunctions have been granted by a Judge in chambers, but a motion appears to be the appropriate process.

(*q*) Order L, r. 6. See also the notes in the Annual Practice under Order L.

(*r*) *Vide ante*, pp. 524, 529.

(*s*) *Moore* (1888), 13 P. D. 36.

(*t*) (1875), 1 P. D. 72.

CHAPTER XII.

TRIAL.

SECTION 1.

PRELIMINARIES.

Place and mode.

THE rules as to the place and mode of trial are dealt with in an earlier chapter (*a*).

Notice of trial by plaintiff.

The plaintiff, or the party in the position of plaintiff (*b*) may give notice of trial (*c*) with the reply, if any, whether it closes the pleadings or not, or, where no reply has been ordered, on the expiration of four days after the defence, or the last of the defences has been delivered; or at any time after the issues of fact are ready for trial (Order XXXVI, r. 11).

Length of notice of trial.

Ten days' notice of trial must be given, unless the defendant has consented or been ordered to accept short notice of trial, usually four days (*d*). The notice must be given to all parties who have entered an appearance, including parties cited and interveners.

Notice of trial by defendant.

If the plaintiff does not give notice within six weeks after he first becomes entitled to do so, the defendant may give notice of trial, or apply to the registrar to dismiss the action for want of prosecution (*e*).

Entry of trial.

In London and Middlesex, unless the trial is entered within six days after notice of trial, the notice is no longer in force (*f*).

Where entered.

The entry is made in the Contentious Department at the registry. Two copies of the pleadings must be left (*g*), one of them being endorsed with a copy of the notice of trial.

Entry for trial at assizes or County Court.

As to entry for trial at assizes, see Order XXXVI, rr. 22B to 28, and as to entry for trial in the County Court, see County Court Rules, Order XLIX.

(*a*) *Vide ante*, pp. 579—583.

(*b*) In spite of these words, it is *not* the practice for the defendant in a revocation suit to give notice of trial.

(*c*) For form of notice see App. VII, Form 110. By Order XXXVI, r. 15, notice of trial shall be given before entering the trial: and the trial may be entered, notwithstanding that the pleadings are not closed, provided that notice of trial has been given.

(*d*) Order XXXVI, r. 14.

(*e*) See *ibid.*, r. 12.

(*f*) *Ibid.*, r. 16.

(*g*) *Ibid.*, r. 30.

Applications for the postponement or adjournment of the trial may be made at any time after notice of trial has been given. They are usually made to the Judge by counsel at the sitting of the Court, and if the postponement is not consented to by the other side, to whom notice should be given, the application should be supported by affidavit setting out the grounds upon which it is made. Applications for postponement, how made.

Subpœnas *ad testificandum* and *ad duces tecum* (*h*) are issued, in accordance with Order XXXVII, rr. 20 and 26—34A, in the Contentious Department, where a *præcipe* is lodged, together with the subpœna, by the practitioner. In the Probate Division a subpœna remains in force until the disposal of the case, irrespective of the sittings (Rule 132, C. B.). Subpœnas.

For the issue of a subpœna for service in Scotland or Northern Ireland, see the note to Order XXXVII, r. 20, in the Annual Practice.

Section 2.

PROCEEDINGS AT THE TRIAL.

Proceedings at the trial are regulated by Order XXXVI, rr. 31—42. Proceedings at the trial.

If a will is propounded, and none of the parties who oppose it appears when the case is called on, the party propounding the will may proceed to prove it in solemn form. Default of appearance.

But a judgment by default may, on application to the Judge who heard the cause, within six days after the trial, be set aside on terms (*i*). It has been held that, notwithstanding this rule, the Court of Appeal has power to entertain an appeal direct from a judgment by default (*k*).

By the practice of the Court, the party propounding the last will is entitled to begin (*l*), for upon him lies the burden of proving the due execution of the will, the testamentary capacity of the testator, and his knowledge and approval of its contents. Right to begin.

But if none of these issues is raised on the pleadings, then it lies upon the party who pleads the affirmative issues impeaching the will (*e.g.*, undue influence, fraud, etc.) to begin, for though proof of the will beyond that raised by the issues will be necessary, the parties have not by the pleadings required that proof, and it is only needed by the Court (*m*).

(*h*) For forms see App. VII, Forms 256, 257.
(*i*) Order XXXVI, r. 33. See also *Cudworth* v. *Hayward* (1896), 75 L. T. 456.
(*k*) *Armour* v. *Bate*, [1891] 2 Q. B. 233.
(*l*) *Hutley* v. *Grimstone* (1879), 5 P. D. 24; *Cross* v. *Cross* (1864), 3 S. & T., at p. 295; *Tate* v. *Tate* (1890), 63 L. T. 112.
(*m*) *Hutley* v. *Grimstone* (1879), 5 P. D. 24.

Duty of party propounding will to call attesting witnesses.

The party propounding the will is bound to call at least one of the attesting witnesses, if he can be produced, to prove due execution (*n*).

Judgment.

The decree is drawn up and signed by the Court registrar, and the copy necessary for obtaining the grant may be applied for at the Copy Department (Room 23) at the registry.

SECTION 3.

"SHORT CAUSE."

Under what circumstances an action may be set down as a "short cause."

Applications for leave to set down an action as a short cause may be made not only when no appearance has been entered by any of the defendants or parties cited (*o*), but also :—

(1) When no defence has been delivered, or where the defendant withdraws his defence;

(2) When the parties have come to terms.

Requirements of the Court.

Where a will is propounded for proof in solemn form, the party propounding it must satisfy the Court of the due execution of the will, of the testator's testamentary capacity at the time of execution, and of his knowledge and approval of the contents of the will.

In a normal case the solicitor who prepared the will will give evidence that the deceased gave instructions for the will, which was prepared accordingly, and that the will was read over to the deceased, who approved of its contents and was of sound mind. One of the attesting witnesses will then be called to give evidence of the due execution of the will.

Court will not pronounce for or against will on the mere consent of the parties.

If the Court is asked to pronounce *against* a will, formal evidence of undue execution or of insanity must be given. The Court will not pronounce against the will on the mere consent of the parties.

SECTION 4.

COMPROMISE.

When an action may be compromised.

The power of compromise in probate actions is of great importance. As soon as the writ has been issued, but not before (*p*), the parties may come to terms, and these terms may be filed and made a rule of Court, binding upon the parties to the compromise, and enforceable in the same way as any

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(*n*) *Vide ante*, p. 267, where the position and evidence of attesting witnesses is discussed.

(*o*) *Vide ante*, pp. 548, 567.

(*p*) *Norman* v. *Strains* (1880), 6 P. D. 219.

Terms made a rule of Court.

other order of the Court (*q*). But if a compromise is to be made a rule of Court, the terms of the compromise must contain an agreement to that effect (*r*).

Upon what terms an action may be compromised.

There is practically no limit to the terms upon which parties may agree to compromise; they may in effect make a new will for the testator. Thus an executor may agree that the will he propounds shall be admitted to probate, but that he will administer the estate in accordance with the provisions of a revoked will; or where a will has been invalidly executed, the persons interested on an intestacy may agree that the will shall be pronounced against, but that they will administer the estate in accordance with its provisions; and, *provided all parties interested are of full age and are parties to the compromise*, such terms would be made a rule of Court.

But if it is part of the terms of the compromise that a will shall be pronounced for or pronounced against, the Court must be satisfied by evidence that the will was duly executed, or is invalid, before it will pronounce its decree.

Compromise only binds parties thereto.

A compromise is binding only upon persons who are parties to it, and in this respect an action which terminates in a compromise differs in its effect from one in which the decree of the Court is pronounced on the merits of the case. In the latter case all persons who were cognisant of the suit and had an opportunity of intervening, are bound by the result (*s*).

It is important, therefore, that every person whose interest might be affected by the compromise should sign the terms. If this precaution is omitted, the compromise may be set aside at a later date.

Where minors or infants are necessary parties to a compromise.

It should be also noted that, where it is sought to make minors or infants parties to a compromise, the Court will only approve of the compromise on their behalf if satisfied that it is for their benefit (*t*). The minors or infants must be represented by an independent solicitor (*u*), who must lay a case before counsel, setting out all the circumstances and the terms of the proposed compromise.

(*q*) *Harvey* v. *Allen* (1858), 1 S. & T. 151. As to enforcing the order, see Order XLII, rr. 24, 26. The decision in *Carritt* v. *Christian* (1870), 2 P. & D. 181, that it is not the practice to embody terms of compromise in an order of the Court, has not been followed. But the terms are not set out *in extenso* in the decree, which will include the provision that "the terms of compromise be filed and made a rule of Court."

(*r*) *Graves* v. *Graves* (1893), 69 L. T. 420; see *Howard* v. *Howard* (1897), 77 L. T. 140. A registrar may order terms to be filed, but he has no power to make them a rule of Court: see *Smythe* v. *Smythe* (1887), 56 L. T. 197.

(*s*) *Wytcherley* v. *Andrews* (1871), 2 P. & D. 327; *Ritchie* v. *Malcolm*, [1902] 2 Ir. R. 403; *vide ante*, pp. 240, 241, 554.

(*t*) The procedure to be followed is that prescribed by the Chancery Division in similar cases.

(*u*) He may also be instructed to represent children unborn.

If in counsel's opinion the compromise is beneficial to the minors or infants, it is then submitted on summons for the approval of the Judge. The summons is supported by the case laid before counsel and his opinion thereon, and affidavits by the guardian of the minors or infants and their solicitor, stating that the case contains a true and accurate statement of the facts, and that, in their belief, the compromise is beneficial to the minors or infants.

It is usual to instruct the counsel who gave the opinion to be present before the Court, in order that he may support his opinion. If the opinion given is that of a junior counsel, and there is a leader, the leader may be asked whether he agrees with the junior's opinion (*x*).

Where compromise affects person of unsound mind.

In a case in which a compromise affects a person of unsound mind, reference should be made to the note in the Annual Practice, under Order XXII, r. 15 (*y*).

Importance of machinery of compromise where charitable institutions are concerned.

It may not be out of place, in this connection, to refer to the usefulness of the machinery of compromise in cases where charitable institutions are interested under a will. Not infrequently a testator leaves the whole of his estate to such an institution, making no provision for his own family, and, in the circumstances, the institution may be willing to forgo some part of the benefit conferred on it, in favour of the testator's wife or children. But difficulties may arise owing to the fact that the trustees are not empowered by the terms of their trust to relinquish any part of a legacy or devise to which they may legally be entitled. In such a case the institution should issue a writ propounding the will, and a defence should be put in by the wife or children. There is then a *lis pendens*, and during the pendency of the action there is no will. The trustees are therefore perfectly entitled to compromise the action on such terms as they consider just and proper.

Where unascertained charities affected, Attorney-General must be a party to the compromise.

Where unascertained charities are or may be affected by the terms of the compromise, the Attorney-General must be made a party to the action, and must consent to the compromise on their behalf (*z*).

(*x*) *Wilson* v. *Birchall* (1880), 16 Ch. D., at p. 43.
(*y*) See also *Re Ryan*, [1911] W. N. 56.
(*z*) *Boughley* v. *Minor*, [1893] P. 181; *Re King; Jackson* v. *Att.-Gen.*, [1917] 2 Ch. 420.

CHAPTER XIII.

APPEALS AND NEW TRIAL.

SECTION 1.

APPEALS FROM THE REGISTRAR.

APPEALS from the registrar (*a*) are regulated by Order LIV, rr. 20 and 21.

Reference by registrar to Judge.

"If any matter appears to the master (*b*) proper for the decision of a Judge, the master (*b*) may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the master (*b*) with such directions as he may think fit" (Order LIV, r. 20).

Appeal from registrar.

"Any person affected by any order or decision of a master (*b*) may . . . appeal therefrom to a Judge at chambers. Such appeal shall be by notice in writing (*c*) to attend before the Judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a Judge or master (*d*). Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing. An appeal from a master's (*b*) decision shall be no stay of proceeding unless so ordered by a Judge or master" (Order LIV, r. 21) (*e*).

No stay of proceedings.

Appeal as to costs.

The appeal may be as to costs only, notwithstanding the provisions of section 31, sub-section 1 (h), of the Supreme Court of Judicature (Consolidation) Act, 1925 (*f*).

Order of registrar on motion in vacation.

An appeal from an order of a registrar on motion, heard by him in the vacation, lies direct to the Court of Appeal.

(*a*) *Patrick* (1889), 14 P. D. 42 (C.A.). Reference should be made to the notes in the Annual Practice under Order LIV, r. 21.

(*b*) Read "registrar."

(*c*) In practice this "notice in writing" takes the form of a summons by way of appeal, for which no fee is chargeable.

(*d*) The time may be enlarged by the Judge on the hearing of the appeal, without a summons being taken out at chambers for that purpose: Annual Practice, note to Order LIV, r. 21.

(*e*) On the hearing of the appeal no evidence on affidavit as to what took place before the registrar will be accepted: *Sykes* v. *Sykes*, [1897] P. 306.

(*f*) *Foster* v. *Edwards* (1879), 48 L. J. Q. B. 767; *Bryant* v. *Reading* (1886), 17 Q. B. D., at p. 131.

SECTION 2.

APPEALS FROM THE JUDGE IN CHAMBERS.

No appeal from consent order, or as to costs only, except by leave.

Section 31, sub-section 1 (h), of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that no appeal shall lie, without the leave of the Court or Judge making the order, from an order of the High Court or any Judge thereof, made with consent of the parties, or as to costs only, which by law are left to the discretion of the Court.

Appeals from the Judge in Chambers in the Probate Division (*g*) are regulated by the provisions of section 31, sub-section 1 (g), of the Act, which provides that no appeal shall lie without the leave of the Judge by whom the order was made or of the Court of Appeal, from any order made by a Judge of the High Court in chambers where no application to set aside or discharge the order has been made to the Judge sitting in Court (*h*).

No appeal, except by leave, from order made in chambers unless matter brought before the Judge in Court.

The party dissatisfied with the order of a Judge in chambers may either apply to the Judge to adjourn the matter into Court for rehearing, or may make application by motion to the Judge in Court to discharge the order. Such a motion, which is a rehearing—not an appeal—must be made within fourteen days, unless the Judge relaxes this rule on ground shown (*i*).

When appeal lies direct to the Court of Appeal.

But if the Judge in chambers gives leave to appeal direct, or certifies that he does not require to hear further argument (*k*), appeal may be made direct to the Court of Appeal.

In matters of practice and procedure every appeal from a Judge is to be made to the Court of Appeal (*l*).

When an appeal lies to the Court of Appeal direct it is subject to the rules which govern appeals from the Judge in Court, discussed below.

SECTION 3.

APPEALS FROM THE JUDGE IN COURT.

Appeals from final and interlocutory orders.

The rules presently to be set out refer to two classes of orders : final orders, which determine the rights of the parties, and interlocutory orders, which do not determine their rights.

(*g*) See *Rigg* v. *Hughes* (1884), 9 P. D. 68.

(*h*) This is, however, subject to the provisions of section 31, sub-section 3 as to appeals in matters of practice and procedure.

(*i*) See notes on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 62, in the Annual Practice. The procedure in the Probate Division is the same as that followed in the Chancery Division : *Rigg* v. *Hughes* (1884), 9 P. D. 68.

(*k*) *Rigg* v. *Hughes* (1884), 9 P. D. 68. If the Judge refuses to give such a certificate a motion must be made to him in Court to discharge the order, or for leave to appeal direct to the Court of Appeal.

(*l*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 3.

Any question which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, is determined by the Court of Appeal (*m*).

By section 27, sub-section 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court of Appeal, subject as otherwise provided in the Act and to Rules of Court, has jurisdiction to hear and determine appeals from any judgment or order of the High Court (*n*).

Appeal from refusal of administration.

It has been held that an appeal lies to the Court of Appeal from a refusal of a Judge of the Probate Division to grant letters of administration on motion (*o*).

The following limitations, affecting appeals from a Judge of the Probate Division, are imposed by statute or by practice on the right of appeal, and should be noted :—

Limitations on the right to appeal.

(1) No appeal lies without the leave of the Judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a Judge, except where the liberty of the subject or the custody of infants is concerned, and in cases of granting or refusing an injunction or a receiver (*p*).

(2) No appeal lies, except by leave of the Judge making the order, from an order made by the consent of parties, or as to costs only which by law are left to the discretion of the Court (*q*).

(3) No appeal lies from an order allowing an extension of time for appealing from a judgment or order (*r*).

(4) Although discretionary orders are appealable, the Court of Appeal will only in exceptional cases allow an appeal where the determination complained of was merely the exercise of the discretion of the Judge (*s*).

Leave to appeal, how applied for.

An application for leave to appeal should first be made to

(*m*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 68, sub-ss. 1, 2. As to what orders are final and what interlocutory, see notes to Order LVIII, rr. 8 and 15 in the Annual Practice.

(*n*) Thus an appeal from a Judge acting as commissioner of assize lies direct to the Court of Appeal.

(*o*) See *Clook* (1890), 15 P. D. 132, where Cotton, L.J., said : " Without giving any opinion whether this application is contentious or non-contentious I think section 19 of the Judicature Act, 1873, covers this case, and the applicant has a right to appeal. There may be some kinds of non-contentious business with respect to which it would not be right to allow an appeal." The section of the Act here referred to has been repealed, and is in substance re-enacted by section 27 of the Supreme Court of Judicature (Consolidation) Act, 1925. See also Order LVIII, r. 10.

(*p*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1 (i).

(*q*) *Ibid.*, s. 31, sub-s. 1 (h). The qualification is important : if the costs are not in the discretion of the Court, an appeal lies without leave : *Wild* v. *Plant*, [1926] P. 139. And see note to Order LVIII, r. 1, in the Annual Practice; *Campbell (Donald) & Co., Ltd.* v. *Pollak*, [1927] W. N. 240; and *Adlington* v. *Conyngham*, [1898] 2 Q. B. 492.

(*r*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1 (b).

(*s*) See note to Order LVIII, r. 1, in the Annual Practice, and cases there cited.

the Judge who made the order against which it is desired to appeal. If leave is refused, application may then be made to the Court of Appeal (*t*).

SUB-SECTION 1.—*Appeals to the Court of Appeal* (Order LVIII, R. S. C.).

Appeal to be by re-hearing on motion.

"All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part" (Order LVIII, r. 1) (*u*).

Length of notice of appeal.

Notice of appeal from any judgment (*x*), whether final or interlocutory, or from a final order, shall be a fourteen days' notice (*y*), and notice of appeal from any interlocutory order shall be a four days' notice (Order LVIII, r. 3) (*y*).

Notice of appeal by respondent.

As to notice of appeal by respondent, see Order LVIII, rr. 6 and 7.

Time for appealing from refusal of *ex parte* application.

Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a Judge of the Court below or of the Court of Appeal may allow (Order LVIII, r. 10).

Time in which to appeal.

Subject and without prejudice to the power of the Court of Appeal under Order LXIV, r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of *fourteen days*, and no other appeal shall be brought after the expiration of *six weeks*, unless the Court or Judge at the time of making the order or at any time subsequently, or the Court of Appeal, shall enlarge the time (*z*). Such deposit or other security for the

Security for costs.

(*t*) Order LVIII, r. 17.

(*u*) Service and amendment of notice of appeal are regulated by Order LVIII, r. 2.

(*x*) A judgment means a decision obtained in an action; every other decision is an order. See *Onslow* v. *Commissioners, etc.* (1890), 25 Q. B. D., at p. 466.

(*y*) The fourteen days' notice *includes* Sunday, Christmas Day, and Good Friday, unless the time expires on such day. In the four days' notice these days are excluded: Order LXIV, rr. 2 and 3.

(*z*) The respective periods are to be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or where the appellant first had notice thereof, and in all other cases from the time at which the order or judgment is signed, entered or otherwise perfected,

costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal. (See Order LVIII, r. 15) (*a*).

Stay of proceedings on appeal.

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct (Order LVIII, r. 16).

Power to admit further evidence, etc.

The power of the Court of Appeal to amend, to admit further evidence, to draw inferences of fact, and to make orders as to costs of appeal, is dealt with in Order LVIII, r. 4.

Power to order new trial.

If upon hearing of an appeal, it shall appear that a new trial ought to be had, it shall be lawful for the Court of Appeal to order that the verdict and judgment shall be set aside, and that a new trial shall be had (*b*).

Practice.

In appeals from the Probate Division, the solicitor for the appellant must leave in the Contentious Department of the registry two copies of the notice of appeal and one copy of the judgment or order against which appeal is made. The following papers for the use of the Lords Justices must be left in the Lords Justices' clerk's room at the Central Office at least one week before the appeal is likely to appear in the paper : three copies in sets respectively of the notice of appeal, the order or judgment appealed from, and of the pleadings or other documents showing the nature of the appeal. Three copies of the transcript of the shorthand note of the proceedings, or such parts thereof as may be required, should be ordered from the official shorthand writer, and arrangements should be made for the production of the notes of the Judge who made the order from which appeal is made (*c*).

Evidence on appeal as to question of fact.

As to evidence on appeal as to questions of fact, see Order LVIII, rr. 11 and 12.

Sub-section 2.—*Motions for New Trial* (Order XXXIX, R. S. C.).

Appeals for a new trial made to Court of Appeal.

In Order XXXIX, r. 1, it is laid down that, subject to certain subsequent provisions in the Order, every application

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or in the case of a refusal of an application from the date of such refusal: Order LVIII, r. 15.

(*a*) In making the application for security, of which no notice of motion need be served (see *Grills* v. *Dillon* (1876), 2 Ch. D. 325), it should be shown that the appellant, if unsuccessful, will be unable to pay the respondent's costs (*Harlock* v. *Ashberry* (1881), 19 Ch. D. 84, and *Whittaker* v. *Kershaw* (1890), 44 Ch. D. 296).

(*b*) Order LVIII, r. 5.

(*c*) See *Bailey* v. *Thurston* (1902), 47 S. J. 69, as to costs in the event of failure to attend to these requirements. But the cost of obtaining transcripts of the shorthand notes will not be allowed on taxation, without special order.

for a new trial or to set aside a verdict, finding, or judgment, where there has been a trial with or without a jury, shall be made to the Court of Appeal.

Every such application shall be brought before the Court of Appeal in like manner as an appeal, and on the hearing of such application the Court of Appeal shall have all such powers as are exercisable by it upon the hearing of an appeal (Order XXXIX, r. 2).

Application by notice of motion.

Every such application shall be made by notice of motion. This shall state whether the whole or part only, and if part only what part, of the verdict, finding, or judgment is complained of, and where there has been a trial with a jury, shall also state the grounds of the application; but where there has been a trial without a jury it shall not be necessary in the notice of motion to ask specifically for a new trial or to state the grounds of the application (Order XXXIX, r. 3).

Time for service of notice of motion.

The notice of motion shall be fourteen days' notice, and shall be served within six weeks after the trial, or, where the trial has been adjourned for further consideration, within six weeks after judgment has been given on such further consideration (*d*).

Ground for granting new trial.

A new trial shall not be granted on the ground of misdirection (*e*) or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned; and if it appears that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties (*f*).

New trial ordered on any one question.

A new trial may be ordered on any question without interfering with the finding or decision upon any other question (*g*).

Section 4.

APPEALS FROM COUNTY COURTS.

Appeals from County Courts.

Appeals from decisions of County Courts in probate actions lie to a Divisional Court of the Probate, Divorce, and Admiralty

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(*d*) Order XXXIX, r. 4. An extension of time can only be granted by the Court of Appeal: *Karno* v. *Spratt*, [1909] W. N. 251. As to amendment of notice of motion, see Order XXXIX, r. 5.

(*e*) For the grounds on which a new trial may be asked, see note to Order XXXIX, r. 6, in the Annual Practice. Particulars of misdirection must be stated: *Murfett* v. *Smith* (1887), 12 P. D. 116.

(*f*) Order XXXIX, r. 6.

(*g*) Order XXXIX, r. 7.

Division (Order LIX, r. 4). The practice indicated in Order LIX should be followed in so far as it applies (*h*).

Section 5.

APPEALS TO THE HOUSE OF LORDS.

Appeal to the House of Lords.

From the Court of Appeal there is an appeal to the House of Lords. The practice on such appeal is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, and by certain standing orders and directions (*i*).

Section 6.

SUMMARY AS TO APPEALS (*k*).

(1) Appeal from Registrar (O. LIV, rr. 20 and 21, *ante*, p. 613).

To what Court - Judge in chambers.
Time for - - - Within *five days* (*Patrick*, 14 P. D. 42).
Mode of - - - Filing fresh summons by way of appeal in Contentious Department; one clear day's notice must be given.
Observation - - No stay of proceedings (O. LIV, r. 21).

(2) Appeal from Judge in Chambers (O. LVIII, *ante*, p. 614).

To what Court - (a) To Judge in Court (*l*);
(b) To Court of Appeal, if Judge in chambers gives leave to appeal direct, or certifies that he requires no further argument.
Time for - - - (a) Within *fourteen days* of order pronounced, whether order interlocutory or final;
(b) *Fourteen days* if interlocutory order or final order not in an action, *six weeks* if final order in an action.
Mode of - - - (a) Notice of motion or adjournment;
(b) Notice of motion.
Where set down In Contentious Department.

(*h*) Appeals in probate matters are entered at the Contentious Department of the registry. By inference from Rule 4A, it may be taken that Rules 7, 8, 10, 11, 12, and 16 of Order LIX are of particular applicability.

(*i*) See pp. 2421—2451 of the Annual Practice for 1918, where the orders, etc. are set out.

(*k*) This summary is based upon the appeal table in the Annual Practice and the adaptation of that summary to probate practice contained in Tristram & Coote's Probate Practice (16th ed.), pp. 561—564.

(*l*) *Rigg* v. *Hughes* (1884), 9 P. D. 64.

(3) Appeal from Judge in Court (O. LVIII, *ante*, p. 614).

To what Court - Court of Appeal (*m*).

Time for - - - Within *six weeks* from perfecting of order, in cases of final order or judgment in an action;

Fourteen days in case of interlocutory order or final order not in an action (O. LVIII, r. 15) (*n*).

Four days in case of *ex parte* applications (O. LVIII, r. 10).

Mode of - - - Notice of motion (O. LVIII, r. 1);

Fourteen days' notice in case of judgment or final order (O. LVIII, r. 3), and *four days'* notice in case of interlocutory order (O. LVIII, r. 3); *eight days'* and *two days' notice* respectively in cross-appeals (O. LVIII, r. 7).

Where set down In Contentious Department (*o*).

(4) Motion for New Trial (O. XXXIX, *ante*, p. 617).

To what Court - Court of Appeal.

Time for - - - Within *six weeks* after trial or, where further consideration has been adjourned, within *six weeks* after judgment has been given on such further consideration (O. XXXIX, r. 4) (*p*).

Mode of - - - Notice of motion; *Fourteen days'* notice (O. XXXIX, r. 4).

Where set down In Contentious Department.

(5) Appeal from County Court (O. LIX, *ante*, p. 618).

To what Court - Divisional Court (*q*).

Time for - - - Within *twenty-one days* (O. LIX, r. 12).

Mode of - - - Notice of motion; *eight days'* notice (O. LIX, r. 10).

Where set down In Contentious Department.

(*m*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 27.

(*n*) The respective periods are to be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment is signed, entered or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal.

(*o*) The appeal must be entered before the day named in the notice: *Re National Funds Assurance Co.*, 4 Ch. D. 305.

(*p*) As to extension of time, *vide ante*, p. 618, note (d).

(*q*) *I.e.*, of the Probate, Divorce and Admiralty Division. For leave to appeal to the Court of Appeal from the Divisional Court application is made in the first instance *ex parte* to the Divisional Court, and if there refused, to the Court of Appeal.

(6) Appeal from Court of Appeal (*ante*, p. 619).

To what Court - House of Lords (*r*).

Time for - - - Within *six months* from date of the last order or judgment appealed from (*s*).

Mode of - - - By petition (Appellate Jurisdiction Act, 1876, s. 4).

(*r*) Appellate Jurisdiction Acts, 1876 and 1887.

(*s*) Standing Order No. 1 as to appeals on or after November 1, 1876, as amended May 23, 1916.

CHAPTER XIV.

COSTS.

SECTION 1.

GENERAL RULES.

Questions of costs in the discretion of the Judge.

IN the Probate Division, as in the Court of Probate and in the Prerogative Court, the question of costs is in the discretion of the Judge (*a*).

By Order LXV, r. 1, "subject to the provisions of the Act (*b*) and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge : Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*bb*) : Provided also that, where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter or issue is tried, or the Court shall, for good cause, otherwise order."

General rules for the exercise of the Court's discretion as to costs.

In the exercise of this discretion the Court has laid down certain general principles (*c*).

First, if the litigation results from the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate.

Secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of

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(*a*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 50.

(*b*) *I.e.*, the Supreme Court of Judicature (Consolidation) Act, 1925 : see *Campbell (Donald) & Co., Ltd.* v. *Pollak*, [1927] W. N. 240.

(*bb*) See *Wild* v. *Plant*, [1926] P. 139, as to the application of this part of the rule in Probate actions.

(*c*) In laying down these principles in *Mitchell* v. *Gard* (1863), 3 S. & T., at p. 278, Sir J. P. Wilde said : "It is hardly in the nature of discretion that its exercise should be adjusted by exact rule. But by acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and to foresee the penalties under which he launches into litigation." And see these rules reaffirmed in *Twist* v. *Tye*, [1902] P., at p. 94, *Spiers* v. *English*, [1907] P., at p. 123, and *Wild* v. *Plant*, [1926] P. 139 (C. A.). Decisions as to costs before 1863 which conflict with the rule in *Mitchell* v. *Gard* ought not to be relied on. Cases as to costs in the Court of Probate decided before 1863 will be found collected in a note to *Summerell* v. *Clements* (1862), 32 L. J. P. 33.

the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

Thirdly, unless the circumstances of the case bring it within one of the foregoing exceptions, the general rule that costs should follow the event ought to prevail.

For convenience of treatment, these three rules may be amplified in the form of six propositions, each of which demands separate consideration.

Sub-section 1.—*Where the Litigation has been caused by the Conduct of the Testator.*

Where the testator's own conduct or the confusion of his testamentary papers are the cause of the litigation.

Where the litigation has been brought about through the conduct of the testator (*d*), or where it is justified by the state in which the testator left his testamentary papers, the costs of ascertaining his will should be defrayed by his estate (*e*).

Thus where, owing to the confusion in which his papers were left by a deceased, it was doubtful whether he intended altogether to revoke an earlier will (*f*), or whether the document signed by him and attested by two witnesses was intended to be testamentary (*g*), the Court ordered the costs of both parties to be paid out of the estate.

Where his conduct has given reasonable ground for questioning his testamentary capacity,

And where the conduct, habits and mode of life of the testator have presented reasonable ground for questioning his testamentary capacity, the costs of the unsuccessful opponents of the will must be paid out of the estate (*h*).

Conversely, if an executor is led into litigation by the fact that the testator seemed to all outward appearance to be capable of managing his affairs, he is entitled to his costs out of the estate, even if the will is pronounced against on the ground of the testator's incapacity (*i*).

or for pleading undue influence.

Again, where the testator's own statements to the unsuccess-

(*d*) *Mitchell* v. *Gard* (1863), 3 S. & T., at p. 277; *Davies* v. *Gregory* (1873), 3 P. & D., at p. 31; *Spiers* v. *English*, [1907] P., at p. 123.

(*e*) *Lemage* v. *Goodban* (1865) 1 P. & D., at p. 63; *Hillam* v. *Walker* (1828), 1 Hagg., at p. 75; *Thorncroft* v. *Lashmar* (1862), 2 S. & T., at p. 484; *Davies* v. *Gregory* (1873), 3 P. & D., at p. 35.

(*f*) *Jenner* v. *Finch* (1879), 5 P. D. 106; *Lemage* v. *Goodban* (1865), 1 P. & D. 57.

(*g*) *Thorncroft* v. *Lashmar* (1862), 2 S. & T. 479.

(*h*) *Davies* v. *Gregory* (1873), 3 P. & D., at p. 31. The reasoning of Sir J. Hannen in this case, and the cases cited in his judgment, must not be taken to mean that the Court will regard the litigation as arising from the conduct of the testator in *every* case where the losing parties had reasonable grounds for contesting the will. The tendency of recent cases is rather to restrict than to enlarge the operation of this rule: see *post*, pp. 625, 626. See also *Roe* v. *Nix*, [1893] P. 55.

(*i*) *Boughton* v. *Knight* (1873), 3 P. & D., at p. 79.

ful litigants had induced them to plead undue influence, it was held that their costs should be paid out of the estate (*k*).

Sub-section 2.—*Where Litigation caused by Conduct of Residuary Legatee.*

If the residuary legatee by his improper conduct has induced the litigation, the estate must bear the costs.

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he, by his improper conduct, has induced a litigation which the Court considers reasonable, the costs of the litigation so caused may justly be borne by the estate (*l*).

Thus where a residuary legatee did not produce the will until after administration had been taken out, although several times called upon to do so if it existed, the Court pronounced for the will, but allowed the costs of the next-of-kin in obtaining administration, and in putting the residuary legatee to proof in solemn form, out of the estate (*m*).

Costs of persons who unsuccessfully allege undue influence or fraud paid out of the estate.

Under this rule the Court will allow the costs of a party, who unsuccessfully contests a will on the ground of undue influence or fraud, to be paid out of the estate, after a full indemnity has been given to the successful party for his costs, if, in the opinion of the Court, the conduct of the persons beneficially interested under the will has reasonably excited doubt and suspicion, and justified those pleas (*n*).

If such persons had no reasonable grounds for raising these pleas.

But there may be cases which fall within the rule laid down in *Fulton* v. *Andrew* (*o*), in which the circumstances do not justify the party disputing the will in pleading undue influence and fraud (*p*). Thus in *Spiers* v. *English* (*q*) the defendant,

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(*k*) *Cousins* v. *Tubb* (1892), 65 L. T. 716. And see *Williams* v. *Coker* (1893), 67 L. T. 626; *Shortman* v. *Shortman* (1893), 67 L. T. 717.

(*l*) *Mitchell* v. *Gard* (1863), 3 S. & T., at p. 277.

(*m*) *Smith* v. *Smith* (1865), 4 S. & T. 3.

(*n*) The costs of a defendant who unsuccessfully pleaded undue influence and fraud were allowed out of the estate :—

Where the widow of the deceased, who was a beneficiary under the will which she propounded, had sought to obtain from the deceased, at a time when he was admittedly insane, a deed vesting all his property in her : *Williams* v. *Henery* (1864), 3 S. & T. 471.

Where the principal beneficiary, a stranger in blood, had taken instructions for the will when no one else was present, and the will was not read over or explained to the testatrix (in this case undue influence or fraud was not pleaded) : *Goodacre* v. *Smith* (1867), 1 P. & D. 359.

Where the principal beneficiary (a stranger) had obtained a will in her favour, and never mentioned that fact to members of the deceased's family, and had got a neighbour to write the testator's signature to two cheques. The state of the deceased's signature to the will excited suspicion (undue influence pleaded) : *Orton* v. *Smith* (1873), 3 P. & D. 23.

See also *Shortman* v. *Shortman* (1893), 67 L. T. 717; *Wilson* v. *Bassil*, [1903] P. 239; and *Child* v. *Osment*, [1914] P. 129 (where the costs of all parties were ordered to be paid out of the legacies bequeathed to the persons whose conduct, though unsuccessfully impeached, had been the real cause of the investigation).

(*o*) [1875), L. R. 7 H. L. 448. *Vide ante*, p. 74.

(*p*) *Per* Walton, J., in *Wilson* v. *Bassil*, [1903] P., at p. 242.

(*q*) [1907] P. 122.

the person who obtained the will and who was mainly interested under it, was a relieving officer. His character could not be impeached, and he believed at the time the will was made that the testatrix possessed only a few pounds to pay for her burial. Sir Gorell Barnes, P., held that the plaintiff, who had alleged undue influence and fraud, had shown no ground on which the Court ought to interfere with the ordinary rule that costs follow the event (*r*).

SUB-SECTION 3.—*Where the unsuccessful Litigant had Reasonable Ground for opposing Probate.*

Unsuccessful litigant not condemned in costs if he had reasonable ground for questioning execution of will or capacity of testator.

"It is the function of this Court," said Sir J. P. Wilde in *Mitchell* v. *Gard* (*s*), "to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed; and so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt."

Thus, in an action in which a next-of-kin had unsuccessfully opposed a will, pleading undue execution and incapacity, upon information given to him by one of the attesting witnesses, the Court refused to condemn him in costs (*t*).

But parties must not assume that costs will be defrayed by others.

But parties should not be tempted into fruitless opposition to a will by the belief that their costs will be defrayed by others, or that they will escape condemnation in costs (*u*).

(*r*) *Spiers* v. *English*, [1907] P., at p. 124; and see *Levy* v. *Leo* (1909), 25 T. L. R. 717; *Oldcorn* v. *Tenniswood* (1909), 25 T. L. R. 825, and *Browning* v. *Mostyn* (1897), 66 L. J. P. 37.

(*s*) (1863), 3 S. & T., at p. 278; see also *Davies* v. *Gregory*, (1873), 3 P. & D., at p. 33; *Twist* v. *Tye*, [1902] P., at p. 94; *Spiers* v. *English*, [1907] P., at p. 123; *Wild* v. *Plant*, [1926] P. 139 (C. A.).

(*t*) *Tippett* v. *Tippett* (1865), 1 P. & D. 54. And see *Aylwin* v. *Aylwin*, [1902] P. 203, where no order was made as to costs (this case would seem to have come within the second proposition, *ante*, p. 624; and costs might have been ordered out of the estate); *Bramley* v. *Bramley* (1864), 3 S. & T. 430.

(*u*) *Mitchell* v. *Gard* (1863), 3 S. & T., at p. 279. See also *Gillett* v. *Rogers* (1913), 108 L. T. 732, where it was held that the parties opposing the will, although entitled to demand proof in solemn form, were not justified in fully contesting the action, of which they were ordered to pay their own costs.

Sub-section 4.—*Where Unsuccessful Litigant pleads Fraud or Undue Influence.*

Unless pleas of fraud or undue influence justified condemnation in costs will follow.

A plea of undue influence or fraud ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it (*x*), and failure to establish such pleas will, as a general rule, be followed by condemnation in costs (*y*).

Each case on its merits.

But in this case, as in the last, the losing party may be relieved from the costs of his successful opponent if there be sufficient and reasonable ground for contesting the case upon these issues (*z*). The question whether such pleas are justifiable must be judged upon its merits in each case that comes before the Court (*a*).

Cases in which parties, who have unsuccessfully pleaded undue influence and fraud, have been allowed their costs out of the estate, are dealt with in the second sub-section of this section (*b*).

Sub-section 5.—*In the Absence of Special Circumstances, Costs follow the Event.*

Costs follow the event.

Unless the circumstances are such as to bring the case within one of the foregoing rules, the Court will not interfere with the general rule that costs should follow the event (*c*).

Sub-section 6.—*Costs of Interest Suits.*

Costs in interest suits.

According to the practice of the Ecclesiastical Courts, unless some special circumstances appeared (*d*), the party who failed to prove his case in an interest suit was condemned in costs (*e*). This practice is followed in the Probate Division (*f*).

(*x*) *Mitchell* v. *Gard* (1863), 3 S. & T., at pp. 278, 279; *Spiers* v. *English*, [1907] P., at p. 124; *Oldcorn* v. *Tenniswood* (1909), 25 T. L. R. 825.

(*y*) *Summerell* v. *Clements* (1862), 3 S. & T. 35; *Levy* v. *Leo* (1909), 25 T. L. R. 717.

(*z*) *Mitchell* v. *Gard* (1863), 3 S. & T., at p. 278; *Summerell* v. *Clements* (1862), 3 S. & T. 35; *Bramley* v. *Bramley* (1864), 3 S. & T. 430; *Smith* v. *Smith* (1866), 1 P. & D. 239.

(*a*) *Orton* v. *Smith* (1873), 3 P. & D., at p. 25.

(*b*) *Vide ante*, p. 624.

(*c*) *Twist* v. *Tye*, [1902] P., at p. 93; *Spiers* v. *English*, [1907] P., at p. 123. See also *Page* v. *Williamson* (1902), 87 L. T., at p. 147, where Sir Gorell Barnes, J., calls attention "to an erroneous idea which seems to exist in the minds of litigants in this Court. They appear to have an expectation of getting their costs out of the estate in almost every case. That is not so. The rule is that costs follow the event, and there is no departure from it in this Court any more than in any other Court, unless under rare and exceptional circumstances."

(*d*) *Wiseman* v. *Wiseman* (1867), 1 P. & D. 351.

(*e*) See *Northey* v. *Cock* (1824), 2 Add. 294; *Sullivan* v. *Haydon* (1752), 1 Lee, 12; *Tucker* v. *Westgarth* (1824), 2 Add. 352.

(*f*) *Wiseman* v. *Wiseman* (1867), 1 P. & D. 351.

Section 2.

COSTS OF PARTICULAR PARTIES.

It is now necessary to discuss the position, with reference to costs of particular parties to an action.

Sub-section 1.—*Executor who propounds Will.*

Executor who proves will in solemn form entitled to costs out of the estate. But not if guilty of negligence.

An executor who proves a will in solemn form is, as a general rule, entitled to his costs out of the estate (*g*). Indeed, apart from an order of the Court, he has a right to take them out of the estate as costs of obtaining probate. But where, through the negligence of the executrix, the original will was lost, and the substance of the will was propounded and in most particulars established, the Court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the will in solemn form (*h*).

Costs on re-trial.

Where a verdict establishing a will was set aside and a new trial granted, the executors were allowed to take their costs out of the estate up to the time of the rule for a new trial being made absolute (*i*).

Executor not bound to propound.

An executor is *prima facie* justified in propounding a will (*k*), but he is not bound to do so unless he chooses (*l*), and if it is made to appear that an executor must have known that he was propounding a document which could not be supported, he may be condemned in costs (*m*).

Similarly, where executors, having ample opportunity of examining into the state of mind of a testator and the whole

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(*g*) *Headington* v. *Holloway* (1830), 3 Hagg., at p. 282.

(*h*) *Burls* v. *Burls* (1868), 1 P. & D. 472. And see *Smith* v. *Atkins* (1870), 2 P. & D. 169.

(*i*) *Boulton* v. *Boulton* (1867), 1 P. & D. 456.

(*k*) *Boughton* v. *Knight* (1873), 3 P. & D., at p. 77. See also *Wild* v. *Plant*, [1926] P. 139 (C. A.)

(*l*) *Rennie* v. *Massie* (1866), 1 P. & D. at p. 119. On this ground an executor, who was exonerated from a charge of undue influence, was condemned in the costs of the action, jointly with his co-executor, who was found to have exercised such undue influence: *Haydon* v. *Pring*, [1919] P. 131 (C. A.).

(*m*) *Boughton* v. *Knight* (1873), 3 P. & D., at p. 77. See *Dodge* v. *Meech* (1828), 1 Hagg. 612; *Clarkson* v. *Waterhouse* (1860), 2 S. & T. 378; *Richards* v. *Humphreys* (1860), 29 L. J. P. 137; *Rennie* v. *Massie* (1866), 1 P. & D. 118 (a bare executor condemned in costs); *Smith* v. *Atkins* (1870), 2 P. & D. 169 (executrix propounding will which was pronounced for, except residuary clause in her favour, which was excluded from probate on the ground of undue influence, condemned in costs, except costs of proving will in solemn form); *Cottrell* v. *Cottrell* (1872), 2 P. & D. 397 (executor who could have no *bona fide* motive in provoking litigation condemned in costs); *Rogers* v. *Lecocq* (1896), 65 L. J. P. 68; *Twist* v. *Tye*, [1902] P. 92; *Bliss Hill* v. *Jeffries*, [1916] W. N. 394 (C. A.).

state of affairs, take upon themselves the responsibility of propounding a will, they do so at their own risk, and, if in the result they are defeated, the Court will not, except under special circumstances (*n*), interfere with the general rule that costs should follow the event (*o*).

Unjustified opposition to codicil.

Where executors unreasonably opposed a codicil, which they insisted should be propounded, they were condemned in the costs of the action (*p*).

Position of executors who proves will, but fail to establish codicil.

The position of executors who propound a will and codicil and succeed in establishing the will, though the codicil is pronounced against, differs from that of persons named as executors in a testamentary paper which they unsuccessfully propound. Having established the will, and made good their position as the testator's executors, they are entitled to their costs of the litigation out of the estate as between solicitor and client, and can be deprived of that right, which rests substantially on contract, only if they have acted culpably or unreasonably (*pp*).

Sub-section 2.—*Legatee who propounds Will.*

A legatee or devisee who successfully propounds will *loco executoris* entitled to his costs.

Where a legatee or devisee propounds a paper and establishes it, thereby fulfilling the duty of the executor, he is entitled to have his expenses paid out of the estate (*q*). If he obtains a grant of administration *cum testamento annexo*, he is entitled to recoup himself out of the estate for these expenses without an order of the Court. But where the legatee is not primarily entitled to such a grant, and so may never be in a position to repay himself the expenses of the suit, he should obtain an order that his costs be paid out of the estate (*r*).

So is a legatee who successfully propounds a codicil,

Where an executor proved the will only, a legatee who successfully propounded a codicil was held to be entitled, not only to his party and party costs against the executor, but also to such further sum *nomine expensarum* as would cover his additional expenses to be paid out of the estate of the deceased (*s*). But costs out of the estate in favour of a legatee, who successfully propounded a codicil but had been guilty of unwise delay in producing the paper, were refused (*t*).

unless guilty of laches.

(*n*) See *Boughton* v. *Knight* (1873), 3 P. & D. 64.
(*o*) *Page* v. *Williamson* (1902), 87 L. T. 146.
(*p*) *Speke* v. *Deakin* (1913), 109 L. T. 719.
(*pp*) *Wild* v. *Plant*, [1926] P. 139 (C. A.).
(*q*) *Sutton* v. *Drax* (1815), 2 Phill. 323; *Williams* v. *Goude* (1828), 1 Hagg., at p. 610; *Thorne* v. *Rooke* (1841), 2 Curt., at p. 830.
(*r*) *Bewsher* v. *Williams* (1861), 3 S. & T. 62; *vide post*, p. 636.
(*s*) *Bremer* v. *Freeman* (1856), Dea. & Sw., at p. 258; *Wilkinson* v. *Corfield* (1881), 6 P. D. 27; *Speke* v. *Deakin* (*supra*).
(*t*) *Headington* v. *Holloway* (1830), 3 Hagg. 280.

SUB-SECTION 3.—*Persons who successfully oppose Probate.*

Persons who successfully oppose probate entitled to their costs.

A will having been successfully opposed, the successful litigant, on becoming the legal personal representative of the deceased, either under an intestacy, or by virtue of an earlier or later will which has been established, is entitled to recoup himself out of the estate for his expenses, and also to proceed against his opponent, provided the latter has been condemned in costs.

But where a will is set aside at the instance of a person who has no title to be constituted the legal personal representative, a distinction appears to exist between cases in which the unsuccessful litigant has, and has not, been condemned in costs. In the latter case the successful litigant may be allowed his costs out of the estate (*u*); in the former he must rely on the party who has been condemned in costs for payment (*x*).

SUB-SECTION 4.—*Next-of-Kin and others who put the Executor of a Will to Proof in Solemn Form.*

Right of next-of-kin, etc., to call for proof in solemn form without liability for costs.

By the practice of the Prerogative Court, the next-of-kin (*y*), a creditor who had obtained a grant of administration (*z*), or an executor under a former will (*a*), had a right to call upon the executor to prove the will in solemn form, without being liable for costs, provided they did not do so vexatiously (*b*). This right, however, did not extend to a legatee under a former will (*c*).

Persons also who put the executor on proof *after* he had taken probate in common form, did so at the risk of being condemned in costs (*d*).

The general practice here indicated was continued in the Court of Probate by Rule 5, C. B. But it was held, under

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(*u*) *Critchell* v. *Critchell* (1863), 3 S. & T. 41; *Bewsher* v. *Williams* (1861), 3 S. & T. 62; and see *Dyke* v. *Williams* (1871), 2 P. & D. 239.

(*x*) *Nash* v. *Yelloly* (1862), 3 S. & T. 59. But see *Cross* v. *Cross* (1864), 3 S. & T., at p. 300.

(*y*) Wms. on Exors. (11th ed.), p. 241, citing 1 Oughton, tit. 6, s. 7; *Reeves* v. *Freeling* (1812), 2 Phill. 56; *Urquhart* v. *Fricker* (1826), 3 Add., at p. 57.

(*z*) *Ibid.*, citing *Dabbs* v. *Chisman* (1810), 1 Phill., at pp. 159, 160. *Secus* a creditor who has not obtained administration: he may not deny an interest or oppose a will: *vide ante*, p. 309.

(*a*) *Mansfield* v. *Shaw* (1818), 3 Phill. 22; *Boston* v. *Fox* (1860), 4 S. & T. 199; *Seaton* v. *Sturch* (1860), 29 L. J. P. 195.

(*b*) Wms. on Exors., 11th ed., p. 241, citing *Urquhart* v. *Fricker* (1826), 3 Add., at p. 57; *Bell* v. *Armstrong* (1822), 1 Add., at p. 375; *Wagner* v. *Mears* (1829), 2 Hagg. 524. Liability, however, for costs resulted if the right was used vexatiously, or a plea of fraud was unjustifiably put forward: *Constable* v. *Tufnell* (1883), 4 Hagg., at p. 508.

(*c*) Wms. on Exors., 11th ed., p. 241; *Urquhart* v. *Fricker*, cited *supra*; *Hockley* v. *Wyatt* (1882), 7 P. D. 239.

(*d*) Wms. on Exors,. 11th ed., p. 241; *Bell* v. *Armstrong* (1822), 1 Add., at p. 375.

Order XXX, r. 18, R. S. C. 1883, which re-enacted with some immaterial alterations Rule 41, C. B., that the Court had no jurisdiction to condemn in costs a party who opposed probate of a will, and had given notice (*e*) of his intention merely to cross-examine the witnesses called in support of the will, even though he had no reasonable ground for his opposition (*f*).

Costs at discretion of Court.

But the discretion of the Court, when a notice of this character has been delivered, was restored in 1898, when Order XXI, r. 18, was amended (*g*), and the question is now whether in the opinion of the Court the defendants had reasonable grounds for opposing the will. If they had not, they will be condemned in costs (*gg*).

When notice under Order XXI, r. 18, cannot be given.

This rule must be construed in accordance with the principles which guided the old Ecclesiastical Courts and afterwards the Probate Court (*h*). It applies, therefore, only to the case of a party opposing a will which another party is seeking to prove in solemn form; it does not apply to the case of a party who asks for revocation of probate (*i*). Neither can a legatee under an earlier will avail himself of the protection afforded by this rule (*k*).

A defendant may plead undue execution, incapacity, and want of knowledge and approval, and still avail himself of the protection of this rule, for the burden of proof upon these issues is on the person who propounds the will (*l*). It is open to question whether the rule applies where matters are pleaded, the burden of proof of which lies upon the party who opposes the will (*m*). It has been held that the rule affords no protection to a party who pleads undue influence or fraud (*n*).

Order XXI, r. 18, applies to trials by jury.

The rule applies whether there be a jury or not, and whatever be the verdict of the jury (*o*).

In what cases next-of-kin, etc., who unsuccessfully oppose probate, will be allowed costs out of the estate.

Persons entitled to share in the estate upon an intestacy, executors of a former will, and creditors who have obtained a grant of administration, who unsuccessfully oppose probate,

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(*e*) *Vide ante*, p. 596. For form of notice, see App. VII, Form 117.

(*f*) *Leigh* v. *Green*, [1892] P. 17; *Tappenden* v. *Lucas* (1892), 65 L. T. 684.

(*g*) See *ante*, p. 596, where the rule is printed *in extenso*.

(*gg*) *Spicer* v. *Spicer*, [1899] P. 38; *Perry* v. *Dixon* (1899), 80 L. T. 297; even though the defendant is a trustee and is protecting the interests of the *cestuis que trust*: *ibid.* But see, as to the position of the Official Solicitor, *post*, p. 632.

(*h*) *Tomalin* v. *Smart*, [1904] P. 141.

(*i*) *Ibid.* See *Beale* v. *Beale* (1874), 3 P. & D. 179; *Leigh* v. *Green*, [1892] P. 17.

(*k*) *Hockley* v. *Wyatt* (1882), 7 P. D. 239.

(*l*) *Cleare* v. *Cleare* (1869), 1 P. & D. 655.

(*m*) *Ibid.*, at p. 658.

(*n*) *Ireland* v. *Rendall* (1866), 1 P. & D. 194; *Harrington* v. *Bowyer* (1871), 2 P. & D. 264.

(*o*) *Davies* v. *Jones*, [1899] P., at p. 164.

will, it would seem, be allowed their costs out of the estate only in cases which fall within the first or second of the general rules indicated at the commencement of this chapter (*p*).

Sub-section 5.—*Interveners and Parties cited.*

Only one set of costs allowed unless sufficient divergence of interest.

It is the general practice of the Court to allow only one set of costs (*q*). Where, therefore, a party cited enters an appearance and pleads in an action, he will not, as a general rule, be allowed separate costs, even if successful (*r*), unless there is such a divergence between his interests and those of the original parties as to justify his delivering a separate pleading (*s*). If his interests are already represented in the action, his reasonable course is to support the side which represents his interests (*t*).

The same rules apply with even greater force to a person who intervenes on his own initiative.

Intervener charged with undue influence.

Where an intervener had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the Court, in pronouncing for the will, condemned the defendants in the costs of the intervener as well as those of the executors (*u*).

The Court has power to condemn in costs a party who has been cited, but who has not appeared (*x*).

Sub-section 6.—*Heir-at-law.*

Position now similar to that of next-of-kin.

After the Land Transfer Act, 1897, the position of an heir-at-law became, in a probate action, practically identical with that of a next-of-kin, and only in cases where his interests are so divergent from those of the original parties that he cannot join in supporting either will he be allowed a separate set of costs (*y*).

(*p*) *Vide ante*, pp. 623, 624. The tendency of modern decisions seems to be to place such persons, originally the favourites of the Court, in no better position as regards costs than any other litigant: see *Davies* v. *Jones*, [1899] P., at p. 163.

(*q*) *Bagshaw* v. *Pimm*, [1900] P. 148; *Tennant* v. *Cross* (1886), 12 P. D. 4.

(*r*) *Twist* v. *Tye*, [1902] P., at p. 98; *Shawe* v. *Marshall* (1858), 1 S. & T. 129.

(*s*) *Bagshaw* v. *Pimm*, [1900] P. 148; *e.g.*, where an intervener is interested under alterations appearing upon the will, which are propounded by neither of the original parties: *Burgoyne* v. *Showler* (1844), 1 Rob., at p. 13; or where he alone propounds a will or codicil: *Cross* v. *Cross* (1864), 3 S. & T. 292; *Jenner* v. *Finch* (1879), 5 P. D. 106.

(*t*) *Twist* v. *Tye*, [1902] P., at p. 98; *Colvin* v. *Fraser* (1829), 2 Hagg., at p. 368.

(*u*) *Tennant* v. *Cross* (1886), 12 P. D. 4.

(*x*) *Foster* v. *Foster* (1823), 1 Add. 462; *King* v. *Gillard* (1867), 1 P. & D. 539.

(*y*) *Twist* v. *Tye*, [1902] P., at p. 98. The right of the heir-at-law, as such, to be a party to a probate action can only arise where the testator or intestate died before January 1, 1926.

Prior to the Land Transfer Act, 1897, an heir-at-law who intervened, although not cited to see proceedings, was entitled, as a general rule, to separate costs, if successful, for he might have stood aside and later have had the whole matter again investigated (*z*). If cited, however, he was not allowed separate costs (*a*).

Sub-section 7.—*Married Woman.*

Security for costs.

Since the Married Women's Property Act, 1882, married women suing as plaintiffs without their husbands being joined are not liable to give security for costs (*b*).

Liability to pay costs.

The Probate Division has a discretionary power to condemn in costs a married woman having general separate estate (*c*); and, under section 2 of the Married Women's Property Act, 1893, where an action or proceeding is "instituted" by a married woman, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation.

What amounts to the "institution" of proceedings.

A summons by a married woman for leave to intervene in a pending probate action, for the purpose of asserting her independent interest in the subject-matter, has been held to be a "proceeding instituted" by her within section 2 of the Married Women's Property Act, 1893, and therefore the Court has jurisdiction to order the costs of the action, as from the date of such summons, to be paid out of her separate property, including property subject to a restraint on anticipation (*d*). But a married woman who enters a caveat, and enters an appearance in answer to the warning, and is subsequently made defendant to the action by a writ of summons issued by the plaintiff, does not "institute proceedings" within the meaning of this section. Proceedings in a probate action are only "instituted," within the meaning of the Act, by the issue of the writ by the plaintiff (*e*).

Sub-section 8.—*Other Persons.*

H.M. Procurator-General.

It has been held that the Court has no authority to condemn His Majesty's Procurator-General, who unsuccessfully contests a will on behalf of the Crown, in the costs of the litigation (*f*).

(*z*) *Rayson* v. *Parton* (1869), 2 P. & D. 38. See the Court of Probate Act, 1857, s. 61, repealed by the Judicature (Consolidation) Act, 1925, but re-enacted by Sched. V, Part II of that Act in the case of persons dying before January 1, 1926.

(*a*) *Fyson* v. *Westrope* (1859), 1 S. & T., at p. 282.

(*b*) *Threlfall* v. *Wilson* (1883), 8 P. D. 18.

(*c*) *Morris* v. *Freeman* (1878), 3 P. D. 65; see *Clarkson* v. *Waterhouse* (1860), 2 S. & T. 378; *Thomas* v. *Crowther* (1861), 2 S. & T. 501; *Parker* v. *Hick* (1864), 3 S. & T. 436.

(*d*) *Crickitt* v. *Crickitt*, [1902] P. 177.

(*e*) *Moran* v. *Place*, [1896] P. 214, C. A.

(*f*) *Atkinson* v. *H.M. Proctor* (1871), 2 P. & D. 255.

Official solicitor.

The position as to costs of the official solicitor who has been appointed guardian *ad litem* is regulated by Order LXV, r. 13 (*g*).

Poor persons.

Reference may be made to Order XVI, rr. 31B and 31C, for the rules as to the costs of persons admitted to sue or to defend or to be parties to legal proceedings under the Rules of the Supreme Court (Poor Persons), 1925.

Section 3.

APPORTIONMENT OF COSTS.

Costs directed to be paid out of particular part of estate.

Order LXV, r. 14D, provides that in any probate action in which it is ordered that any costs shall be paid out of the estate, the Judge may direct out of what portion or portions of the estate such costs shall be paid.

Under this rule the Court has ordered the costs of both plaintiff and defendant to be charged on and paid out of the *corpus* of certain real estate, devised by the will to successive life tenants (*h*); and in another case to be paid out of the residuary shares of four defendants, there being six in all interested in the residuary estate, these four defendants being held to have caused the litigation (*i*).

An order has also been made directing the costs of all parties to be paid out of legacies bequeathed in the will to the successful parties, whose conduct was considered to be the cause of the litigation (*k*).

Costs to be paid out of real estate.

It was at one time deemed that the Court had no jurisdiction to order costs to be paid out of real estate (*l*); but it has been held that since the Land Transfer Act, 1897, the Court may distinguish between the realty and personalty and may impose costs accordingly (*m*).

Where issues are found distributively.

Where issues are found distributively, the Court may condemn the unsuccessful party in the costs of those issues alone upon which he failed, but only, it seems, where the exact amount of such costs, as distinguished from the issues upon which he was successful, can be ascertained on taxation (*n*).

(*g*) See *White* v. *Duvernay*, [1891] P. 290; *Gill* v. *Gill*, [1909] P., at p. 163.
(*h*) *Dean* v. *Bulmer*, [1905] P. 1.
(*i*) *Harrington* v. *Butt*, [1905] P. 3, n.
(*k*) *Child* v. *Osment*, [1914] P. 129.
(*l*) *Young* v. *Dendy* (1867), 1 P. & D. 344; *semble*, even if the personal estate was insufficient: *Davies* v. *Reynolds* (1873), 3 P. & D. 90; unless by consent: *Smith* v. *Hopkinson* (1878), 4 P. D. 84.
(*m*) *Vickerstaff* v. *Chadwick*, [1906] 1 Ch. 762; see *Brisco* v. *Baillie Hamilton*, [1902] P., at p. 238.
(*n*) *Rayson* v. *Parton* (1869), 2 P. & D. 38; and see *Fyson* v. *Westrope* (1859), 1 S. & T., at p. 283; *Smith* v. *Atkins* (1870), 2 P. & D. 169.

SECTION 4.

SECURITY FOR COSTS (*o*).

Security for costs.

The question of giving security for costs in the Probate Division is governed by the same rules as apply at common law (*p*). These rules are fully dealt with in the notes to Order LXV, rr. 6 and 6A, in the Annual Practice, and the cases there cited. It should, however, be observed that, on the question of the immunity of a *defendant* from giving security for costs, the substantial, and not the nominal, position of defendant and plaintiff respectively in the action should be considered (*q*).

Position of caveator.

A caveator, who has been made a defendant to an action following the entry by him of the caveat, is not thereby placed in the position of plaintiff so as to become liable to give security for costs (*r*).

Amount of security.

Order LXV, r. 6, provides that the security shall be of such amount, and be given at such times and in such manner and form, as the Court shall direct.

Security for costs by plaintiff temporarily within jurisdiction.

By Order LXV, r. 6A, a plaintiff ordinarily resident without the jurisdiction may be ordered to give security for costs, though temporarily resident within the jurisdiction.

Practice.

The application for security is made on the summons for directions or by notice thereunder. An affidavit in support will be required.

SECTION 5.

TAXATION OF COSTS.

Costs in contentious business regulated by Rules of the Supreme Court.

Order LXV, r. 27 (37), provides: "The rules, orders and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing immediately before the 1st November, 1875, shall, *in so far as they are not inconsistent with the Act and these rules*, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal."

The taxation of costs in probate actions is, therefore, now

(*o*) Security for costs of appeal is dealt with on p. 616, and security for costs of discovery on p. 577.

(*p*) Wms. on Exors. (11th ed.), p. 288, citing *Robson* v. *Robson* (1864), 3 S. & T. 568.

(*q*) Wms. on Exors. (11th ed.), p. 288, citing *Robson* v. *Robson*, *ubi supra*; and see *Brandreth* v. *Brandreth* (1862), 2 S. & T. 446.

(*r*) *Emery* v. *Emery*, [1923] P. 184, in which the Irish decision in *Lambert* v. *Bassett* (1877), Ir. R. 11 Eq. 291, was not followed.

regulated by Order LXV, and Appendix N to the Rules of the Supreme Court, and only in particulars upon which they are silent by the table of costs allowed to solicitors in contentious business in the Court of Probate.

Practice on taxation.

The bill of costs is filed in the Contentious Department at the registry (*s*). If there are several sets of costs to be taxed relating to the same action, all should be filed at the same time, or notice given that there are other costs to be filed. No order to tax need be produced (*t*) nor need any vouchers or briefs be left when the bill is filed.

Notice of appointment.

Notice of appointment to tax is sent from the registry to the applicant's solicitor, who must give notice forthwith to the other side, delivering at the same time a copy of the bill (*u*). At least one clear day's notice must be given (*x*), but a longer notice is recommended (*y*).

Receipts for all payments and vouchers for counsel's fees, together with briefs and other necessary papers, should be brought upon the appointment before the registrar.

The bill, as taxed and completed, having been agreed and signed by the solicitors for the parties, is taken to the registrar's clerk, who will see that the balance of taxing fees due, and also the fee for the order, if required, have been paid. Thereupon the allocatur will be indorsed on the bill and the order drawn (*z*). The taxing fees taken are 2s. where the amount of the taxed bill does not exceed £4, and 1s. for every £2 or fraction of £2, if the total of the taxed bill exceeds £4.

Objections.

Objections to the taxation (*a*) must be drawn in three columns: (1) the item objected to; (2) nature of the objection; (3) a blank column for the registrar's observations. The objections are filed in the Contentious Department before the allocatur is signed, and the registrar will send notice of appointment if he desires to hear the parties on the objections.

Review of taxation.

Either party may take out a summons before the Judge to review the taxation, if objection has first been made to the registrar and disallowed, within fourteen days from the date of the registrar's allocatur (*b*). It has been held that the Court

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(*s*) A deposit on account of taxing fees is taken at the rate of 3s. for each £10 of the untaxed bill in addition to the filing fee of 2s. 6d.

(*t*) Rule 92, C. B. See also note to Order LXV, r. 26A, in the Annual Practice.

(*u*) Rule 93, C. B. (*x*) Order LXV, r. 16.

(*y*) Rule 93, C. B., lays down the procedure to be followed at the taxation in the absence of some of the parties.

(*z*) No order is drawn where the costs are to be paid out of the estate. But a copy of the allocatur may be obtained on application at the Copies Department.

(*a*) See Order LXV, r. 27 (39).

(*b*) Order XLV, r. 27 (41). See also *Harben* v. *Gordon* (1913), 109 L. T. 794.

will not generally interfere with the decision of the registrar upon a mere question of *quantum* (*c*).

In a testamentary suit, in which under a compromise the defendant's attorney received a fixed sum for his agreed costs, it was held that the Court could not afterwards allow his bill to be taxed on the application of his client (*d*).

SECTION 6.

MISCELLANEOUS.

Delay in applying for costs.

A claim for costs ought to be put forward at the trial. Where, after a lapse of nine years, the Court was moved to order the costs of a successful litigant to be paid out of the estate, it was held that after such a lapse of time the application ought not to be granted, although the order would have been made if applied for at the trial (*e*).

In *Bewsher* v. *Williams* (*f*) the Court gave judgment and pronounced for a will, and refused to make any order as to costs. Some weeks later the Court was successfully moved to direct that the costs of the legatee who propounded the will should be paid out of the estate (*g*).

Condemnation in costs includes all charges of administrator *pendente lite*.

In a testamentary action condemnation in costs includes all the charges of an administrator pending suit (*h*), from the date of his appointment until the dismissal of an appeal, if any (*i*).

Administration (will) not made conditional on payment of costs.

When administration with the will annexed was granted to the testator's next-of-kin, who had been condemned in the costs of his unsuccessful opposition to the will, the Court refused to make the grant conditional on the payment by him of these costs, on the ground that such an order might delay the payment of legacies to legatees who were not parties to the litigation (*k*).

Order to pay costs can be enforced in King's Bench Division.

An order of the Probate Division to pay costs of a fixed amount can be enforced by specially endorsed writ in the King's Bench Division (*l*), as well as by the usual modes of enforcing an order for costs (*m*).

(*c*) *Ogilvie* v. *Massey*, [1910] P. 243; *Slingsby* v. *Att.-Gen.*, [1918] P. 236 (C. A.).

(*d*) *Holditch* v. *Carter* (1873), 3 P. & D. 115.

(*e*) *Dyke* v. *Williams* (1871), 2 P. & D. 239.

(*f*) (1861), 3 S. & T. 62.

(*g*) As to the power of a Judge to vary an order, see Order XXVIII, r. 11; in a case of this kind a supplemental order would now probably be made.

(*h*) *Fisher* v. *Fisher* (1879), 4 P. D. 231.

(*i*) *Taylor* v. *Taylor* (1881), 6 P. D. 29.

(*k*) *Sawbridge* v. *Hill* (1871), 2 P. & D. 219.

(*l*) *Norton* v. *Gregory* (1895), 73 L. T. 10.

(*m*) *Vide ante*, pp. 527—529; and see Rules 130, 131, C. B. For form of order for payment of costs, see App. VII, Form 242.

CHAPTER XV.

TIME-TABLE.

THE following table, in which the various times fixed for proceedings are arranged in alphabetical order, has been adapted to the practice in the Probate Division from the table in the Diary for Lawyers, published by Messrs. Sweet and Maxwell.

Admissions of Facts.	
Notice to admit. Any party may call on any other party to admit for the purposes of the cause, matter, or issue only, any specific fact or facts	at any time not later than *nine days* before the day for which notice of trial has been given (Order 32, r. 4).
Admissions to be made in pursuance of such notice	within *six days* after service thereof (*ibid.*).
Affidavit of Scripts. *See* " SCRIPTS."	
Amendment. *See* " PLEADINGS, AMENDMENT."	
Appeals. *See* " SUMMARY AS TO APPEALS " (*ante*, pp. 619—621).	
Appearance.	
Appearance to citation to accept or refuse a grant, or to propound a will to be entered in the principal registry—	
(i) If citation served personally	within *eight days* of service.
(ii) If served by advertisement	within *one month* (or such time as may be fixed) of last advertisement.
(iii) If served abroad	within the time limited in the citation.
Appearance to citation to see proceedings to be entered at the Central Office, Royal Courts of Justice,	at any time during the dependence of the action and before final judgment.
Appearance to warning to be entered in the principal registry	within *six days* of service.
Appearance, Default of. *See* " GUARDIAN *ad litem*."	
Appearance to Writ of Summons.	
The time limited for appearance, which is entered at the Central Office, is	*eight days* from service, inclusive of the day of such service, where defendant resides within the jurisdiction (R. S. C., App. A, Part I, No. 1; App. K, No. 1a); where the defendant is not within the jurisdiction, within the time fixed by the order giving leave to serve the writ.
A defendant may appear at any time	before judgment, although the time limited for appearance has expired (Order 12, r. 22).
Notice of appearance must be given by defendant	on the day on which the appearance is entered (Order 12, r. 9).

Attachment of Debts.

Order *nisi* must be served on the garnishee or his solicitor and, unless otherwise ordered, on the judgment debtor or his solicitor	at least *seven days* before the hearing (Order 45, r. 1).

Caveats.

A caveat shall remain in force	for the space of *six months* from the day of entry (Rule 60, N.-C.B.).
A caveat may be subducted—	(1) at any time before warning issued; (2) after warning has issued (a) at any time before service of warning (on affidavit of non-service); (b) within *six days* of entry of warning.

Change of Parties by Death, etc. *See* "PARTIES."

Citations. *See* "APPEARANCE."

Citation to bring in Grant.

Grant must be lodged at the Contentious Department of the principal registry	within *eight days* (or such time as may be fixed) of service of citation.

Claim, Statement of. *See* "PLEADINGS."

Concurrent Writ. *See* "WRIT OF SUMMONS."

Costs Taxation.

Notice of taxation to be	a *one day's* notice (Order 65, r. 16).
If any of the parties do not attend at the time appointed, the registrar may proceed to tax the bill	after the expiration of a quarter of an hour (Rule 94, C.B.).
Review of taxation after certificate or *allocatur* signed may be obtained by application to the Judge in chambers on summons	within *fourteen days* from the date of the certificate or *allocatur* (Order 65, r. 27 (41)).

Counterclaim. *See* "PLEADINGS."

Death of Party. *See* "PARTY."

Default of Appearance. *See* "GUARDIAN *ad litem*."

Defence. *See* "PLEADINGS."

Directions, Summons for. *See* "SUMMONS FOR DIRECTIONS."

Discontinuance.

Summons to discontinue proceedings by consent may be taken out	at any time up to trial (see p. 522).

Discovery and Inspection.

1. DISCOVERY BY INTERROGATORIES— (a) Delivery. In any cause or matter interrogatories may by leave of the Court or a Judge be delivered to the opposite party, (NOTE.—Leave to deliver interrogatories is now necessary in all cases.)	(i) by the plaintiff at any time after delivering his statement of claim; (ii) by the defendant at or after the time of delivering his defence (Order 31, r. 1). These fixtures, however, are now subject to Order 30 (Summons for Directions).

Discovery and Inspection—*continued.*

(b) Answer. Affidavit in answer to interrogatories to be filed	within *ten days*, or within such other time as a Judge may allow (Order 31, r. 8).

2. Discovery by Affidavit of Documents—

Affidavit to be filed	within the time fixed in the Order for Directions (see also Order 30, r. 26).

3. Production and Inspection of Documents—

(a) Notice to produce. Either party to a cause or matter may *at any time* give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for inspection (Order 31, r. 15).

(b) Time for inspection. The party to whom such notice is given shall—	(a) if all the documents referred to in such notice have been set forth in the affidavit of documents, within *two days* from the receipt of such notice; (b) or if any of the documents referred to in such notice have not been set forth in the affidavit of documents, then within *four days* from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which such documents as he does not object to produce may be inspected at the office of his solicitors, or in the case of bankers' books or other account books in constant use, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground (Order 31, r. 17).

Divisional Court. *See* "Summary of Appeals" (*ante*, p. 620).

Documents. *See* "Discovery and Inspection."

Evidence.

1. By Affidavit—

(a) Plaintiff's affidavits must be filed and a list thereof delivered to the defendant or his solicitor	within *fourteen days* after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the Court or a Judge may allow (Order 38, r. 25).
(b) Defendant's affidavits must be filed and a list thereof delivered to the plaintiff or his solicitor	within *fourteen days* after the delivery of plaintiff's list, or within such time as may be agreed or allowed (Order 38, r. 26).
(c) Affidavits in reply must be filed by the plaintiff and a list thereof delivered to the defendant or his solicitor	within *seven days* after the expiration of the fourteen days or such other time as may be allowed to the defendant for the delivery of his list (Order 38, r. 27).
(d) Cross-examination of deponent. Notice to produce deponent for cross-examination may be served	at any time before the expiration of *fourteen days* next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint (Order 38, r. 28).

Evidence —*continued.*

2. READING EVIDENCE TAKEN IN OTHER MATTERS—	
(a) In *ex parte* applications evidence taken in another cause or matter may be read by leave to be obtained	at the time of making any such application (Order 37, r. 3).
(b) In other cases the party desiring to use such evidence must give	*two days'* previous notice to the other parties of his intention to read such evidence (*ibid.*).
3. EXAMINATIONS BEFORE EXAMINER OF THE COURT—	
(a) Appointment. Upon the production of an order for an examination indorsed with his name the examiner shall give an appointment in writing	specifying the place and time (within not more than *seven days*) at which, subject to any application from the parties, the examination shall be taken (Order 37, r. 44).
(b) Notice of appointment. The party prosecuting such order shall give notice of the appointment to all parties	within *twenty-four hours*, or such shorter time (if any) as may be mentioned in the order (*ibid.*).
4. EVIDENCE TAKEN BEFORE ISSUE JOINED—	
No affidavit or deposition filed or made before issue joined shall without special leave of the Court or a Judge be received at the hearing or trial, unless notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf	within *one month* after issue joined or within such longer time as may be allowed by special leave of the Court or a Judge (Order 37, r. 24).

Execution.

A Writ of Execution may issue without leave	at any time *within six years* from the recovery of the judgment, or the date of the order (Order 42, r. 22).
,, ,, if unexecuted, shall remain in force	for *one year* from its issue (Order 42, r. 20).
,, ,, if unexecuted may be renewed	at any time before its expiration, by leave of the Court or a Judge for *one year* from the date of such renewal and so on from time to time during the continuance of the renewed writ (Order 42, r. 20).

Garnishee. *See* "ATTACHMENT OF DEBTS."

Guardian *ad litem.*

On default of appearance by defendant who is an infant or person of unsound mind, the plaintiff shall apply for appointment of guardian *ad litem*, and shall serve notice of such application on the infant or person of unsound mind in manner provided	after the expiration of time allowed for appearance, and at lease *six clear days* before the day in such notice named for hearing the application (Order 13, r. 1).

Inspection. *See* "DISCOVERY AND INSPECTION."

Interrogatories. *See* "DISCOVERY AND INSPECTION."

Jurisdiction, Service of Writ out of. *See* "APPEARANCE."

Jury. *See* "TRIAL."

Motion for New Trial. *See* "NEW TRIAL."

Motions.

Between service of notice of motion and the day named for hearing the motion there must be	at least *two clear days* unless the Judge give special leave to the contrary (Order 52, r. 5).
By leave of the Court or a Judge, notice of motion may be served	with the writ of summons or at any time after service of the writ of summons and before the time limited for appearance (Order 52, r. 9).
All papers for motions on Mondays must be left in the Contentious Department of the registry	before 2 o'clock p.m. on the preceding Tuesday.

New Trial. *See* "SUMMARY OF APPEALS" (*ante*, p. 620).

Notice of Motion. *See* "MOTION."

Notice of Trial. *See* "TRIAL."

Notice to admit. *See* "ADMISSIONS OF FACTS."

Notice to inspect. *See* "DISCOVERY AND INSPECTION."

Notice to prove in Solemn Form.

Notice by party opposing will that he merely insists upon the will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of the will, must be delivered	with the defence (Order 21, r. 18; *Bone* v. *Whittle*, 1 P. & D. 249).

Order to carry on Proceedings. *See* "PARTIES."

Parties.

Change of parties by death, etc.; order to carry on proceedings (Order 17, r. 4).	
An application to discharge or vary an order under Order 17, r. 4, may be made—	
(a) Where person served is under no disability other than coverture, or being under disability other than coverture, has a guardian *ad litem*,	at any time within *twelve days* from the service of the order (Order 17, r. 6).
(b) Where person served is under disability other than coverture and has no guardian *ad litem*,	at any time within *twelve days* from the appointment of a guardian *ad litem* for such party. Until such period of twelve days shall have expired the order shall have no force or effect as against the person served (Order 17, r. 7).
Appearance to be entered after service of order to carry on proceedings	within same time as after service of writ of summons (Order 17, r. 5).
Cause marked "Abated" in cause book to be struck out	after *one year* (Order 17, r. 10).

Pleadings, Delivery (as to close of Pleadings, *see* Order 27, r. 13).

1. GENERALLY—*See also* "TIME"	
Time for pleading after delivery of particulars is	the same as at the return of the summons for particulars, unless the time is extended in the order for particulars (Order 19, r. 8).
Pleadings in the Long Vacation.	*See* "TIME."
2. STATEMENT OF CLAIM—	
In probate actions statements of claim, if any, must be delivered	within the time ordered in the summons for directions, or if no time is specified, within *six weeks* of appearance or of time limited for appearance (Order 20, r. 2).
3. DEFENCE AND COUNTERCLAIM—	
(a) The defendant must deliver his defence	within such time as may be fixed by the order for directions (Order 30, r. 2. See also Order 21, r. 8).
(b) After delivery of amended statement of claim	within original time for defence or within *eight days* from the delivery of the amendment, whichever shall be last (Order 28, r. 5), or within time fixed by order for directions, if any.
(c) After delivery of particulars	the same length of time as defendant had at the return of the summons for particulars (Order 19, r. 8).
4. REPLY AND SUBSEQUENT PLEADINGS—	
Reply, if any, or subsequent pleading must be delivered	within time specified in the order giving leave to deliver special pleading. If no time specified, within *four days* after the defence or the last of defences delivered (Order 23, r. 2).

Pleadings, Amendment (*a*).

1. STATEMENT OF CLAIM—	
(a) Amendment. A plaintiff may *without leave*, amend his statement, whether indorsed on the writ or not	*once* at any time before the expiration of the time limited for reply and before replying, or where no defence is delivered at any time before the expiration of *four* weeks from the appearance of the defendant who shall have last appeared, or where defence delivered but no order for reply is made within *ten days* from delivery of the defence or the last of the defences (Order 28, r. 2).
(b) Disallowance of amendment under Order 28, r. 2. A defendant may apply to have an amendment made under Order 28, r. 2, or any part thereof disallowed	within *eight days* after the delivery of the amended statement of claim (Order 28, r. 4).
2. COUNTERCLAIM—	
(a) Amendment. A defendant who has set up a counterclaim may *without leave* amend his counterclaim	at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply, then at any time before the expiration of *twenty-eight days* from defence (Order 28, r. 3).
(b) Disallowance of Amendment.	within eight days after the delivery

(*a*) See *ante*, pp. 588, 589.

Pleadings, Amendment—*continued.*

The plaintiff may apply to have an amendment made under Order 28, r. 3, or any part thereof disallowed	of the amended counterclaim or set off (Order 28, r. 4).
3. By Order—	
An amendment in pursuance of an order to be made	within the time limited by the order, or if no time is thereby limited, then within *fourteen days* from the date of the order, which shall, on the expiration of such limited time, or of such fourteen days, as the case may be, become void unless the time is extended (Order 28, r. 7).

Pleadings (other than Reply), Close of.

Pleadings shall be deemed to be closed and all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

(a) Where no reply or subsequent pleading ordered	at the expiration of *four days* from delivery of the defence or last pleading delivered (Order 27, r. 13).
(b) Where a reply or subsequent pleading ordered, but not delivered within the period limited for that purpose	at the expiration of the period so limited (*ib.*).
Reply, deemed to be Admitted.	
Where reply to counterclaim delivered without leave, the statements of facts in the counterclaim shall be deemed to be admitted	at the expiration of *ten days* from the delivery of the counterclaim or of such time (if any) as may by order be allowed for delivery of a reply thereto (*ib.*).
Reply, Leave to Deliver.	
The Court or Judge may give leave to the plaintiff to deliver a reply	at any subsequent time (*ib.*).

Refresher Fees.

Refresher fees allowed according to scale	for every clear day beyond the first five hours during which the trial has lasted (Order 65, r. 27 (48)).

Renewal of Writ. *See* "Writ of Summons."

Reply and Subsequent Pleadings. *See* "Pleadings."

Scripts. *See also* "Subpœna."

Affidavits of scripts of all parties to be filed	within the time ordered on the summons for directions (*vide* p. 571).
Where action is undefended, plaintiff should file his affidavit of scripts	before the action is entered for trial.
Inspection of scripts by opposite party	not before the party's own affidavit of scripts has been filed (Rule 32, C. B.).

Service of Pleadings, Notices, Summons, etc. *See* "Time."

Service of Writ. *See* "Writ of Summons."

Subduction of Caveat. *See* "Caveat."

Subpœna to bring in Scripts.

Scripts to be lodged in Record Keeper's Department in the registry	within *eight days* of service of subpœna (Rule 73, C. B., and form).

Summons.

Summons to be served	*one clear day* before the return thereof (Rule 100, C. B.; *Hopkinson* v. *Carter* [1909] P. 118).
Summons for time only may be served	on the day previous to the return thereof (Order 54, r. 4E).
Appeal from Registrar.	*See* "SUMMARY OF APPEALS" (*Ante*, p. 619).

Summons for Directions.

(a) Plaintiff must issue a summons for directions	within *fourteen days* from entry of appearance and before taking any fresh step except application for injunction or receiver (Order 30, rr. 1—8).
(b) If plaintiff fails to take out such summons, defendant may apply to dismiss	after the expiration of *fourteen days* from entry of appearance (Order 30, r. 8).
(c) Summons for directions is returnable	not less than *four days* after service (Order 30, r. 1A).
(d) Application subsequent to original summons by any party to be made by	*two clear days'* notice to the other party (Order 30, r. 5).

Time.

(a) Month, unless otherwise expressed, means	calendar month (Order 64, r. 1).
(b) Sunday, Christmas Day, and Good Friday not to be reckoned	(*See* Rule 91, C. B., and Rule 87, N. C. B.).
(c) Where time limited for proceeding expires on Sunday or other day when offices closed, such proceeding may be taken	on next day offices are open (Order 64, r. 3).
(d) In causes to be tried at autumn assizes, when commission day is prior to December 1 pleadings may be amended, delivered, or filed and summonses issued in Long Vacation	on and after October 1 (Order 64, r. 4).
(e) Long Vacation not to be reckoned (except as in (d), *supra*)	in computation of time for amending, delivering, or filing pleadings (Order 64, r. 5).
(f) Time limited for pleading not to include	day of service of order for security for costs and the time from that day until and including the day on which security is given (Order 64, r. 6).
(g) Time under these rules may be enlarged or abridged	by the Court or a Judge (Order 64, r. 7).
(h) Time for amending, delivering, or filing pleadings, etc., may be enlarged	by consent in writing without order (Order 64, r. 8).
(i) Service shall be effected	before the hour of six in the afternoon (Order 64, r. 11).
except on Saturday, when it shall be effected	before the hour of one in the afternoon (*ib.*).

Time—*continued.*

Service effected after six shall be deemed to have been effected	on the following day (*ib.*).
except on Saturday, when service effected after one shall be deemed to have been effected	on the following Monday (*ib.*).
(j) Days not expressed to be clear days shall be reckoned	exclusively of the first day and inclusively of the last day (Order 64, r. 12).
(k) Where no proceeding for one year from last proceeding in any cause or matter, party who desires to proceed must give to other party	*one month's* notice of his intention to proceed (Order 64, r. 13).

Trial.

1. Notice of Trial—	
(a) Notice of trial may be given	
(i) By plaintiff :	with the reply, if any, whether it closes the pleadings or not, or where no order for a reply has been made under Order 23 on the expiration of *four days* after defence, or the last of the defences shall have been delivered, or at any time after the issues of fact are ready for trial (Order 36, r. 11).
(ii) By defendant :	where the plaintiff does not give notice of trial within *six weeks* after the time when he first becomes entitled to do so as above stated, or within time extended by order, the defendant may give notice of trial or apply to dismiss the action for want of prosecution (Order 36, r. 12).
(b) Avoidance of notice of trial. In London, Middlesex, Manchester and Liverpool and such other places as the Lord Chancellor shall from time to time direct the notice of trial shall be no longer in force unless the trial shall be entered by one party or the other	within *six days* after notice of trial (Order 36, r. 16).
(c) Length of notice of trial—	
(i) Ordinary notice	*ten days* (Order 36, r. 14).
(ii) Short notice	*four days* (*ib.*).
2. Entry of Action for Trial—	
(a) In London, Middlesex, Manchester and Liverpool and such other places as the Lord Chancellor may from time to time direct	within *six days* after notice of trial (Order 36, r. 16). If the party giving the notice of trial omits to enter the trial on the day of, or day after, giving notice, the party to whom the notice has been given may, unless the notice has been countermanded, within *four days* enter the trial (Order 36, r. 20).
(b) In places other than those mentioned in (a), *supra.*	not less than *seven days* before the Commission Day except by leave of the Judge (Order 36, r. 22B).
3. With Jury.	
An application for a trial with a jury may be made by either party	by summons for directions or on leave given to defend under Order 14; or at any stage on notice for directions (Order 36, r. 1).

Trial—*continued.*

4. With Special Jury—	
(a) By application. Parties in any cause or matter in which they are entitled to a jury may have the issues tried by a special jury on application	made at the time at which the mode of trial is fixed, or, if the Court or Judge thinks fit, at any later stage (Order 36, r. 9).
(b) By order. An order for a special jury may be made	at any time (Order 36, r. 9).

Vacation, Long. *See* "Time."

Warning. *See* "Appearance."

Writ of Summons.

Original writ in force	*twelve months* from the day of the date thereof, including the day of such date (Order 8, r. 1).
,, ,, to be served or renewed	within *twelve months* from the day of the date thereof, including the day of such date (Order 8, r. 1).
Renewed writ to be served or renewed	within *six months* from the date of the renewal, including the day of such date (Order 8, r. 1).
Concurrent writ may be issued	at any time during *twelve months* after issue of original writ (Order 6, r. 1).
,, ,, to be served	within *twelve months* after issue of original writ or within the term for which writ renewed (Order 6, r. 1).
,, ,, in force	for the period during which the original writ is in force (Order 6, r. 1).
Indorsement of date of service to be made	within *three days* after such service (Order 9, r. 15).
Service out of jurisdiction.	*See* "Appearance to Writ of Summons."

APPENDIX I.

STATUTES AND ORDERS IN COUNCIL.

NOTE.—*In many instances, only those sections of the various statutes which directly affect the practice of the Probate Division are quoted in this Appendix. Such portions of the various statutes as are printed in italics have been repealed.*

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STATUTE OF WESTMINSTER II, 1285.

13 Edw. 1, stat. 1, c. 19.

(13 Edw. 1, stat. 1, c. 19.)

[A.D. 1285.]

The ordinary chargeable to pay the debts of an intestate.

19. *Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Administration of Estates Act, 1925, ss. 9 and 32.

ADMINISTRATION UPON INTESTACY, 1357.

31 Edw. 3, stat. 1, c. 11.

(31 Edw. 3, stat. 1, c. 11.)

[A.D. 1357.]

The ordinary shall commit administration upon an intestacy.

The administrators shall have the same rights and charges as executors.

11. *Item it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's Court, for to administer and dispend for the soul of the dead; and shall answer also in the King's Court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. Repealed without reservation by Judicature (Consolidation) Act, 1925, ss. 226, 227, sub-s. 2, and Sched. 6. See now Administration of Estates Act, 1925, ss. 21, 26, and 32, and Judicature (Consolidation) Act, 1925, s. 162.

PROBATE AND ADMINISTRATION, 1529.

(21 HEN. 8, c. 5.)

21 Hen. 8, c. 5.

[A part of section 2.]

AN Act concerning Fines and Sums of Money to be taken by the Ministers of Bishops and other Ordinaries of Holy Church for the Probate of Testaments.

[A.D. 1529.]

To what persons administration of effects of intestates, etc., shall be granted by ordinaries.

2. *And in case any person die intestate, or that the executors named in any such testaments refuse to prove the said testament, then the said ordinary or other person or persons having authority to take probate of testaments as is above said, shall grant the administration of the goods of the testator or person deceased to the widow of the same person deceased or to the next of his kin or to both as by the discretion of the same ordinary shall be thought good [taking surety of him or them to whom shall be made such commission for true administration of the goods, chattels, and debts which he or they shall be so authorised to minister]. And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the ordinary be at his election and liberty to accept any one or more making request, where divers do require the administration; or where but one or more of them and not all being in equality of degree, do make request, then the ordinary to admit the widow and him or them only making request or any one of them at his pleasure.*

Words in square brackets repealed by Court of Probate Act, 1857, s. 80. Wholly repealed, as to deaths after 1925, by Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Administration of Estates Act, 1925, s. 25, Judicature (Consolidation) Act, 1925, ss. 159 and 162.

STATUTE OF FRAUDS, 1677.

(29 CAR. 2, c. 3.)

29 Car. 2, c. 3.

[Sections 5, 6, 19—24.]

AN Act for Prevention of Frauds and Perjuries.

[A.D. 1677.]

Devises of land shall be in writing, and attested by three or four witnesses.

5. *That from and after the said 24th day of June* [1677] *all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the*

29 Car. 2, c. 3.

presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

How the same shall be revocable.

6. *And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after the said 24th day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

Nuncupative wills.

19. *And for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury: be it enacted, that from and after the aforesaid 24th day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased; and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

Probate of nuncupative wills.

20. *That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof were committed to writing within six days after the making of the said will.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

21. *That no letters testamentary or probate of any nuncupative will shall pass the seal of any Court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

Repeal of wills.

22. *That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or*

bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least. 29 Car. 2, c. 3.

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

23. *Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act.* *Soldiers' and mariners' wills excepted.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

24. *That nothing in this Act shall extend to or alter or change the jurisdiction, or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other Ecclesiastical Courts, and other Courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect, subject nevertheless to the rules and directions of this Act.* *The jurisdiction of Courts saved.*

Repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

ADMINISTRATION OF ESTATES ACT, 1798 (*a*).

(38 GEO. 3, c. 87.) 38 Geo. 3, c. 87.

AN Act for the Administration of Assets in Cases where the Executor to whom Probate has been granted is out of the Realm. [28th June, 1798.]

WHEREAS the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons where the executor to whom probate of the will hath been granted is out of the jurisdiction of his Majesty's Courts of law and equity; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his Majesty's Courts of law and equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment [stamped only with one five shilling stamp, and shall pay no further or other duty to his Majesty, his heirs or successors]. *Preamble. If, after a certain period, the executor to whom probate is granted, shall not reside within the jurisdiction of his Majesty's Courts, on application of a creditor, etc., special administration may be granted, for which a 5s. stamp duty shall be paid.*

(*a*) Extended by the Court of Probate Act, 1857, s. 74; Court of Probate Act, 1858, s. 18. The whole Act repealed, as to deaths after 1925, by the Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Administration of Estates Act, 1925, ss. 21 and 57; Judicature (Consolidation) Act, 1925, ss. 164, 165.

38 Geo. 3, c. 87.

Words in square brackets repealed by 44 Geo. 3, c. 98; extended to administrators by Court of Probate Act, 1857, s. 74, and to cases where it was not intended to institute proceedings in Chancery by Court of Probate Act, 1858, s. 18. Repealed as to deaths after 1925 by Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Judicature (Consolidation) Act, 1925, s. 164.

The party applying to make the following affidavit.

2. *And be it further enacted, that the party applying to the spiritual Court to grant such administration as aforesaid, shall make an affidavit in the following words, or to the purport and effect following:*

Affidavit.

"I, A. B. of do swear, that there is due and owing to me, upon bond or simple contract, or upon account unsettled, as the case may happen to be (in which latter case he shall swear to the best of his belief only), from the estate and effects of deceased, the sum of and that C. D., the only executor capable of acting, and to whom probate hath been granted, hath departed this kingdom and is now out of the jurisdiction of his Majesty's Courts of law and equity, and that this deponent is desirous of exhibiting a bill in equity in his Majesty's Court of for the purpose of being paid his demand out of the assets of the said testator."

See note to section 1 (Preamble).

Administration to be granted in the following form.

3. *And be it further enacted, that the administration to be granted pursuant to this Act shall be in the form hereinafter mentioned; (that is to say,)*

" by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, to our well-beloved in Christ Greeting: Whereas it has been alleged before the Worshipful Doctor of Laws, Surrogate of Doctor of Laws, Master, Keeper, or Commissary of our Prerogative Court of Canterbury, lawfully constituted by you the said that did, whilst living and of sound mind, memory, and understanding, make and duly execute his last will and testament in writing, and did therefore nominate, constitute, and appoint, his executors (or, sole executor), who in the month of proved his said will by the authority of our said Court, and now reside (or, resides) out of this kingdom, and out of the jurisdiction of his Majesty's Courts of law and equity (as in and by an affidavit duly made and sworn to by and brought into and left in the registry of our said Court, reference being thereunto had, will more fully and at large appear): And whereas the Surrogate aforesaid, having duly considered the premises, did, at the petition of the said decree letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be committed and granted to you the said named by or on the behalf of the said a creditor (legatee), or (one of the next of kin) of the said deceased (as the case may be), limited for the purpose, to become and be made a party to a bill or bills to be exhibited against you in any of his Majesty's Courts of equity, and to carry the decree or decrees of any of the said Court or Courts into effect, but no further or otherwise (justice so requiring): And we being desirous that the said goods, chattels, and credits, may be well and faithfully administered, applied, and disposed of, according to law,

38 Geo. 3, c. 87.

do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer, and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said will, limited as aforesaid, so far as such goods, chattels, and credits of the deceased will thereto extend, and the law requires, you having been already sworn, well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels, and credits, so far as the same may come to your hands, and to exhibit the same into the registry of our said Prerogative Court of Canterbury, on or before the next ensuing, and also to render a just and true account thereof: And we do by these presents ordain and constitute you administrator of all and singular the goods, chattels, and credits, of the said deceased, limited as aforesaid, but no further, or otherwise.

"Given at London, the day of in the year of our Lord and in the year of our translation."

See note to section 1 (Preamble).

Court may appoint persons to collect outstanding debts.

4. *And be it further enacted, that it shall be lawful for the Court of Equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner, duly to account for the same.*

See note to section 1.

Stock belonging to the estate of the deceased may be transferred into the name of the Accountant-General in Chancery, in trust for such purposes as the Court shall direct in any suit.

5. *And be it further enacted, that it shall be lawful for the Accountant-General of the High Court of Chancery, or for the Secretary, or Deputy Secretary, of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made of any stock belonging to the estate of such deceased person, into the name of the Accountant-General, in trust, for such purposes as the Court shall direct, in any suit in which the person to whom such administration hath been granted, shall be, or may have been, a party: Provided nevertheless, that if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said Courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the Court where such suit is depending shall direct.*

Executors returning to reside within jurisdiction of the Court, to be made a party in such suit.

See note to section 1 (Preamble).

Where an infant is sole executor, administration to be granted to the guardian, etc., who

6. *And whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted, that where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.*

Repealed, as to deaths after 1925, by Administration of Estates

38 Geo. 3, c. 87.

Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Judicature (Consolidation) Act, 1925, s. 165.

have the same power as where administration is granted durante minore ætate of the next-of-kin.

7. *And be it enacted, that the person to whom such administration shall be granted, shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him durante minore ætate of the next of kin.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, ss. 56, 58, sub-ss. 2, 3, Sched. 2, pt. 1. See now Administration of Estates Act, 1925, s. 21.

WILLS ACT, 1837 (*b*).

1 Vict. c. 26.

(1 VICT. c. 26.)

AN Act for the amendment of the Laws with respect to Wills. [3rd July, 1837.]

Meaning of certain words in this Act;

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the

"will":

word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an

12 *Car.* 2, *c.* 24.

Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof," or by virtue of an Act passed in the Parliament of

14 & 15 *Car.* 2 (*I*).

Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and

"real estate":

the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest), therein; and the

"personal estate":

words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property

(*b*) The 9th Schedule of the Law of Property Act, 1924, gives the following authoritative statement as to enactments affected by the Law of Property Acts, 1922 and 1924: "The Wills Act, 1837: takes effect to enable equitable interests to be disposed of subject and without prejudice to the estate and powers of a personal representative." "All previous statutory provisions relating to the disposition of copyhold or customary lands: become obsolete."

whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

1 Vict. c. 26.

number:

gender.

Repealed by 37 and 38 Vict. c. 35 (S. L. R.).

2. *And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land"; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills"; and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins"; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to Amend the Law concerning Common Recoveries, and to explain and amend an Act made in the Twenty-ninth Year of the Reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America," except so far as relates to His Majesty's Colonies and plantations in America and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real*

Repeal of the Statutes of Wills, 32 *Hen.* 8, *c.* 1, *and* 34 *&* 35 *Hen.* 8, *c.* 5.

10 *Car.* 1, *sess.* 2, *c.* 2 (*I.*).

Sections 5, 6, 12, 19, 20, 21, *and* 22 *of the Statute of Frauds,* 29 *Car.* 2, *c.* 3; 7 *Will.* 3, *c.* 12 (*I.*).

Section 14 *of* 4 *&* 5 *Anne, c.* 16.

6 *Anne, c.* 10 (*I.*).

Section 9 *of* 14 *Geo.* 2, *c.* 20.

25 *Geo.* 2, *c.* 6 (*except as to colonies*).

25 *Geo.* 2, *c.* 11 (*I.*).

1 Vict. c. 26. 55 Geo. 3, c. 192.

Estates" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates pur autre vie to which this Act does not extend.

Repealed by 37 & 38 Vict. c. 35 (S. L. R.).

All property may be disposed of by will,

3. *And be it further enacted, that* it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

See Law of Property Act, 1925, s. 176 (power of tenant in tail in possession to dispose of property by specific devise or bequest); s. 178 (power for persons having no issue to dispose of real estate by will); and see note (*b*) on p. 654.

4. [*As to the fees and fines payable by devisees of customary and copyhold estates.*]

See note (*b*) on p. 654.

5. [*Wills or extracts of wills of customary freeholds and copyholds to be entered on the Court rolls.*] 1 Vict. c. 26.

See note (*b*) on p. 654.

6. *And be it further enacted, that* if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. Estates pur autre vie.

7. *And be it further enacted, that* no will made by any person under the age of twenty-one years shall be valid. No will of a person under age valid;

See note to section 11.

8. Provided also, *and be it further enacted*, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act. nor of a feme covert, except such as might now be made.

See Married Women's Property Act, 1882, s. 1.

9. *And be it further enacted, that* no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

See Wills Act Amendment Act, 1852 (interpretation of "signed at the foot or end").

10. *And be it further enacted, that* no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Appointments by wills to be executed like other wills, and to be valid, although other required solemnities are not observed.

11. Provided always, *and be it further enacted*, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers' and mariners' wills excepted.

Explained by the Wills (Soldiers and Sailors) Act, 1918, s. 1;

1 Vict. c. 26.

extended by section 2 of that Act; and see section 3 (Validity of testamentary dispositions of real property made by soldiers and sailors), and section 4 (power to appoint testamentary guardians).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

12. *And be it further enacted, that* this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

The Act referred to is now repealed and replaced by the Navy and Marines (Wills) Acts, 1865 and 1914.

Publication not to be requisite.

13. *And be it further enacted, that* every will executed in maner herein-before required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. *And be it further enacted, that* if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. *And be it further enacted, that* if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditor attesting to be admitted a witness.

16. *And be it further enacted, that* in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. *And be it further enacted, that* no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. *And be it further enacted, that* every will made by a man or woman shall be revoked by his or her marriage (except a will

made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). 1 Vict. c. 26.

Amended as to wills made after the commencement of the Act, by the Law of Property Act, 1925, s. 177 (wills in contemplation of marriage).

19. *And be it further enacted, that* no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. No will to be revoked by presumption.

20. *And be it further enacted, that* no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

21. *And be it further enacted, that* no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. No alteration in a will shall have any effect unless executed as a will.

22. *And be it further enacted, that* no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

23. *And be it further enacted, that* no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. A devise not to be rendered inoperative by any subsequent conveyance or act.

24. *And be it further enacted, that* every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed A will shall be construed to speak from

1 Vict. c. 26.

immediately before the death of the testator, unless a contrary intention shall appear by the will.

the death of the testator.

See Married Women's Property Act, 1893, s. 3 (application of section 24 of the Wills Act, 1837, to the wills of married women).

A residuary devise shall include estates comprised in lapsed and void devises.

25. *And be it further enacted, that*, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

26. *And be it further enacted, that* a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment.

27. *And be it further enacted, that* a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A devise without any words of limitation shall be construed to pass the fee.

28. *And be it further enacted, that* where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue

29. *And be it further enacted, that* in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention

shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. 1 Vict. c. 26. living at the death.

30. *And be it further enacted, that* where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

31. *And be it further enacted, that* where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

32. *And be it further enacted, that* where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. Devises of estates tail shall not lapse.

33. *And be it further enacted, that* where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

34. *And be it further enacted, that* this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate pur autre vie of any Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who

1 Vict. c. 26.

person who shall die before the first day of January one thousand eight hundred and thirty-eight.

die before 1838.

35. *And be it further enacted, that* this Act shall not extend to Scotland.

Act not to extend to Scotland.

36. *And be it enacted, that this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.*

Act may be altered this session.

Repealed by 37 & 38 Vict. c. 35 (S. L. R.).

WILLS ACT AMENDMENT ACT, 1852.

15 Vict. c. 24.

(15 Vict. c. 24.)

(Lord St. Leonards' Act.)

AN Act for the Amendment of an Act passed in the First Year of the Reign of her Majesty Queen Victoria, intituled An Act for the Amendment of the Laws with respect to Wills.

[17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: Be it therefore enacted, etc., as follows:

1 Vict. c. 26. [Wills Act, 1837.]

1. Where by *an Act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills,"* it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the

When signature to a will shall be deemed valid.

generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. 15 Vict. c. 24.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will. Act to extend to certain wills already made.

3. The word " will " shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the *said Act of the first year of the reign of her Majesty Queen Victoria* (*a*). Interpretation of " will."

4. This Act may be cited as " The Wills Act Amendment Act, 1852." Short title of Act.

COURT OF PROBATE ACT, 1857.

(20 & 21 Vict. c. 77.) 20 & 21 Vict. c. 77.

AN Act to amend the Law relating to Probates and Letters of Administration in England. [25th August, 1857.]

WHEREAS it is expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration in England should be exercised, in the name of her Majesty, by one Court: Be it enacted, etc., as follows:

1. *This Act (except where otherwise specially provided) shall come into operation on such day, not sooner than the first day of January one thousand eight hundred and fifty-eight, as her Majesty shall by Order in Council appoint, provided that such order shall be made one month at least previously to the day so to be appointed.* Commencement of Act.

Section 1 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

2. In the construction of this Act, unless the context be inconsistent with the meaning hereby assigned— Interpretation of terms.

" Will " shall comprehend " testament " and all other testamentary instruments of which probate may now be granted:

" Administration " shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes:

(*a*) The Wills Act, 1837.

20 & 21 Vict. c. 77.

"Matters and causes testamentary" shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration:

"Common form business" shall mean the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

Testamentary jurisdiction of Ecclesiastical and other Courts abolished.

3. *The voluntary and contentious jurisdiction and authority of all Ecclesiastical, Royal Peculiar, Peculiar, Manorial, and other Courts and persons in England, now having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons, shall in respect of such matters absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such Court or person.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Testamentary jurisdiction to be exercised by a Court of Probate.

4. *The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as herein-after is mentioned, be exercised in the name of her Majesty in a Court to be called the Court of Probate, and to hold its ordinary sittings and to have its principal registry at such place or places in London or Middlesex as her Majesty in Council shall from time to time appoint.*

Repealed by Judicature (Consolidation) Act, 1925, ss. 226, 227, sub-s. 1, Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 20.

5. [*Power to her Majesty to appoint a judge of the Court of Probate.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

6. [*Judge's tenure of office.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

7. [*Judge before acting to take the following oath.*]

Repealed by 34 & 35 Vict. c. 48, s. 8.

8. [*Rank and precedence of judge, who shall appoint a secretary and usher.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

9. [*Salaries of judge, secretary and usher.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

10. [*Judge of Court of Probate to be also judge of the Admiralty Court on the next vacancy.*] 20 & 21 Vict. c. 77.

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

11. [*As to increase of salary upon union of the two offices.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

12. [*Retiring pensions of judges.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

13. *There shall be established for each of the districts specified in Schedule (A.) to this Act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the Court of Probate, herein-after referred to as "the district registry."* *District registries to be established as in Schedule (A.).*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 108, and Sched. 2.

14. [*Appointment of officers of the Court of Probate.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

15. [*As to appointment of the first officers of the principal registry.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

16. [*Clerks and officers of Prerogative Court to be transferred to like offices in Court of Probate.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

17. [*Existing diocesan registrars to be entitled to be appointed district registrars at the same places.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

18. [*As to appointment to offices. Salaries of officers.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

19. *The registrars and district registrars shall hold their offices during good behaviour, subject to be removed by order of the Lord Chancellor for some reasonable cause to be in such order expressed; and the other officers of the Court may be removed by the judge, with the sanction of the Lord Chancellor.* *Tenure of office of officers.*

Repealed by Administration of Justice Act, 1925, s. 29, and Sched. 5. See now Judicature (Consolidation) Act, 1925, s. 115.

20. *No person shall be appointed a registrar or district registrar who shall not be or have been an advocate, barrister-at-law, proctor, solicitor, or attorney-at-law, unless at the time of the passing of this Act he is performing in person the duties of registrar or deputy registrar of some Ecclesiastical Court in England, or is acting as articled clerk or paid clerk to a proctor in Doctors' Commons, or as officer or clerk in the office of the said Prerogative Court, or of the Prerogative Court of York, or of any diocesan Court.* *Qualification of registrars and district registrars.*

Amended by Court of Probate Act, 1858, s. 8. Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 126, sub-s. 3.

20 & 21 Vict. c. 77.

Officers of the Court to execute their offices in person. Registrars, etc., not to act as proctors, etc.

21. *All registrars, district registrars, officers, and clerks of the Court of Probate shall execute their respective offices in person and not by deputy; and no registrar of the principal registry of the Court, nor any officer or clerk in the principal registry thereof, shall during the time of his holding such office directly or indirectly practise as an advocate, barrister, proctor, solicitor, or attorney, or receive or participate in the fees of any other person so practising.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 116.

Power to judge to cause seals of the Court to be provided.

22. *The judge shall cause to be made seals for the Court of Probate, that is to say, one seal to be used in its principal registry, and separate seals to be used in the several district registries, and may cause the same respectively from time to time to be broken, altered, and renewed at his discretion; and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof, respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.*

Amended by Court of Probate Act, 1858, s. 33. Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 174.

The Court to have throughout all England the same powers as the Prerogative Court within the province of Canterbury.

23. *The Court of Probate shall be a Court of record, and such Court shall have the same powers, and its grants and orders shall have the same effect, throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate: Provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished.*

Suits for legacies or distribution not to be entertained.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 20.

Power to examine witnesses.

24. The Court of Probate may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may, either before or after or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their

or any of their affidavits or solemn affirmations as the case may be; and the Court may by writ require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by any of her Majesty's superior Courts of law at Westminster; and every person disobeying any such writ shall be considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding one hundred pounds.

20 & 21 Vict. c. 77.

As to production of deeds, etc.

See Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1 (f) (g), and Sched. 1 (the section made repealable by rules of Court).

25. *The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court.*

Powers of the Court to enforce orders.

Repealed by 44 & 45 Vict. c. 59, s. 3.

26. The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court.

Order to produce any instrument purporting to be testamentary.

See Court of Probate Act, 1858, s. 23. And see Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1 (f) (g), and Sched. 1 (the section made repealable by rules of Court).

27. [*Registrars, etc., to have power to administer oaths. Power to appoint, also, Commissioners to administer oaths, etc.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

20 & 21 Vict. c. 77.

Penalty on forging or counterfeiting seals or signatures of officers.

28. If any person forge the signature of any registrar, district registrar, or commissioner for taking oaths, or forge or counterfeit any seal of the Court of Probate, or knowingly use or concur in using any such forged or counterfeit signature or seal, or tender in evidence any document with a false or counterfeit signature of such registrar, district registrar, or commissioner, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life *or any term not less than seven years, or to imprisonment for any term not exceeding three years, with or without hard labour.*

Practice of the Court.

29. *The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 32.

Rules and orders to be made for regulating the procedure of the Court.

30. *And to the intent and end that the procedure and practice of the Court may be of the most simple and expeditious character, it shall be lawful for the Lord Chancellor, at any time after the passing of this Act, with the advice and assistance of the Lord Chief Justice of the Court of Queen's Bench, or any one of the judges of the superior Courts of law to be by such Chief Justice named in that behalf, and of the judge of the said Prerogative Court, to make rules and orders, to take effect when this Act shall come into operation, for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious and what shall be deemed non-contentious business, and, subject to the express provisions of this Act, for fixing and regulating the time and manner of appealing from the decisions of the said Court, and generally for carrying the provisions of this Act into effect; and after the time when this Act shall come into operation it shall be lawful for the judge of the Court of Probate from time to time, with the concurrence of the Lord Chancellor and the said Lord Chief Justice, or any one of the judges of the superior Courts of law to be by such Chief Justice named in this behalf, to repeal, amend, add to, or alter any such rules and orders as to him, with such concurrence as aforesaid, may seem fit.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, ss. 99, 100.

Mode of taking evidence in contentious matters.

31. Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary the parties, in all contentious matters where their attendance can be had, shall be examined orally by or before the judge in open court: Provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite

party orally in open court as aforesaid, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed. 20 & 21 Vict. c. 77.

See Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1 (f) (g) and Sched. 1 (section made repealable by rules of Court).

32. [*Court may issue commissions or give orders for examination of witnesses abroad, or who are unable to attend.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

33. [*Rules of evidence in common law Courts to be observed.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

34. [*Common law judges may sit, on request of judge of Court.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

35. [*Court may cause questions of fact to be tried by a jury before itself, or direct an issue to a Court of law.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

36. [*Powers of the Court for the trial of questions by a jury.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

37. *When any such question shall be so ordered to be tried by a jury before the Court itself, such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of Probate shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said superior Courts sitting at Nisi Prius.* *Question to be stated, and jury sworn to try it.* *Court, on trial, to have the same authority as a judge at Nisi Prius.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

38. *Where the Court of Probate directs an issue, it shall be lawful for such Court to direct such issue to be tried either before a judge of Assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.* *Court may direct where issues shall be tried.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

39. *Any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate may appeal therefrom to the House of Lords: Provided always, that no appeal from any interlocutory order of the Court of Probate shall be made without leave of the Court of Probate first obtained, but on the hearing of an appeal from any final decree all interlocutory orders complained of shall be considered as under appeal as well as the final decree.* *Appeal to the House of Lords.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

40. [*Advocates admitted to practise. Barristers may practise in contentious causes.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

20 & 21 Vict. c. 77.

41. [*Advocates admitted to practise as barristers.*]
Repealed by 44 & 45 Vict. c. 59, s. 3.

42. [*Proctors admitted to practise.*]
Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

43. [*Admission of registrars and proctors as solicitors.*]
Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

44. [*Admission of articled clerks to proctors as solicitors.*]
Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

45. [*Practitioners.*]
Repealed by 44 & 45 Vict. c. 59, s. 3.

Probates and administration may be granted in common form by district registrars, if it shall appear by affidavit that the testator, etc., had a fixed place of abode.

46. *Probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate and under the seal appointed to be used in such district registry, [if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit,] and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly.*

Words in square brackets repealed by the Administration of Justice Act, 1925, Sched. 5, as from the date on which section 18 of that Act should come into operation; the section wholly repealed by the Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now Judicature (Consolidation) Act, 1925, ss. 151, 158. The temporary provisions in Sched. 5, pt. 1, ceased to have effect from January 1, 1926.

Affidavit to be conclusive for authorising grant of probate.

47. *Such affidavit shall be conclusive for the purpose of authorising the grant, by the district registrar, of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, ss. 151, 158, and see note to section 46, *supra*.

District registrars not to make grants where there is contention, etc.

48. *The district registrar shall not grant probate or administration in any case in which there is contention as to the grant until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 151, sub-s. 2.

20 & 21 Vict. c. 77.

As to transmission of notice of application for grants of probate, etc., to district registrar.

49. *Notice of every application to any district registrar for the grant of probate or administration shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition (if any), of the testator or intestate, the time of his death, [and the place of his abode at his decease, as stated in the affidavit made in support of such application,] and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this Act; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate, under the hand of one of the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications.*

Words in square brackets repealed by Administration of Justice Act, 1925, s. 29, and Sched. 5, as from the date when section 18 of that Act should come into operation; the section wholly repealed by the Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now Judicature (Consolidation) Act, 1925, s. 152, and note to section 46, *supra*.

District registrar in case of doubt as to grant to take the directions of the judge.

50. *In every case where it appears to a district registrar that it is doubtful whether the probate or letters of adminstration which may be applied for should or should not be granted, or where any question arises in relation to the grant, or application for the grant, of any probate or administration, the district registrar shall transmit a statement of the matter in question to the registrars of the Court of Probate, who shall obtain the directions of the judge in relation thereto, and the judge may direct the district registrar to proceed in the matter of the application according to such instructions as to the judge may seem necessary, or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate through its principal registry, or, if the case be within its jurisdiction, to a County Court.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 151, sub-section 3 of that Act.

District registrars to transmit

51. *On the first Thursday of every month, or oftener if required by any rules or orders to be made in that behalf, every*

20 & 21 Vict. c. 77.

lists of probates and administrations, and copies of wills.

district registrar shall transmit to the registrars of the principal registry a list, in such form and containing such particulars as may be from time to time required by the Court of Probate, or by any rules or orders under this Act, of the grants of probate and administration made by such district registrar up to the last preceding Saturday, and not included in a previous return, and also a copy, certified by the district registrar to be a correct copy, of every will to which any such probate or administration relates.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 152, sub-section 5 of that Act.

District registrars to preserve original wills.

52. *Every district registrar shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him, in the public registry of the district, subject to such regulations as the judge of the Court of Probate may from time to time make in relation to the due preservation thereof, and the convenient inspection of the same.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 152, sub-section 6 of that Act.

As to caveats.

53. *Caveats against the grant of probates or administrations may be lodged in the principal registry or in any district registry, and (subject to any rules or orders under this Act) the practice and procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury, and immediately upon a caveat being lodged in any district registry, the district registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the district registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may appear to the registrar of the principal registry expedient to transmit the same.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 154 of that Act.

Where personalty is under £200, and real property is under £300, County Court to have jurisdiction.

54. *Where it shall appear by affidavit of the person or some or one of the persons applying for probate or letters of administration that the testator or intestate had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to this Act, and that the personal estate in respect of which such probate or letters of administration should be granted under this Act, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, is under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate, or that the value of the real estate of or to which he was seised or entitled beneficially at the time of his death was under the value of three hundred pounds, the judge of the County Court having jurisdiction in the place in which it shall be sworn that the deceased had at the time of his death his fixed place of abode shall have the contentious juris-*

diction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto. 20 & 21 Vict. c. 77.

Repealed by Court of Probate Act, 1858, s. 11. See now Judicature (Consolidation) Act, 1925, s. 150.

Registrar of County Court to transmit certificate of decree for grant or revocation of probate.

55. On a decree being made by a judge of a County Court for the grant or revocation of a probate or administration in any such cause, the registrar of the County Court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode a certificate under the seal of the County Court of such decree having been made, and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree.

The judge of the County Court to decide causes and enforce judgments as in other cases.

56. The judge of any County Court before whom any disputed question shall be raised relating to matters and causes testamentary under this Act shall, subject to the rules and orders under this Act, have all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the County Court.

Affidavit of the facts giving the County Court jurisdiction to be conclusive, unless disproved while the matter is pending.

57. The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of a County Court under the previous provisions shall, except as hereinafter provided, be conclusive for the purpose of authorising the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge or within any of the said districts at the time of his death, or by reason that the personal estate sworn to be under the value of two hundred pounds did in fact amount to or exceed that value, or that the value of the real estate of or to which the deceased was seised or entitled beneficially at the time of his death amounted to or exceeded three hundred pounds: Provided, that where it shall be shown to the judge of a County Court before whom any matter is pending under this Act that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorised him to exercise such contentious jurisdiction, he shall stay all further proceedings in this Court in the matter, leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just.

20 & 21 Vict. c. 77.

As to appeals from County Court.

58. Any party who shall be dissatisfied with the determination of the judge of the County Court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this Act, *and the decision of the Court of Probate on such appeal shall be final.*

Words in italics repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6.

Not obligatory to apply for probate, etc., to district registries or County Court, but may in every case be made to Court of Probate.

59. *It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any County Court, but in every case such application may be made through the principal registry of the Court of Probate, wherever the testator or intestate may at the time of his death have had his fixed place of abode: Provided, that where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the Court of Probate may send the cause to such County Court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his Court in the first instance.*

Amended by Court of Probate Act, 1858, s. 12. Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 150 of the last-mentioned Act.

Rules and orders for regulating the procedure of County Courts under the Act to be made by the Judges now having authority for the like purpose.

60. *For regulating the procedure and practice of the County Courts, and the judges, registrars, and officers thereof, in relation to their jurisdiction and proceedings under this Act, rules and orders may be from time to time framed, amended, and certified by the County Court judges appointed for the time being to frame rules and orders for regulating the practice of the County Courts under the Act of the session holden in the nineteenth and twentieth years of her Majesty, chapter one hundred and eight, and shall be subject to be allowed or disallowed or altered, and shall be in force from the day named for that purpose by the Lord Chancellor, as in the said Act is provided in relation to other rules and orders regulating the practice of the same Courts; and for establishing rules and orders to be in force when this Act comes into operation the power given by this enactment shall be exercised as soon as conveniently may be after the passing of this Act.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in

61. *Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending*

interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court.

20 & 21 Vict. c. 77.

the real estate to be cited.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6, but re enacted by Sched. 5, pt. 2, of that Act in the case of persons dying before the commencement of the Act.

62. *Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders.*

Where the will is proved in solemn form, or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

See note to section 61, *supra*.

63. *Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court and the Court is satisfied that the deceased was at the time of his decease seised of or entitled to or had power to appoint by will some real estate beneficially, or in any case where the will propounded or of which the validity is in question would not in the opinion of the Court, though established as to personalty, affect real estate, but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate: Provided that the probate, decree, or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.*

Heir in certain cases not to be cited, and where not cited not to be affected by probate.

See note to section 61, *supra*.

64. *In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the*

Probate or office copy to be evidence of the will in suits con-

20 & 21 Vict. c. 77.

cerning real estate, save where the validity of the will is put in issue.

party intending to establish in proof such devise or other disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.

See note to section 61, *supra*.

As to costs of proof of will.

65. *In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the Court or judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Place of deposit of original wills.

66. *There shall be one place of deposit under the control of the Court of Probate, at such place in London or Middlesex as her Majesty may by Order in Council direct, in which all the original wills brought into the Court or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the rules and orders under this Act.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 170 of that Act.

Judge to cause calendars to be made from time to time in the principal registry, and to be printed.

67. *The judge shall cause to be made from time to time in the principal registry of the Court of Probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the Court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed.*

Repealed by Judicature (Consolidation) Act, 1925. See now section 156 of that Act.

Registrar to transmit

68. *The registrars shall cause a printed copy of every calendar to be transmitted through the post or otherwise to each of the*

district registries, and to the office of her Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices, if any, as the Court of Probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected.

20 & 21 Vict. c. 77.

printed copies to certain offices.

See note to section 67, *supra*.

69. *An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act.*

Official copy of whole or part of will may be obtained.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 171 of that Act.

70. *Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction.*

Administration pendente lite.

Amended by Court of Probate Act, 1858, s. 22. Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See as to deaths after 1925, Judicature (Consolidation) Act, 1925, s. 163.

71. *It shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any will of such deceased person by which the real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct.*

Receiver of real estate pendente lite.

Amended by Court of Probate Act, 1858, s. 21. Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See as to deaths after 1925, Judicature (Consolidation) Act, 1925, s. 163.

72. *The Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit.*

Remuneration to administrators pendente lite and receivers.

See note to section 71, *supra*.

73. *Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and*

Power as to appointment of administrator.

20 & 21 Vict. c. 77.

competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who if this Act had not been passed would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who if this Act had not passed would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

Affected by Land Transfer Act, 1897, s. 2, sub-s. 2, and by Irish Free State (Consequential Adaptation of Enactments) Order, 1923, Art. 2 (" United Kingdom of Great Britain and Ireland " to be read exclusive of Irish Free State). Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See as to deaths after 1925, Judicature (Consolidation) Act, 1925, s. 162.

38 *Geo.* 3, *c.* 87, *extended to administrators.*

74. *The provisions of an Act passed in the thirty-eighth year of his late Majesty King George the Third, chapter eighty-seven, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's Courts of law and equity.*

Amended by Court of Probate Act, 1858, s. 18. Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See, as to deaths after 1925, Judicature (Consolidation) Act, 1925, s. 164.

After grant of administration no person to have power to sue as an executor.

75. *After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant administration, until such administration shall have been recalled or revoked.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now section 15 of that Act.

Revocation of temporary grants not to prejudice actions or suits.

76. *Where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now, section 17 of that Act.

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Payments under revoked probates or administration to be valid.

77. *Where any probate or administration is revoked under this Act, all payments bona fide made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now section 27 of that Act.

Persons, etc., making payment upon probates granted for estate of deceased person to be indemnified.

78. *All persons and corporations making or permitting to be made any payment or transfer bona fide, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.*

See note to section 77, *supra*.

Rights of an executor renouncing probate to cease as if he had not been named in the will.

79. *Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.*

Amended by Court of Probate Act, 1858, s. 16. Repealed by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1, as to deaths after 1925. See now s. 5 of that Act.

Sureties to administration bonds.

80. *So much of an Act passed in the twenty-first year of King Henry the Eighth, chapter five, and of an Act passed in the twenty-second and twenty-third years of King Charles the Second, chapter ten, and of an Act passed in the first year of King James the Second, chapter seventeen, as requires any surety, bond, or other security to be taken from a person to whom administration shall be committed, shall be repealed.*

Repealed by 38 & 39 Vict. c. 66 (S. L. R.); also repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2. Apparently this second repeal was by mistake for section 81.

Persons to whom grant of administration shall be committed shall give bond.

81. *Every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct: Provided that it shall not be necessary for the Solicitor for the Affairs of the Treasury or the Solicitor of the Duchy of Lancaster applying for or obtaining administration to the use or benefit of her Majesty to give any such bond as aforesaid.*

20 & 21 Vict. c. 77.

Amended by Grant of Administration (Bonds) Act, 1919, and partly repealed by the Administration of Justice Act, 1920, s. 21, and Sched. Wholly repealed by the Administration of Justice Act, 1925, s. 29, and Sched. 5. See now Judicature (Consolidation) Act, 1925, s. 167.

Penalty on bond.

82. Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do, and the Court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable.

Amended by the Grant of Administration (Bonds) Act, 1919, s. 1, sub-ss. 2, 4, and Sched., which Act is since repealed by the Administration of Justice Act, 1925, s. 29, and Sched. 5.

Power of Court to assign bond.

83. *The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.*

Repealed by Administration of Justice Act, 1920, s. 21, and Sched. See now Judicature (Consolidation) Act, 1925, s. 167.

84. [*Pending suits transferred to Court of Probate.*] [*Not to apply to appeals pending before her Majesty in Council.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

85. [*Power to judges whose jurisdiction is determined to deliver written judgments.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

86. [*Void and voidable probates and administrations.*]
Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

87. [*Probates and administrations granted before this Act comes into operation.*]
Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched 6.

88. [*Probate or administration may be granted of personal estate not affected by the former grants.*]
Repealed (as obsolete) by Administration of Justice Act, 1925, s. 27 and Sched 4.

Judges of present Ecclesiastical Courts and others to

89. *The acting judge and registrar of every Court, and other person now having jurisdiction to grant probate or administration, and every person having the custody of the documents and papers of or belonging to such Court or person, shall, upon receiving a*

requisition for that purpose, under the seal of the Court of Probate, from a registrar, and at the time and in the manner mentioned in such requisition, transmit to the Court of Probate, or to such other place as in such requisition shall be specified, all records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be easy of reference, under the control and direction of the Court.

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transmit all wills, etc., to the registry.

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now section 173 of that Act.

90. *No judge, registrar, or other person who shall wilfully refuse or neglect so to transmit such records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, writs, documents, or any other instrument relating to matters or causes testamentary, shall be entitled to any compensation under this Act, and every judge, registrar, or other person so refusing or neglecting shall be liable to a penalty of one hundred pounds, to be sued for and recovered, together with full costs of suit, in any of her Majesty's superior Courts, by the registrars.*

Penalty for default.

Repealed by 55 & 56 Vict. c. 19 (S. L. R.). Also repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched 6. See now section 173, sub-section 2 of that Act.

91. *One or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such wills of living persons as shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct.*

As to depositories for safe custody of the wills of living persons.

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now section 172 of that Act.

92. *Nothing in this Act contained shall affect the stamp duties now by law payable upon probates and administrations; and all the clauses, provisions, rules, regulations, and directions contained in any Act of Parliament relating to the said duties, and to wills, probates of wills, and letters of administration, for securing the said duties, not superseded by or inconsistent with the express provisions of this Act, shall be in full force, and shall be observed, applied, and put in execution for securing the duties payable on probates of wills and letters of administration granted under this Act, as if such duties had been granted by this Act, and the said clauses, provisions, rules and regulations relating thereto were herein repeated and specially enacted.*

This Act not to affect the stamp duties on probates and administrations.

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6.

93. *The registrars of the Court of Probate shall, within such period as the judge shall direct after probate of any will or letters*

The registrars to

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deliver copies of wills, etc., to the Commissioners of Inland Revenue.

of administration shall have been granted, deliver or cause to be delivered to the Commissioners of Inland Revenue, or their proper officer, the following documents respectively; that is to say, in the case of a probate or administration with a will annexed a copy of the will and the original affidavit, and in the case of letters of administration without a will annexed such original affidavit, and in every case of letters of administration a copy or extract thereof, and in every case such certificate or note of the grant as the said Commissioners may require.

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now section 157 of that Act.

94. [*Sections 8 and 9 of 53 Geo. 3, c. 127, repealed in part as to the Court of Probate.*]

Repealed (as obsolete) by the Administration of Justice Act, 1925, s. 27 and Sched. 4.

95. [*Fees to be taken by officers of Court and by officers of County Courts.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

96. [*Taxation of costs.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

97. [*Fees not to be paid in money, but by stamps.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

98. [*Provisions of Acts relating to stamps to be applicable to stamps for collecting fees.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

99. [*No document to be received or used unless stamped.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

100. [*Officers of the Court may be dismissed for fraud or wilful neglect in relation to stamps.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

101. [*Salary of Judge and compensations to be charged on Consolidated Fund.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

102. [*Salaries and expenses not charged on the Consolidated Fund to be paid out of monies to be provided by Parliament.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

103. [*Compensation to registrars, etc., of existing Courts.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

104. [*Persons receiving compensation to continue to discharge the remaining duties of their offices.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

105. [*Compensation to proctors.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

106. [*Compensation to proctors in partnership.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

107. [*For the protection of the interests of Viscount Canterbury.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

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108. [*The registry of Prerogative Court of Canterbury to vest in registrars of the Court.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

109. [*Compensation to Sir John Dodson in case he be not appointed Judge of the Court of Probate.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Establishments in district registries.

110. *There shall be a clerk or so many clerks in each district registry, and there shall be paid to such clerk or clerks such salary or respective salaries as the judge of the Court, with the sanction of the Commissioners of her Majesty's Treasury, may from time to time think fit to direct; and it shall be lawful for such judge to prescribe from time to time the qualifications which shall be possessed by persons appointed to be clerks in such district registries, and generally to regulate the establishment of such district registries with reference to the duties to be performed therein; and the clerk or clerks in each district registry shall be appointed by the district registrar, with the approval of the judge; and every such clerk may be removed by such judge, or by the district registrar with the approval of the judge.*

Repealed by Judicature (Consolidation) Act, 1925. See now section 109 of that Act.

111. [*Fees payable to district registrars. District registrars may be paid by salaries instead of fees.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

112. [*Compensation to clerical surrogates, etc.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

113. [*Persons receiving compensation to be liable to be called upon to fill offices, etc.*]

Repealed by 42 & 43 Vict. c. 78, s. 29.

114. [*Publication of accounts.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

115. *Judge if a Privy Councillor to be a member of Judicial Committee.*

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

College of Doctors of Law may let, sell, etc., their real and personal estate, and lay out monies in purchase of other estates, etc.

116. And whereas, with reference to the abolition of the jurisdiction hereby abolished and otherwise, it is expedient to give, confirm, or extend certain powers to or of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts," incorporated under that style and title by letters patent, dated the twenty-second day of June, in the eighth year of his late Majesty King George the Third: Be it enacted, that it shall be lawful for the said college from time to time hereafter to let, sell, or exchange for other real or personal estate, or both, all or any part of the real and personal estate which shall for the time being belong to the said college, either directly or through the medium of any trustee or trustees, and to lay out the monies to be received on any such sale or exchange, or otherwise, belonging to the said college as aforesaid, in the purchase of other real or personal estate, or both, but so that the said college shall not at any one time hold or enjoy real estate of a yearly value exceeding one thousand pounds in the whole, and to pay, apply, and dispose of the income of all the real and personal estate which shall for the

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time being belong to the said college as aforesaid to or for the benefit of such body or bodies politic or corporate, or person or persons, whether being or including, or not being or including, the said college, and all or any individual members or member thereof for the time being, and generally for such purposes and in such manner as the said college shall think fit; and further, to alien and dispose of all or any part of such real and personal estate, and the proceeds of any sale thereof, either by way of donation, voluntary disposition, or otherwise, unto, between, or amongst any body or bodies politic or corporate, or any person or persons whatsoever, whether being or not being a member or members of the said college: provided always that no donation or other voluntary disposition of the corpus, or any part of the corpus, of the real and personal estate of the said college to any person or persons being a member or members thereof at the time of such donation or other voluntary disposition shall be effectual without the previous consent thereto of a majority of the members of the said college present at any meeting of the college, and the receipt of the treasurer for the time being of the said college shall be an effectual dicharge for all gross annual and other sums which shall for the time being belong or be payable to the said college.

College may surrender their charter, and upon such surrender shall be dissolved.

117. It shall be lawful for the said college, at any time after a resolution to that effect shall have been come to at a meeting of the college, by a majority of the members present at such meeting, to surrender and yield up to her Majesty, her heirs or successors, at such times as in such resolution shall be determined, the charter of incorporation of the said college, and all franchises and privileges thereby conferred, or which shall for the time being belong to the said college; and upon and by such surrender the said corporation shall be dissolved, and shall cease to exist, for all purposes whatsoever, (except so far as its existence may be requisite for the saving of the rights of her Majesty, her heirs and successors, and of all and every person and persons, body and bodies politic or corporate, whatsoever other than the said college,) and all real and personal estate which at the time of such dissolution of the said college shall belong to the said college for its own use and benefit, either directly or through the medium of any trustee or trustees, shall thenceforth belong, for all the estate and interest therein which at the time of such dissolution belonged to the said college absolutely, to all the persons who at the time of such dissolution thereof shall be the president and fellowes of the said college, in equal shares as tenants in common, to and for their own use and benefit respectively, but subject to any charges or incumbrances affecting the same at the time of such dissolution, and all real and personal estate of which the said college at the time of such dissolution thereof be seised or possessed, upon any trust or trusts, shall thereupon become vested in the four persons who at the time of such dissolution shall be the president and three senior fellowes of the said college, as joint tenants, their heirs, executors, or administrators, according to the nature of the real and personal estates respectively, upon the trust or trusts affecting the same respectively.

118. [*Treasury to provide the buildings for registries, etc.*]
Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

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119. *All rules and orders to be made under this Act, concerning procedure and practice, and the table of fees to be fixed under this Act, and all alterations thereof to be from time to time made, shall be laid before both Houses of Parliament within one month after the making thereof if Parliament be then sitting, of if Parliament be not then sitting, within one month after the commencement of the then next session of Parliament.*

Rules and orders to be laid before Parliament.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 100 of that Act.

SCHEDULE (A.).

Districts and Places of District Registries throughout England and Wales.

Districts,	*Places of District Registries.*	*Districts.*	*Places of District Registries.*
County of Northumberland (a)	*Newcastle-on-Tyne.*	*Eastern Division of the County of Suffolk and North Division of the County of Essex.*	*Ipswich.*
County of Durham . . .	*Durham.*	*Western Division of the County of Suffolk.*	*Bury St. Edmunds.*
Counties of Cumberland and Westmoreland.	*Carlisle.*	*County of Bedford and Southern Division of Northamptonshire* (h).	*Northampton.*
West Riding of the County of York.	*Wakefield.*	*County of Warwick* (i) . .	*Birmingham.*
North Riding ditto . .	*York.*	*County of Stafford* (k) . .	*Lichfield.*
East Riding ditto (b) *including the City of York and Ainsty*		*Counties of Radnor, Brecknock, and Hereford.*	*Hereford.*
County of Lancaster, except the Hundred of Salford and West Derby and the City of Manchester.	*Lancaster.*	*Counties of Cardigan, Carmarthen* (l), *and Pembroke* (m) *with the Deaneries of East and West Gower in the County of Glamorgan.*	*Carmarthen.*
City of Manchester and Hundred of Salford.	*Manchester.*	*Counties of Glamorgan (with the exception of the Deaneries of East and West Gower) and Monmouth.*	*Llandaff.*
Hundred of West Derby in Lancashire.	*Liverpool.*	*County of Worcester* (n) . .	*Worcester.*
County of Chester (c) . .	*Chester.*	*County of Gloucester* (o), *except the present Bristol County Court District.*	*Gloucester.*
Counties of Carnarvon and Anglesea.	*Bangor.*	*Bristol and Bath present County Court Districts.*	*Bristol.*
Counties of Flint, Denbigh, and Merioneth.	*St. Asaph.*	*Counties of Oxford* (p), *Berks, Bucks.*	*Oxford.*
County of Derby . . .	*Derby.*	*Eastern Division of the County of Somerset, except the present Bath County Court District, and the Part in Somersetshire of the present Bristol County Court District.*	*Wells.*
County of Nottingham (d) .	*Nottingham.*		
Counties of Leicester and Rutland.	*Leicester.*		
County of Lincoln (e) . .	*Lincoln.*		
Counties of Salop and Montgomery.	*Shrewsbury.*		
Northern Division of Northampton, and Counties of Huntingdon and Cambridge (f).	*Peterborough.*		
County of Norfolk (g) . .	*Norwich.*		

(a) *Including the towns and counties of Newcastle-on-Tyne and Berwick-upon-Tweed.*
(b) *Including the town and county of Kingston-on-Hull.*
(c) *Including the city of Chester.*
(d) *Including the town of Nottingham.*
(e) *Including the city of Lincoln.*
(f) *Including the University of Cambridge.*
(g) *Including the city of Norwich.*
(h) *Including the town of Northampton.*
(i) *Including the city of Coventry.*
(k) *Including the city of Lichfield.*
(l) *Including the town of Carmarthen.*
(m) *Including the town of Haverfordwest.*
(n) *Including the city of Worcester.*
(o) *Including the city of Gloucester.*
(p) *Including the University of Oxford.*

SCHEDULE (A.).—continued.

Districts.	*Places of District Registries.*	*Districts.*	*Places of District Registries.*
Western Division of the County of Somerset.	*Taunton.*	*County of Hants* (s) . .	*Winchester.*
County of Devon (q). . .	*Exeter.*	*Eastern Division of the County of Sussex* (t) . . .	*Lewes.*
County of Cornwall . .	*Bodmin.*	*Western Division of the County of Sussex.*	*Chichester.*
County of Wilts . . .	*Salisbury.*	*East Division of the County of Kent* (u).	*Canterbury.*
County of Dorset (r). . .	*Blandford.*		

The divisions of counties referred to in the Schedule are the divisions of the same counties described for election purposes in the Act of the second and third years of King William the Fourth, chapter sixty-four, and the cities and towns herein referred to are to be taken to include the counties of such cities and towns as are counties of themselves.

(q) *Including the city of Exeter.*
(r) *Including the town of Poole.*
(s) *Including the town of Southampton and Isle of Wight.*
(t) *Including such of the Cinque Ports and their dependencies as are locally situate in the county of Sussex.*
(u) *Including the city of Canterbury and such of the Cinque Ports and their dependencies as are locally situate in the county of Kent.*

Schedule (A) repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 108 of that Act, and Sched. 2.

SCHEDULE (B.).

	Annual Salary.
The Three Registrars in London, each	£1,500
The Record Keepers, each	600
The Sealer	300

Schedule (B.) repealed by 57 & 58 Vict. c. 56 (S. L. R.).

PROBATES AND LETTERS OF ADMINISTRATION (IRELAND) ACT, 1857.

20 & 21 Vict. c. 79.

(20 & 21 Vict. c. 79.)

[Sections 94 and 95.]

Probates granted in England to be of like force as if originally granted in Ireland on being re-sealed.

94. From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland.

Amended (under powers conferred by the Government of Ireland Act, 1920) by the Government of Ireland (Resealing of Probates, etc.) Order, 1922, replaced in the case of persons dying on or after April 1, 1923, by the Government of Ireland (Resealing of Probates, etc.) Order, 1923. Both Orders are printed in this Appendix. See also the Irish

Free State (Consequential Adaptation of Enactments) Order, 1923, also printed in this Appendix.

20 & 21 Vict. c. 79.

Probates granted in Ireland to be of like force as if originally granted in England on being re-sealed.

95. *From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England.*

Repealed, so far as it relates to grants made in respect of the estates of persons dying on or after April 1, 1923, by the Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 169 of that Act.

CONFIRMATION OF EXECUTORS (SCOTLAND) ACT, 1858.

(21 & 22 Vict. c. 56.)

21 & 22 Vict. c. 56.

[Sections 9, 12, 14—17.]

Inventory may include personal estate in any part of United Kingdom.

9. From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

Amended by Sheriff Courts (Scotland) Act, 1876, s. 41. Expressions "Ireland" and "United Kingdom" to be construed as exclusive of the Irish Free State: The Irish Free State (Consequential Adaptation of Enactments) Order, 1923, *post*, p. 735. See also the Government of Ireland (Re-sealing of Probates, etc.) Order, 1923, *post*, p. 733.

Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.

12. *From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.*

21 & 22 Vict. c. 56.

Amended by Sheriff Courts (Scotland) Act, 1876, ss. 41—43. Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 168 of that Act.

Probate or letters of administration produced in Commissary Court and certified, to have effect of confirmation.

14. From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said Court; the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule (F.) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted by the said Court.

Amended by Sheriffs Court (Scotland) Act, 1876, ss. 41—43, and see note to section 9, *supra*.

For securing the stamp duties, probates, etc., to be deemed granted for all the property in the United Kingdom.

15. In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to Stamp Duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the Commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and

Inventory to include all such property.

the said affidavit shall also separately specify the value of the said estate and effects in Scotland. 21 & 22 Vict. c. 56.

Expressions "Ireland" and "United Kingdom" to be construed as exclusive of the Irish Free State: The Irish Free State (Consequential Adaptation of Enactments) Order, 1923, *post*, p. 735.

16. For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of his Majesty King George the Third, relating to probates and letters of administration granted in England, and the like provisions in the Act passed in the fifty-sixth year of the said King, chapter fifty-six, relating to probates and letters of administration granted in Ireland, and the provisions contained in the Act passed in the forty-eighth year of the said King, chapter one hundred and forty-nine, relating to inventories in Scotland, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively. Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.

See note to section 15, *supra*.

17. Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration; Provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only. Affidavit as to domicile to be made on applying for probate or administration.

See note to section 15, *supra*.

SCHEDULE F.

Section 14.

I, *A B*, commissary clerk [*or* commissary clerk depute] of the county of Edinburgh, hereby certify that this grant of probate has [*or* these letters of administration have] been produced in the Commissary Court of the said county, and that a copy thereof has been deposited with me.

COURT OF PROBATE ACT, 1858.

21 & 22 Vict. c. 95.

(21 & 22 Vict. c. 95.)

An Act to amend the Act of the twentieth and twenty-first Victoria, chapter seventy-seven.

[2nd August, 1858.]

20 & 21 Vict. c. 77.

Whereas in the last session of Parliament an Act was passed, intituled An Act to amend the Law relating to Probates and Letters of Administration in England, hereinafter designated "The Court of Probate Act:" and whereas it is expedient to amend the same: Be it therefore enacted, etc., as follows:

1. [*The judge of the High Court of Admiralty and the judge of the Court of Probate may sit for each other.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

2. [*Serjeants and barristers may practise in Court of Probate.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

The Judge of the Court of Probate may sit in chambers.

3. *It shall be lawful for the judge of the Court of Probate for the time being to sit in chambers for the dispatch of such part of the business of the said Court as can in the opinion of the said judge, with advantage to the suitors, be heard in chambers; and the times at which such sittings shall be held shall from time to time be fixed by the judge: Provided always, that no question shall be heard in chambers which either party shall require to be heard in open Court.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now section 61 of that Act.

4. [*The Treasury to cause chambers to be provided.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

5. [*Powers of Judge when sitting in chambers.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

6. [*Power to appoint an additional registrar.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

7. [*Vacancy in office of registrar how to be filled up.*]

Repealed by 56 & 57 Vict. c. 54 (S. L. R.).

Clerks in the principal registry eligible to be registrars, etc.

8. *Clerks having served five years in the principal registry of the Court of Probate shall be eligible to be appointed registrars or district registrars of the said Court.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6. See now section 126, sub-section 3, of that Act.

9. [*Certain articled clerks to be admitted proctors of the Court of Probate.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Where personalty is under £200

10. *Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate*

or letters of administration is applied for had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to the said "Court of Probate Act," and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.

21 & 22 Vict. c. 95.

County Court to have jurisdiction.

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 150 of that Act.

11. [*Section 54 of 20 & 21 Vict. c. 77, repealed.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

12. *The said Court of Probate Act, section fifty-nine, shall, so far as the County Courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant.*

Sec. 59 of 20 & 21 Vict. c. 77, to apply to applications for revocation of grants.

See note to section 10, *supra*.

13. [*Power to make rules and orders and frame scales of fees for the County Courts.*]

Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

14. [*Non-contentious business pending in any Ecclesiastical Court to be transferred.*]

Repealed by 38 & 39 Vict. c. 66 (S. L. R.).

15. [*Bonds given before January* 11, 1858, *to remain in force.*]

Repealed by Administration of Justice Act, 1925, s. 29, and Sched. 5.

16. *Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.*

An executor not acting or not appearing to a citation to be treated as if he had renounced.

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now section 5 and 7 of that Act.

17. *The judge of the Court of Probate shall have and exercise the same power of altering and amending grants*

Judge of the Court of

21 & 22 Vict. c. 95.

of probate and letters of administration made before the eleventh day of January one thousand eight hundred and fifty-eight as any Ecclesiastical Court had and exercised in respect of such grants.

Repealed, as obsolete, by Administration of Justice Act, 1925, section 27, and Sched. 4.

Probate may amend grants made before January 11, 1858.

Provisions of 38 Geo. 3, c. 87, and 20 & 21 Vict. c. 77, extended to all cases of executors and administrators.

18. *The provisions of an Act passed in the thirty-eighth year of George the Third, chapter eighty-seven, and of "the Court of Probate Act," shall be extended to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned Act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now Judicature (Consolidation) Act, 1925, s. 164.

Between the death of the person deceased and the grant the property to vest in the judge ordinary.

19. *From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now section 9 of that Act.

Second and subsequent grants to be made where the original will or the original letters of administration are deposited.

20. *All second and subsequent grants of probate or letters of administration shall be made in the principal registry, or in the district registry where the original will is registered or the original grant of letters of administration has been made, or in the district registry to which the original will or a registered copy thereof, or the record of the original grant of administration, have been transmitted, by virtue of a requisition issued in pursuance of section eighty-nine of "The Court of Probate Act;" [and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made.]*

Words in square brackets prospectively repealed by Administration of Justice Act, 1925, s. 29, and Sched. 5. Wholly repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 153 of the last-mentioned Act.

The Court of Probate may require security from a receiver of real estate.

21. *It shall be lawful for the Court of Probate to require security by bond, in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under section seventy-one of "The Court of Probate Act;" [and the Court may, on application, made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named in such*

order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof.] 21 & 22 Vict. c. 95.

Words in square brackets repealed by Administration of Justice Act, 1925, s. 29, and Sched. 4. Wholly repealed as to deaths after 1925 by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now Judicature (Consolidation) Act, 1925, ss. 163, 167.

22. *All the provisions contained in the Court of Probate Act respecting grants of administration pending suit shall be deemed to apply to the case of appeals to the House of Lords under the said Act.* *Administration pending suit deemed to apply to appeals.*

Repealed, as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, and Sched. 2, pt. 1. See now Judicature (Consolidation) Act, 1925, s. 163.

23. It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpœna requiring any person to produce and bring into the principal or any district registry, or otherwise, as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing. Registrar may issue subpœnas to produce papers, etc

Made repealable by rules of Court: Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1, (f), (g), and Sched. 1.

24. *The registrars of the principle registry shall be invested with and shall and may exercise with reference to proceedings in the Court of Probate the same power and authority which surrogates of the judge of the Prerogative Court of Canterbury could or might before the passing of the Court of Probate Act have exercised in chambers with reference to proceedings in the said Prerogative Court.* *The registrars to do all acts heretofore done by surrogates.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6.

25. *Copies of wills required to be transmitted by a district registrar, and certified by him to be correct copies, under section fifty-one of the Court of Probate Act, may be so certified and transmitted under a stamp provided by the district registrar for that purpose, and approved of by the judge of the Court of Probate.* *Copies of wills may be certified by stamp.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 152, sub-section 5 of that Act.

21 & 22 Vict. c. 95.

Certificates from the principal registry may be stamped.

26. *Certificates issued from the principal registry with reference to notices of applications transmitted from the district registrars under section forty-nine of the Court of Probate Act need not be made under the hand of a registrar of the principal registry, as required by the said Act, but may be issued under a stamp provided for that purpose, and approved of by the judge of the Court of Probate.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 152, sub-section 2 of that Act.

Requisitions may be issued for the transmission of a single paper.

27. *Whereas doubts have been entertained whether a requisition can be issued under section eighty-nine of the Court of Probate Act for the transmission of one or more papers only, not being all the papers and documents in the custody of the person to whom any such requisition may be addressed: Be it therefore enacted and declared, That the said section shall be construed to extend to all requisitions, whether for the transmission of one or of more records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, or other instruments relating exclusively or principally to matters and causes testamentary.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 173 of that Act.

Power to enforce decree as to costs.

28. *The judge of the Court of Probate, and the registrars of the principal registry thereof, shall respectively, in any case where an Ecclesiastical or other Court having testamentary jurisdiction had previously to the eleventh day of January one thousand eight hundred and fifty-eight made any order or decree in respect of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court of Probate: Provided that in taxing any such costs, or any other costs incurred in causes depending in any such Courts before the time aforesaid, all fees, charges and expenses shall be allowed which might have been legally made, charged and enforced according to the practice of the Prerogative Court of Canterbury.*

Repealed (as obsolete) by Administration of Justice Act, 1925, s. 27, and Sched. 4.

Letters of administration granted in Ireland not to be re-sealed in England, until sufficient bond is given.

29. *Letters of administration granted by the Court of Probate in Ireland shall not be re-sealed, under section ninety-five of the twentieth and twenty-first Victoria, chapter seventy-nine, until a certificate has been filed under the hand of a registrar of the Court of Probate in Ireland that bond has been given to the judge of the Court of Probate in Ireland in a sum sufficient in amount to cover the property in England as well as in Ireland in respect of which such administration is required to be re-sealed.*

Repealed, so far as it relates to grants made in respect of the estates of persons dying on or after April 1, 1923, by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 169 of that Act.

21 & 22 Vict. c. 95.

30. [*Commissioners may be appointed in the Isle of Man, etc.*]

Repealed by 52 & 53 Vict. c. 10, s. 12.

31. [*Affidavits, before whom to be sworn when parties making them reside in foreign parts.*]

Repealed by 52 & 53 Vict. c. 10, s. 12.

32. [*Affidavits before whom to be sworn.*]

Repealed by 52 & 53 Vict. c. 10, s. 12.

33. [*Persons forging seal or signature guilty of felony.*]

Repealed by 52 & 53 Vict. c. 10, s. 12.

34. [*Persons taking a false oath before surrogate guilty of perjury.*]

Repealed by 52 & 53 Vict. c. 10, s. 12.

Provision for the necessary absence of officers.

35. *In case any officer appointed or to be appointed by virtue of the Court of Probate Act*, 1857, *or of this Act, shall by reason of ill-health or other infirmity, become temporarily incapable of performing the duties of his office, it shall be lawful for the judge to appoint some other fit and proper person to discharge the duties of such office for any period not exceeding six calendar months at any one time, and the person so appointed shall, during such period, have all the power and authority of the officer in whose place he shall be so appointed, and shall be paid by such officer such sum by way of salary or allowance as shall be agreed upon between them respectively or be fixed by the judge, and the judge may, at his discretion, give leave of absence to any officer of the Court for any period not exceeding two months in any year, and shall have the like power of making provision for the discharge of the duties of the office during such absence.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 116 of that Act.

36. [*The judge to have the same powers over practitioners as judges of other Courts.*]

Repealed by 44 & 45 Vict. c. 59, s. 3.

Provision for expenses of indexing, etc., documents required to be removed under requisition.

37. *When any requisition shall issue in pursuance of section eighty-nine of "The Court of Probate Act*, 1857," *it shall be lawful for the Commissioners of her Majesty's Treasury out of such monies as may be provided and appropriated by Parliament for that purpose, to cause to be paid all such expenses attending the arranging, classification, indexing, carriage, or otherwise connected with the removal of the documents or books required by such requisition to be removed, as the judge shall from time to time certify to the said Commissioners to be proper and necessary.*

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. See now section 173, sub-section 3 of that Act.

Short title of Act.

38. *In citing the Act of the twentieth and twenty-first Victoria, chapter seventy-seven, in any instrument, document, or proceeding,* it shall be sufficient to use the expression "The Court of

21 & 22 Vict. c. 95.

Probate Act, 1857," and in citing this Act, the expression " Court of Probate Act, 1858."

SCHEDULE.

	Annual Salary.
Senior Registrar	£1,600
Second	1,400
Third	1,200
Fourth	1,000

Schedule repealed by 44 & 45 Vict. c. 59, s. 3.

WILLS ACT, 1861.

24 & 25 Vict. c. 114.

(24 & 25 Vict. c. 114.)

(Lord Kingsdown's Act.)

An Act to amend the Law with respect to Wills of Personal Estate made by British subjects.

[6th August, 1861.]

Be it enacted, etc., as follows:—

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom (*a*) by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland (*a*) to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom (*a*) by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland (*a*) to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom (*a*) where the same is made.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Nothing in this Act to invalidate wills otherwise made.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked

(*a*) The expressions " United Kingdom " and " Ireland " must, since the Constitution of the Irish Free State, be construed as exclusive of the Irish Free State: Irish Free State (Consequential Adaptation of Enactments) Order, 1923.

or altered by any subsequent will or testamentary instrument made valid by this Act. 24 & 25 Vict. c. 114.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act. Extent of Act.

THE NAVY AND MARINES (WILLS) ACT, 1865 (*b*).

(28 & 29 VICT. C. 72.) 28 & 29 Vict. c. 72.

An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines.

[29th June, 1865.]

Be it enacted, etc., as follows:—

1. This Act may be cited as The Navy and Marines (Wills) Act, 1865. Short title.

2. In this Act— Interpretation of terms.

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty. Will made before entry ineffectual as to wages, etc.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney. Will invalid if combined with power of attorney.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, *or when he has ceased so to serve* (*c*), shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:— Regulations for wills of seamen, etc., as to wages, etc.

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea:

(*b*) As to the powers of the Admiralty to dispense with the provisions of this Act, see Navy and Marines (Wills) Act, 1914, *post*, p. 727.

(*c*) Words in italics repealed by the Navy and Marines (Wills) Act, 1897 (60 Vict. c. 12), in respect of a person dying after June 3, 1897.

28 & 29 Vict. c. 72.

(2.) Where the will is made on board one of her Majesty's ships one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force:

(3.) Where the will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public (*d*):

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills made by prisoners of war.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's naval hospital, or a notary public:

(2.) If the will is made according to the forms required by the law of the place where it is made:

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or marines or seamen at sea.

Payment under will not in conformity with Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

(*d*) By the Navy and Marines (Wills) Act, 1897 (60 Vict. c. 12), in respect of a person dying after June 3, 1897, the words "or a solicitor or in Scotland a law agent" are inserted here.

8. This Act shall commence on such day, not later than the first day of January one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct; nevertheless her Majesty in council may, if it seems fit, with reference to any places out of the United Kingdom, direct that this Act do not commence there, respectively, until a time after that day, and with respect to every such place the time so appointed shall be deemed the time of commencement of this Act. 28 & 29 Vict. c. 72. Commencement of Act.

9. Every Order in Council under this Act shall be published in the London Gazette, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not, then within thirty days after the next meeting of Parliament. Publication of Orders in Council.

NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865.

(28 & 29 Vict. c. 111.) 28 & 29 Vict. c. 111.

An Act to regulate the Disposal of Money and Effects under the Control of the Admiralty belonging to Deceased Officers, Seamen, and Marines of the Royal Navy and Marines, and other Persons.

[5th July, 1865.]

Be it enacted, etc., as follows:—

1. This Act may be cited as "The Navy and Marines (Property of Deceased) Act, 1865." Short title.

2. In this Act— Interpretation of terms.

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral:

The term "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer, in her Majesty's naval or marine force:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part, in any capacity, of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force (not being an officer within the meaning of this Act), or a petty officer or man of the Royal Naval Reserve or Naval Coast Volunteers:

The term "representation" includes probate and letters of administration, with or without will annexed:

The term "representative" means any person taking out representation:

The term "person" includes a corporation.

3. On the death of any person being or having been an officer, seaman, or marine, the amount (if any) to the credit of the deceased in the books of the Admiralty, in respect of sale of effects, arrears of pay, wages, prize money, bounty money, grants, or other allowances in the nature thereof, or other money Residue belonging to deceased officers, seamen, or marines.

28 & 29 Vict. c. 111.

payable by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue), shall be disposed of according to the provisions of this Act.

Residue belonging to deceased persons in civil service of navy.

4. On the death of any person being or having been employed in any of her Majesty's dockyards or other naval establishment, or in any of the civil departments of the navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount (if any) due by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue) shall be disposed of according to the provisions of this Act.

Residue exceeding £100 to be paid to representative.

5. Where the residue exceeds one hundred pounds the Admiralty shall dispose thereof by paying it to the representative of the deceased.

Residue not exceeding £100 to be paid to representative, if any.

6. Where the residue does not exceed one hundred pounds it shall not be necessary for any purpose that representation to the deceased be taken out; but in any case the Admiralty may, if they think fit, require representation to be taken out, and, if on that requisition or otherwise, representation is taken out, then the Admiralty shall dispose of the residue by paying it to the representative.

Power to require certificate, etc., before representation.

7. In the case, nevertheless, of a seaman or marine, the Admiralty shall not be bound to pay the residue (whatever be its amount) to the representative of the deceased, if representation has been taken out either by a creditor as such, or by any person without such certificate respecting the title to representation having been first obtained from the Admiralty, or such other regulations or conditions having been duly observed or performed, as is or are prescribed by Order in Council; and in any such case the Admiralty shall dispose of the residue in pursuance of this Act as if representation had not been taken out.

Residue not exceeding £100, and no representation, power to pay it to widow, etc.

8. Where the residue does not exceed one hundred pounds, and representation is not taken out, then, subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows:

(1.) They shall, if they think fit, pay the residue to any person showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor)—to the end that the residue may be applied by the person to whom it is so paid in a due course of administration; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit):

(2.) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof:

(3.) And in cases where the foregoing provisions of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by Order in Council.

Admiralty not bound to

9. In the case of a seaman or marine, the Admiralty shall not pay the residue or any part thereof to any nominee of the repre-

sentative of the deceased or of a person entitled to take out representation to the deceased, whether such nominee be appointed by power of attorney or otherwise, unless in special circumstances it appears to the Admiralty safe and proper to make such payment to any such nominee. 28 & 29 Vict. c. 111.

pay to nominee of representative.

10. Notwithstanding anything in this Act, the Admiralty shall not in any case dispose of the residue or any part thereof otherwise than by paying the same to the representative of the deceased, until after the expiration of three months from the receipt by the Admiralty of notice of the death, unless in special circumstances it appears to the Admiralty safe and proper to dispose of the residue or any part thereof at an earlier time.

Admiralty not to dispose of residue for three months, etc.

11. In the case of a seaman or marine, where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereby satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions:

Provision for payment of debts out of residue.

First.—That the debt accrued due within three years before the death:

Second.—That payment of it is claimed within two years after the death:

Third.—That the claimant proves the debt to the satisfaction of the Admiralty:

Fourth.—That six months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased.

In any such case, any person claiming to be a creditor of the deceased shall not be entitled to obtain payment of his debt out of any money being under this Act in the hands of the Admiralty by any means or proceeding whatever except by means of a claim lodged with the Admiralty and proceedings thereon under and according to this Act.

12. *Nothing in this Act shall prejudicially affect the claim of any creditor in respect of a debt incurred before the commencement of this Act.*

Saving for existing claims.

Repealed by 56 & 57 Vict. c. 14 (S. L. R.).

13. The provisions of this Act relative to the residue, in the case of a deceased officer, seaman, or marine, shall extend and apply, mutatis mutandis, to unsold effects and money (if any) in charge of the Admiralty.

Provision as to unsold effects, etc.

14. Medals and decorations belonging to an officer, seaman, or marine dying on service shall not be considered as comprised in the personal estate of the deceased with reference to the claims of creditors, or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act, the same shall be held and disposed of according to regulations prescribed by Order in Council.

Disposal of medals and decorations.

15. Where the residue does not exceed one hundred pounds and is administered and disposed of under this Act without representation being taken out, it shall not be liable to the pay-

Exemptions from duty.

28 & 29 Vict. c. 111.

ment of any duty; and if in any case the Admiralty under this Act require security by bond for the application of a residue in due course of administration, the bond shall be exempt from stamp duty where an ordinary administration bond relative to the same residue would be so exempt; but this provision shall not affect any exemption from duty existing independently hereof.

Validity of payments, sales, etc., under this Act.

16. Every payment or application of money, and every sale or other disposition of property, made by the Admiralty in pursuance of this Act, or of any Order in Council for carrying this Act into effect, shall be good and valid as against all persons whomsoever; and the Admiralty shall be by virtue of this Act absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of.

Her Majesty may make Orders in Council.

17. Her Majesty in council may from time to time make such Orders in Council as seem meet for the better execution of any of the purposes of this Act.

Orders in Council to be published in the London Gazette.

18. Every Order in Council under this Act shall be published in the London Gazette, and shall be laid before both Houses of Parliament within thirty days after the making thereof if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

Commencement of Act.

19. This Act shall commence on such day, not later than the first day of January, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct.

Any Order in Council for the better execution of any of the purposes of this Act may nevertheless be made before that day, but not so as to commence before it.

ORDER IN COUNCIL, December 28, 1865 (*e*).

MADE IN PURSUANCE OF THE NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865.

At the Court at Osborne House, Isle of Wight, the 28th day of December, 1865. Present the Queen's most Excellent Majesty in Council.

Whereas by the Navy and Marines (Property of Deceased) Act, 1865, it is enacted (among other things), that her Majesty in council may from time to time make such Orders in Council as seem meet for the better execution of any of the purposes of that Act, and that the said Act shall commence on such day not later than the first day of January, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct:

Now, therefore, her Majesty, by virtue of the powers in this behalf by the said Act or otherwise in her vested, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered as follows:

(*e*) This Order in Council has been amended by Orders in Council of September 14, 1915 (as regards duties of inspectors of seamen's wills); February 15, 1916 (as to disposal of medals), and September 7, 1916 (as regards bastards). These amending Orders are printed in this Appendix, *post*, pp. 728, 729.

Preliminary.

I. The said Act and this Order shall commence from and immediately after the thirty-first day of December, one thousand eight hundred and sixty-five.

II. In this Order—

The term "naval assets" includes all property affected by the Navy and Marines (Property of Deceased) Act, 1865:

The term "will" includes codicil:

The term "probate" includes letters of administration with will annexed:

Other terms have the same respective meanings as in the said Act.

I.—Wills of Seamen and Marines.

Deposit of Will in Testator's Lifetime.

III. In the office of the Inspector of Seamen's Wills (hereafter in this Order called the inspector) there shall be a repository for wills of seamen and marines.

IV. The will of a seaman or marine intended to pass naval assets, may, as soon as practicable after its execution, be sent to the Secretary of the Admiralty to be examined by the inspector.

V. On receipt of any instrument purporting to be such a will the inspector shall register it in books kept in his office for the purpose, specifying the date and place of execution, the name and description of the testator, the name, description and address of the person appointed executor, and those of the attesting witnesses.

VI. If the instrument appears to the inspector invalid as a will on account of any informality or of non-accordance in any respect with the Navy and Marines (Wills) Act, 1865, or otherwise, he shall, as soon as may be, return it to the intending testator, with a statement in writing of the objection to its validity and of the mode in which the objection may be removed.

VII. If the instrument does not appear to the inspector invalid as a will, he shall cause it to be stamped with the official stamp of the Admiralty, and to be placed in the repository for wills of seamen and marines, under official seal, and shall issue a receipt for it to the testator, specifying the matters required to be registered as aforesaid.

VIII. With reference to every such will the inspector shall also proceed as follows:

(1.) He shall, with all convenient speed, issue to the person appointed executor, if any, a cheque of the will, not giving any information respecting the testator's disposition of his property, but containing directions as to the steps to be taken on the testator's death.

(2.) If there is not any person appointed executor, then, with the assent of the testator, either implied by the mode of transmission of the will to the Admiralty Office or expressed, but not otherwise, he shall, with all convenient speed, issue to the residuary or the universal legatee, or other person most beneficially interested under the

will, a cheque in lieu of the will, containing directions as to the steps to be taken on the testator's death.

(3.) If in any such last-mentioned case, by reason of the absence of such assent, a cheque is not issued in the testator's lifetime, then he shall, with all convenient speed, after the testator's death, issue to the residuary or the universal legatee, or other person most beneficially interested under the will, a cheque in lieu of the will, containing directions as to the steps to be taken in consequence of the testator's death.

Deposit of Will after Testator's Death.

IX. On the death of a seaman or marine leaving a will, if the will is not already deposited with the inspector, it shall be forthwith sent to the Secretary of the Admiralty by the executor or other person having possession of it, to be examined by the inspector.

X. On receipt of any instrument purporting to be such a will, the inspector shall register it in books kept in his office for the purpose, specifying the date and place of execution, the name and description of the testator, and the name, description and address of the person appointed executor, and those of the attesting witnesses.

XI. If the inspector doubts the authenticity of the alleged will, or if the instrument appears to him invalid as a will on account of any informality or of non-accordance in any respect with the Navy and Marine (Wills) Act, 1865, or otherwise, he shall, as soon as may be, give notice in writing to the person appointed executor, or, if none, to the residuary or the universal legatee or other person most beneficially interested under the alleged will, informing him that the alleged will is stopped, and stating the reason thereof.

XII. If the inspector does not doubt the authenticity of the will, and the instrument does not appear to him invalid as a will, he shall cause it to be stamped with the official stamp of the Admiralty, and shall issue to the person appointed executor, or, if none, to the residuary or the universal legatee or other person most beneficially interested under the will, a cheque in lieu of the will, containing directions as to the steps to be taken in consequence of the testator's death.

Proceedings on Testator's Death.

XIII. Where a seaman or marine dies leaving a will, and a cheque has been issued in pursuance of the foregoing provisions, the following steps shall be taken (in cases where this course of proceeding is applicable) by and with respect to the holder of the cheque:—

(1.) The officiating minister of the parish or district parish wherein the holder of the cheque resides shall on his request examine him and two inhabitant householders of the parish produced by him for the purpose.

(2.) In the presence of the minister, the holder of the cheque shall sign the application, and the householders shall sign

the certificate, subjoined to the cheque (all blanks being first filled up according to truth, and the minister having first read over to the holder of the cheque and householders the caution printed on the cheque), for which purpose the holder of the cheque and householders shall attend at such time and place as the minister appoints.

(3.) The minister being, on the examination of the holder of the cheque and householders, satisfied of the truth of their statements, and of the holder of the cheque being the executor, or other person therein described as qualified to act, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair, and age of the holder of the cheque, and of any observable peculiarities of person about him, and shall certify to the several particulars by subscribing his signature thereto.

(4.) The holder of the cheque shall, before signing the application, pay to the minister a fee of 2s. 6d. for his trouble in the matter.

(5.) The application and certificates being completed, the minister shall return them with the cheque addressed as directed.

XIV. If the inspector, on the return of the cheque, application, and certificates, is satisfied of the right of the claimant he shall proceed as follows:—

(1.) In case representation is required or intended to be taken out, he shall endorse on the original will a certificate (in such form and to such effect as he thinks fit) to enable the claimant to take out representation, and shall deliver the will to the claimant: and probate, obtained in accordance with the certificate, being produced to the inspector and registered, and being endorsed by him as available for receipt of naval assets, shall be so available.

(2.) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without probate.

XV. If the inspector, on the return of the cheque, application, and certificates, is not satisfied of the right or fitness of the claimant, he may (by endorsement on the original will) certify to that effect, and that he declines to interfere; or, if he thinks fit, he may (by endorsement on the original will) certify his objections for the information of the Court out of which representation would be taken, and if the Court thinks fit to grant probate to the claimant, the same, being produced to the inspector and registered, shall be endorsed by him as available for receipt of naval assets, and shall be so available accordingly.

XVI. If in any case the minister is not satisfied that the holder of the cheque is the person qualified to act according to the instructions therein, he shall forthwith advise the Admiralty of his reasons by letter addressed as directed.

XVII. Notwithstanding anything in the foregoing provisions,

where probate, or in Scotland, confirmation of executor, in case of testacy, is obtained without the inspector's certificate, and naval assets form part of the effects, the inspector, if satisfied on subsequent investigation, from official or other information, that there is no reason to doubt that representation has been obtained by the proper person, may admit the probate or confirmation of executor as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly.

II.—Intestacies of Seamen and Marines.

XVIII. Where a seaman or marine dies intestate leaving naval assets, the following proceedings shall be taken:

(1.) On receipt by the inspector of a letter from a person claiming the naval assets (as widow or next of kin) of the deceased, the inspector shall, if, after the requisite preliminary inquiries, there appear sufficient grounds for entertaining the claim, send by post, under cover to the officiating minister of the parish or district parish wherein the claimant resides, a form of application to be filled up, and a letter of instructions for the minister's guidance.

(2.) The inspector shall at the same time send to the claimant a letter advising her or him of the transmission to the minister of the form of application and pointing out the steps to be taken by the claimant for substantiating the claim.

(3.) After the minister's receipt of the form, he shall, on the request of the claimant, examine her or him and two inhabitant householders of the parish produced by her or him for the purpose.

(4.) In the presence of the minister the claimant shall sign the application and the householders shall sign the certificate subjoined thereto (all blanks being first filled up according to truth, and the minister having first read over to the claimant and householders the caution printed on the form of application), for which purpose the claimant and householders shall attend at such time and place as the minister appoints.

(5.) The minister being, on examination of the claimant and householders, satisfied of the truth of their statements, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair, and age of the claimant, and of any observable peculiarities of person about her or him, and shall certify to the several particulars by subscribing his signature thereto.

(6.) The claimant shall, before signing the application, pay to the minister a fee of 2s. 6d. for his trouble in the matter.

(7.) The application and certificates being completed, the minister shall return them addressed as directed.

XIX. If the inspector, on the return of the application and certificates, is satisfied of the right of the claimant he shall proceed as follows:—

(1.) In case representation is required or intended to be taken out, he shall issue to the claimant a certificate (in such form and to such effect as the inspector thinks fit) to enable the claimant to take out representation; and letters of administration obtained in accordance with the certificate being produced to the inspector and registered, and being endorsed by him as available for receipt of naval assets, shall be so available.

(2.) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without administration.

XX. If the inspector, on the return of the application and certificates, is not satisfied of the right or fitness of the claimant, he may certify to that effect, and that he declines to interfere; or if he thinks fit he may certify his objection for the information of the Court out of which letters of administration or confirmation of executor dative would be taken, and if the Court thinks fit to grant such letters or confirmation to the claimant, the same, being produced to the inspector and registered, shall be endorsed by him as available for receipt of naval assets, and shall be so available accordingly.

XXI. If in any case within two calendar months from the minister's receipt of the form a request for examination is not made to him by the claimant or effectual steps are not taken by the claimant to complete the application, the minister shall, at the expiration of those two months, return the form, addressed as directed, with his reason for doing so noted thereon.

XXII. If in any case the minister rejects any claim for want of satisfactory proof he shall state his reason for such rejection on the form, and forthwith return it addressed as directed.

XXIII. Notwithstanding anything in the foregoing provisions, where letters of administration have, or in Scotland confirmation of executor (on intestacy) has, been obtained without the inspector's certificate and naval assets form part of the effects, the inspector, if satisfied on subsequent investigation, from official or other information, that there is no reason to doubt that representation has been obtained by the proper person, may admit the letters of administration or confirmation of executor as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly.

III.—Officers, Pensioners, Civil Servants, and Others.

XXIV. Where an officer or any person described in section 4 of the Navy and Marines (Property of Deceased) Act, 1865, dies, testate or intestate, leaving naval assets not exceeding £100 and representation is not required or intended to be taken out in England, the inspector, after making such preliminary inquiries as seem to him requisite, shall proceed as follows:—

(1.) He may (if he thinks fit) require the form of application

to be certified by an officiating minister and two householders, as prescribed in this Order in the case of a seaman or marine; or else—

(2.) He may (if he thinks fit) require a statutory declaration by the claimant, suited to the circumstances of the case, and a certificate from two householders, certifying to the claimant's identity, and to their belief in the truth of the statement declared to; or—

(3.) He may, in any case where the foregoing provisions do not apply, accept such other evidence in support of the claim as seems to him sufficient.

XXV. On the return to the inspector of the application or statutory declaration (as the case may be), and the certificate of the householders, or after such other investigation as he thinks fit under the authority of the last foregoing provision of this Order to substitute, and, where there is a will, on the production to him thereof, then if he is satisfied of the right of the claimant, he shall issue to the claimant a certificate which shall be available for receipt of naval assets, without probate or administration.

XXVI. Where, however, representation is taken out in any Court other than the Court of Probate in England, the inspector may, instead of issuing any certificate, admit the letters of administration, probate, or other equivalent instrument as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly without the seal of the Court of Probate in England.

XXVII. In every such case the provisions of the Navy and Marines (Property of Deceased) Act, 1865, with respect to the payment of debts out of the residue, shall apply mutatis mutandis, except that on the claim of a creditor not being entertained or allowed the creditor may take out representation.

IV.—Intestacy, generally.

XXVIII. Notwithstanding anything in this Order the inspector shall not in any case of intestacy (except in cases exempted by a general order of the Admiralty from the operation of the present clause) issue a certificate available for receipt of naval assets without administration, until after the expiration of three calendar months from the receipt by the Admiralty of notice of the intestate's death, unless in special circumstances it appears to the inspector safe and proper to issue his certificate at an earlier time.

V.—Special Disposal of Residue by Admiralty.

XXIX. With respect to any case provided for by paragraph (3) of section 8 of the Navy and Marines (Property of Deceased) Act, 1865, the ground of the non-applicability of paragraphs (1) and (2) of that section being the absence of proof of the death of some person, proof of whose death is requisite to make those paragraphs applicable, then and in every such case if it appears to the inspector that those paragraphs would have been applicable but for the desertion or misconduct of the person, proof of whose

death is wanting, the inspector shall proceed as if the death of that person were proved.

VI.—Bastards.

XXX. *Where a person, subject to the Navy and Marines (Property of Deceased) Act*, 1865, *dies intestate, being a bastard, and not leaving a widow or children or descendants, and leaving naval assets, the following provisions shall have effect:—*

(1.) *Where the naval assets exceed* £10 *no petition to her Majesty for a grant shall be entertained by the Lords Commissioners of her Majesty's Treasury, unless and until the inspector has investigated the facts of the case in such manner as seems to him expedient, and has certified for the information of the said Lords Commissioners the result of his investigation.*

(2.) *Where the naval assets do not exceed* £10, *it shall not be necessary that a grant from her Majesty be obtained, but the inspector may issue a certificate authorising payment of the naval assets to the person who would (in the judgment of the inspector), according to the practice observed by the Lords Commissioners of her Majesty's Treasury, obtain a grant if the naval assets exceeded* £10.

Clause 30 cancelled, and a new clause substituted, by Stat. R. & O., 1916, No. 627. See *post*, p. 729.

VII.—General Provisions.

XXXI. Notwithstanding anything in this Order, the inspector may make such investigations as seem to him expedient into any statements submitted to him and into the facts and circumstances of the case,—in any case whatever, in addition to the investigations prescribed by this Order,—and in any case where the provisions of this Order are not applicable, or the naval assets do not exceed 10*s*., in substitution for the investigations prescribed by this Order, or any of them.

XXXII. The provisions of this Order shall have effect without prejudice to the rules and practice for the time being in force and observed under the Navy and Marines (Property of Deceased) Act, 1865, with respect to the discharge of the claims of creditors.

VIII.—Medals and Decorations.

XXXIII. *Any medal or decoration to which an officer, seaman or marine is entitled, but which is not issued at the time of his death, shall be issued in favour of his—*

(1.) *Wife;*
(2.) *Father and mother;*
(3.) *Son or daughter* } *according to seniority;*
(4.) *Brother or sister* }

and not in favour of any other person, except under the special directions of the Admiralty.

Clause 33 cancelled, as from February 15, 1916, and a new clause substituted by Stat. R. & O., 1916, No. 132. See *post*, p. 728.

XXXIV. Any medal or decoration belonging to an officer, seaman or marine, issued before his death shall, on coming into the custody of the Admiralty, be delivered to his representative, unless representation has been taken out by a creditor as such, in which case it shall be disposed of as if it had not been issued.

And the Lords Commissioners of her Majesty's Treasury and the Lords Commissioners of the Admiralty are to give the necessary directions herein as to them may respectively appertain.

INTESTATES' WIDOWS AND CHILDREN ACT, 1873 (*f*).

36 & 37 Vict. c. 52.

(36 & 37 Vict. c. 52.)

An Act for the Relief of Widows and Children of Intestates where the Personal Estate is of Small Value.

[28th July, 1873.]

Whereas many poor persons die intestate, possessed of property of small amount, and it is desirable to increase the facilities for taking out letters of administration to their estates and effects, and to reduce the expenses attending the same:

Be it therefore enacted, etc., as follows:

For purposes of Act application may be made to a registrar of a County Court.

1. Where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this Act.

Identity of person may be required.

2. The registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

Registrar may refuse to take affidavit.

3. If the registrar of the County Court has reason to believe that the whole estate and effects of which the intestate died possessed exceeds in value one hundred pounds, he shall refuse to

(*f*) Extended by Intestates' Widows and Children Act Extension Act, 1875, *post*, p. 711.

proceed with the application until he is satisfied as to the real value thereof. 36 & 37 Vict. c. 52.

4. All registrars of County Courts shall for the purposes of this Act have power and are hereby authorised to administer oaths, and to take declarations and affirmations, and to exercise any other powers which can be exercised by Commissioners of the Court of Probate. In the necessary absence of the registrar of the County Court, applicants may be sworn and execute any necessary documents at the office of the said registrar before any Commissioner of the Court of Probate. Registrars may exercise powers of Commissioners of Court of Probate.

5. Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the judge of the Court of Probate, subject as regards the tables of fees to the approval of the Commissioners of her Majesty's Treasury; and such proportions of the said fees as the said judge, with such approval as aforesaid, shall think proper, may be made payable to the registrars of the County Courts acting in the said matters, but the total amount to be charged to applicants shall not in any one case exceed the sums mentioned in the schedule to this Act. Power to frame rules, orders, etc.

6. Provided always, that nothing herein contained shall be construed to affect any duty now payable on letters of administration. Not to affect duty on administration.

7. [Application of Act to Ireland.]

SCHEDULE.

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings; and where the whole estate and effects shall exceed in value twenty pounds, the sum of five shillings, and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

INTESTATES' WIDOWS AND CHILDREN ACT EXTENSION ACT, 1875.

(38 & 39 Vict. c. 27.) 38 & 39 Vict. c. 27.

An Act to extend to the Surviving Children of Poor Widows the Benefits of the Act thirty-sixth and thirty-seventh Victoria, chapter fifty-two, intituled An Act for the Relief of Widows and Children of Intestates where the Personal Estate is of Small Value. [29th June, 1875.]

Whereas it is desirable that the provisions of the Act of thirty-six and thirty-seven Victoria, chapter fifty-two, intituled An Act for the relief of widows and children of intestates where the personal estate is of small value, should be made applicable to the surviving children of a poor widow who dies intestate:

Be it therefore enacted, etc., as follows:

1. Where the whole estate and effects of an intestate widow shall not exceed in value the sum of one hundred pounds, any one or more of her children, if they shall reside at a distance Extension of Act of 36 & 37 Vict. c. 52 to

38 & 39 Vict. c. 27.

children of poor intestate widows.

exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district in which the intestate had her fixed place of abode at the time of her death, and on compliance with the regulations prescribed in the said Act of thirty-six and thirty-seven Victoria shall be entitled to the benefits in that case made and provided by the said Act, and the schedule thereunto annexed.

Construction of the Act.

2. This Act shall be read and construed along with and as part of the recited Act.

SHERIFF COURTS (SCOTLAND) ACT, 1876.

39 & 40 Vict. c. 70.

(39 & 40 Vict. c. 70.)

[Sections 41—43.]

VIII.—*Amendment of Law as to Confirmation of Executors.*

Note in confirmation by sheriff clerk or commissary clerk that deceased died domiciled in Scotland substituted for certified copy interlocutor by the sheriff commissary and to have like effect.

41. Where, under the provisions of the ninth and subsequent sections of the Act (*g*) *passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, intituled "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration,"* it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland (*h*), it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff clerk to insert in the confirmation or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland; *and sections twelve and thirteen of the said Act, so far as they make it a condition of the sealing of a confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.*

Extension of the provisions of sections 12 *and* 13 *of* 21 *&* 22 *Vict. c.* 56.

42. *When an additional inventory has been given in and recorded and confirmation granted in a sheriff Court in Scotland of estate situated in England or Ireland* (*h*) *of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England, or in the*

(*g*) Confirmation of Executors (Scotland) Act, 1858, *ante*, p. 687.

(*h*) Expressions "United Kingdom" and "Ireland," since the Constitution of the Irish Free State, are to be construed as exclusive of the Irish Free State: Irish Free State (Consequential Adaptation of Enactments) Order, 1923, *post*, p. 735.

Court of Probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the Court, such additional confirmation shall be sealed with the seal of the Court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the Court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed. 39 & 40 Vict. c. 70.

Repealed by Judicature (Consolidation) Act, 1925, so far as it relates to the re-sealing of confirmations or additional confirmations in England. See now section 168 of that Act.

43. When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the sheriff clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal Court of Probate in England or in the Court of Probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such Court in the same manner as is provided by sections twelve and thirteen of the Act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, as amended by this Act, with respect to sealing confirmations, which include personal estate situated in England or Ireland (*i*) respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland (*i*) with respect to such funds as if probate or letters of administration as the case may be, had been granted by the Court of Probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the Court of which he is clerk. Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in Probate Courts as if it contained English or Irish estate of the deceased.

MARRIED WOMEN'S PROPERTY ACT, 1882.

(45 & 46 Vict. c. 75.) 45 & 46 Vict. c. 75.

[Sections 1—5, 18, 22—27.]

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled The Married Women's Property Act, 1870, and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled An Act to amend the Married Women's Property Act, 1870:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and

(*i*) *Vide supra*, p. 712, note (*h*).

45 & 46 Vict. c. 75.

temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*k*).

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*k*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

(*k*) Sub-sections 3 and 4 of section 1 repealed by Married Women's Property Act, 1893, s. 4.

45 & 46 Vict. c. 75.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Execution of general power.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

* * * * *

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

* * * * *

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not effect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

45 & 46 Vict. c. 75.

27. This Act may be cited as the Married Women's Property Act, 1882.

Short title.

INTESTATES' ESTATES ACT, 1890 (*l*).

53 & 54 Vict. c. 29.

(53 & 54 VICT. c. 29.)

An Act to amend the Law by making better Provision for the Widows of certain Intestates in the Distribution of such Intestates' Property. [*25th July*, 1890.]

Be it enacted, etc., as follows:

Intestates' estate not exceeding £500 to belong to widow where no issue.

1. *The real and personal estates of every man who shall die intestate after the first day of September one thousand eight hundred and ninety leaving a widow with no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively.*

Intestate's estate not exceeding £500, widow to have a charge for £500.

2. *Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled the five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment.*

How charge to be borne as between realty and personalty.

3. *As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.*

Above provision to be in addition to share of residue.

4. *The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed.*

How realty to be valued.

5. *The net value of such real estates as aforesaid shall for the purposes of this Act be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the statute sixteenth and seventeenth Victoria, chapter fifty-one, and in the case of an estate for a life or lives according to the said tables and rules.*

[*Succession Duties Act*, 1853.]

How personalty to be valued.

6. *The net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts,*

(*l*) Whole Act repealed as to deaths after 1925, by Administration of Estates Act, 1925, s. 56, Sched. 2, pt. 1. See now section 46 of that Act.

funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject. 53 & 54 Vict. c. 29.

7. *This Act may be cited as the Intestates' Estates Act*, 1890. *Short title.*

8. *This Act shall not extend to Scotland.* *Extent of Act.*

COLONIAL PROBATES ACT, 1892.

(55 VICT. c. 6.) 55 Vict. c. 6.

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions. [20th May, 1892.]

Be it enacted, etc., as follows:

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the Courts of the United Kingdom (*m*), direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly (*n*). Application of Act by Order in Council.

(*m*) Since the Constitution of the Irish Free State, this expression must be construed as exclusive of the Irish Free State: Irish Free State (Consequential Adaptation of Enactments) Order, 1923, *post*, p. 735.

(*n*) The Act has been applied by Orders in Council to the following British Possessions:

Alberta (S. R. & O., 1913, No. 214); Ashanti (S. R. & O., 1920, No. 1663); Bahamas (November 23, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 3); Barbados (January 29, 1894, *ibid.*, p. 4); Bechuanaland Protectorate (S. R. & O., 1916, No. 818); Bermudas (S. R. & O., 1919, No. 670); British Columbia (October 26, 1896, see S. R. & O. Rev., 1904, Vol 1, Administration, p. 8); British Guiana (May 16, 1893, *ibid.*, p. 2); British Honduras (January 30, 1893, *ibid.*, p. 1); Ceylon (S. R. & O., 1921, No. 2003); East Africa Protectorate (now Kenya) (S. R. & O., 1916, No. 818); Falkland Islands (October 3, 1895, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 7); Fiji (April 30, 1894, *ibid.*, p. 4); Gambia Colony (S. R. & O., 1921, No. 263); Gibraltar (January 30, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 1); Gold Coast (May 16, 1893, *ibid.*, p. 2); Grenada (February 3, 1898, *ibid.*, p. 10); Hong Kong (March 15, 1893, *ibid.*, p. 2); Jamaica (July 18, 1894, *ibid.*, p. 5); Kenya (see East Africa Protectorate); Lagos (see Nigeria Colony); Leeward Islands (March 6, 1896, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 7); Manitoba (November 27, 1896, *ibid.*, p. 9); New South Wales (January 30, 1893, *ibid.*, p. 1); New Zealand (January 30, 1893, *ibid.*, p. 1); Newfoundland (May 20, 1903, *ibid.*, p. 13); Nigeria Colony (formerly Lagos) (S. R. & O., 1920, No. 887); North West Territories (May 18, 1897, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 10); Northern Rhodesia Protectorate (S. R. & O., 1916, No. 818); Nova Scotia (October 26, 1896, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 8); Nyassaland Protectorate (S. R. & O., 1916, No. 622); Ontario (March 15, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 2); Papua (S. R. & O., 1914, No. 1473); Queensland (May 19, 1899, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 11); St. Helena (January 22, 1900, *ibid.*, p. 12); St. Lucia (S. R. & O., 1917, No. 745); St. Vincent (May 19, 1898, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 11); Saskatchewan (S. R. & O., 1913, No. 214); Sierra Leone Colony (S. R. & O., 1916, No. 273); Sierra Leone Protectorate (S. R. & O., 1916, No. 274); South Africa, Union of (S. R. & O., 1914, No. 144); South Australia May 16, 1893, see S. R. & O. Rev., 1904, Vol. 1,

55 Vict. c. 6.

Sealing in United Kingdom of colonial probates and letters of administration.

2.—(1.) Where a Court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of probate in the United Kingdom (*m*), be sealed with the seal of that Court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

(2.) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied—

(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom (*m*); and

(b) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom (*m*) to which the letters of administration relate;

and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3.) The Court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom (*m*).

(4.) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

(5.) Rules of Court may be made for regulating the procedure and practice, including fees and costs, in Courts of the United Kingdom (*m*), on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and, subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

Application of Act to British Courts in foreign countries.

3. This Act shall extend to authorise the sealing in the United Kingdom (*m*) of any probate or letters of administration granted by a British Court in a foreign country, in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the

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Administration, p. 2); Southern Rhodesia (S. R. & O., 1916, No. 818); Straits Settlements (May 16, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 4); Swaziland Protectorate (S. R. & O., 1916, No. 818); Tasmania (January, 1894, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 2); Trinidad and Tobago (June 27, 1894, *ibid.*, p. 5); Uganda Protectorate (S. R. & O., 1916, No. 818); Victoria (January 30, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 1); Weihaiwei Protectorate (S. R. & O., 1916, No. 818); Western Australia (March 15, 1893, see S. R. & O. Rev., 1904, Vol. 1, Administration, p. 2); Zanzibar Protectorate (S. R. & O., 1916, No. 275).

(*m*) See note (*m*), p. 717.

provisions of this Act shall apply accordingly with the necessary modifications. 55 Vict. c. 6.

Orders in Council.

4.—(1.) Every Order in Council made under this Act shall be laid before both Houses of Parliament as soon as may be after it is made, and shall be published under the authority of her Majesty's Stationery Office.

(2.) Her Majesty the Queen in council may revoke or alter any Order in Council previously made under this Act.

(3.) Where it appears to her Majesty in council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for her Majesty to direct by Order in Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

Application of Act to probates, etc., already granted.

5. This Act when applied by an Order in Council to a British possession shall, subject to the provisions of the Order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

Definitions.

6. In this Act—

The expression "Court of Probate" means any Court or authority, by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the County of Edinburgh:

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively:

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted:

The expression "British Court in a foreign country" means any British Court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

Short title.

7. This Act may be cited as the Colonial Probates Act, 1892.

MARRIED WOMEN'S PROPERTY ACT, 1893.

(56 & 57 Vict. c. 63.) 56 & 57 Vict. c. 63.

An Act to amend the Married Women's Property Act, 1882.

[5th December, 1893.]

Be it enacted, etc., as follows:

Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any

56 & 57 Vict. c. 63.

separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Repeal.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Short title.

5. This Act may be cited as the Married Women's Property Act, 1893.

Extent.

6. This Act shall not apply to Scotland.

MERCHANT SHIPPING ACT, 1894.

57 & 58 Vict. c. 60.

(57 & 58 Vict. c. 60.)

[Sections 150, 176, 177.]

Application of deposits of deceased depositor.

150. All sums due from the Board of Trade to the estate of any deceased person on account of any deposit in a seamen's savings bank shall be paid and applied by the Board of Trade as if they were the property of a deceased seamen received by the Board under this Act, and the provisions of this Act respecting that property shall apply accordingly.

Payment over of property of deceased seamen by Board of Trade.

176.—(1.) Where any property of a deceased seaman or apprentice comes into the hands of the Board of Trade, or any agent of that Board, the Board of Trade, after deducting for expenses incurred in respect of that seaman or apprentice or of his property such sum as they think proper to allow, shall, subject to the provisions of this Act, deal with the residue as follows:—

(a) If the property exceeds in value one hundred pounds, they

shall pay and deliver the residue to the legal personal representative of the deceased: 57 & 58 Vict. c. 60.

(b) If the property do not exceed in value one hundred pounds, the Board may as they think fit either pay or deliver the residue to any claimant who is proved to their satisfaction to be the widow or a child of the deceased, or to be entitled to the personalty of the deceased either under his will (if any) or any statute of distribution or otherwise, or to be a person entitled to take out representation, although no such representation has been taken out, and shall be thereby discharged from all further liability in respect of the residue so paid or delivered; or

(c) They may, if they think fit, require representation to be taken out, and pay and deliver the residue to the legal personal representative of the deceased.

(2.) Every person to whom any such residue is so paid or delivered shall apply the same in due course of administration.

Dealing with deceased seaman's property when he leaves a will.

177.—(1.) Where a deceased seaman or apprentice has left a will the Board of Trade may refuse to pay or deliver the above-mentioned residue—

(a) if the will was made on board ship, to any person claiming under the will, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship, and

(b) if the will was not made on board ship, to any person claiming under the will, and not being related to the testator by blood or marriage, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

(2.) Whenever the Board of Trade refuse under this section to pay or deliver the residue to a person claiming under a will the residue shall be dealt with as if no will had been made.

NAVY AND MARINES (WILLS) ACT, 1897.

(60 Vict. c. 15.) 60 Vict. c. 15.

An Act to amend the Navy and Marines (Wills) Act, 1865.

[3rd June, 1897.]

Be it enacted, etc., as follows:—

Amendment of 28 & 29 Vict. c. 72, as to wills of seamen, etc.

1. Section five of the Navy and Marines (Wills) Act, 1865 (which contains regulations as to the wills of persons being or having been seamen or marines with respect to wages, allowances, and other like payments), shall, in its application to the will of any person who dies after the passing of this Act, be amended as follows:—

(1.) The words " or when he has ceased so to serve " shall be repealed:

60 Vict. c. 15.

(2.) After the words "or a notary public" shall be inserted the words "or a solicitor, or in Scotland a law agent."

Short title.

2. This Act may be cited as the Navy and Marines (Wills) Act, 1897, and the Navy and Marines (Wills) Act, 1865, and this Act may be cited together as the Navy and Marines (Wills) Acts, 1865 and 1897.

LAND TRANSFER ACT, 1897.

60 & 61 Vict. c. 65.

(60 & 61 Vict. c. 65.)

[Sections 1—5, 24—26.]

An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875. [*6th August*, 1897.]

38 & 39 Vict. c. 87.

Whereas it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875, in this Act referred to as "the principal Act":

Be it therefore enacted, etc., as follows:—

Part I. (o).

Establishment of a Real Representative.

Devolution of legal interest in real estate on death.

1.—(1.) *Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.*

See now Administration of Estates Act, 1925, s. 1, sub-s. 1.

(2.) *This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.*

See now Administration of Estates Act, 1925, s. 3.

(3.) *Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.*

See now Judicature (Consolidation) Act, 1925, s. 155.

(4.) *The expression "real estate," in this Part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.*

See now Administration of Estates Act, 1925, s. 3.

(5.) *This section applies only in cases of death after the commencement of this Act.*

(o) Part I repealed as to deaths after 1925, and re-enacted in an amended form by the Law of Property Act, 1922 (see Law of Property (Amendment) Act, 1924, ss. 1, 12, and Sched.). The new provisions are incorporated in the Administration of Estates Act, 1925. Remainder of the Act repealed (January 1, 1926) by the Land Registration Act, 1925, ss. 147, 148, sub-s. 2, and Sched.

60 & 61 Vict. c. 65.

Provisions as to administration.

2.—(1.) *Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.*

See now Administration of Estates Act, 1925, Pts. III and IV.

(2.) *All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.*

See now Administration of Estates Act, 1925, s. 2.

(3.) *In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.*

See now Administration of Estates Act, 1925, s. 2 and Pt. III.

(4.) *Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.*

See now Judicature (Consolidation) Act, 1925, s. 162.

Provision for transfer to heir or devisee.

3.—(1.) *At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.*

(2.) *At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have*

60 & 61 Vict. c. 65.

failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

See now Administration of Estates Act, 1925, Pts. III and IV.

Appropriation of land in satisfaction of legacy or share in estate.

4.—*(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.*

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

See now Administration of Estates Act, 1925, Pts. III and IV.

Liability for duty.

5. *Nothing in this Part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.*

Interpretation.

24.—*(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to*

mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such. 60 & 61 Vict. c. 65.

(2.) *In this Act the expression "personal representative" means an executor or administrator.*

25. *This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.* *Commencement of Act.*

26. *This Act may be cited as the Land Transfer Act,* 1897, *and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts,* 1875 *and* 1897. *Short title and construction.*

PUBLIC TRUSTEE ACT, 1906.

(6 Edw. 7, c. 55.)

[Sections 1, 2, 6, 11, 15—17.] 6 Edw. 7, c. 55.

An Act to provide for the appointment of a Public Trustee and to amend the Law relating to the administration of Trusts. [21st December, 1906.]

Be it enacted, etc., as follows:—

Establishment of Public Trustee.

1.—(1) There shall be established the office of public trustee. Office of public trustee.

(2) The public trustee shall be a corporation sole under that name, with perpetual succession and an official seal, and may sue and be sued under the above name like any other corporation sole, but any instruments sealed by him shall not, by reason of his using a seal, be rendered liable to a higher stamp duty than if he were an individual.

Powers and Duties of Public Trustee.

2.—(1) Subject to and in accordance with the provisions of this Act and rules made thereunder, the public trustee may, if he thinks fit— General powers and duties of public trustee.

(a) act in the administration of estates of small value;

(b) act as custodian trustee;

(c) act as an ordinary trustee;

(d) be appointed to be a judicial trustee;

(e) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870. 33 & 34 Vict. c. 23.

(2) Subject to the provisions of this Act, and to the rules made thereunder, the public trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of this Act, and shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities and be subject to the control and orders of the court, as a private trustee acting in the same capacity.

6 Edw. 7, c. 55.

(3) The public trustee may decline, either absolutely or except on the prescribed conditions, to accept any trust, but he shall not decline to accept any trust on the ground only of the small value of the trust property.

(4) The public trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent.

(5) The public trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the official trustee of charity lands or official trustees of charitable funds.

* * * * *

Power as to granting probate.

6.—(1) If in pursuance of any rule under this Act, the public trustee is authorised to accept by that name probates of wills or letters of administration, the court having jurisdiction to grant probate of a will or letters of administration may grant such probate or letters to the public trustee by that name, and for that purpose the court shall consider the public trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the public trustee shall not be required for the grant of letters of administration to any other person, and that, as between the public trustee and the widower widow or next-of-kin of the deceased, the widower widow or next-of-kin shall be preferred, unless for good cause shown to the contrary.

(2) Any executor who has obtained probate or any administrator who has obtained letters of administration, and notwithstanding he has acted in the administration of the deceased's estate, may, with the sanction of the court, and after such notice to the persons beneficially interested as the court may direct, transfer such estate to the public trustee for administration either solely or jointly with the continuing executors or administrator, if any. And the order of the court sanctioning such transfer shall, subject to the provisions of this Act, give to the public trustee all the powers of such executor and administrator, and such executor and administrator shall not be in any way liable in respect of any act or default in reference to such estate subsequent to the date of such order, other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible.

By the Public Trustee Rules, 1912, Rule 6: "Subject to the Act and these Rules, the Public Trustee is authorised . . . to accept by the name of the Public Trustee probate or letters of administration of any kind and either as principal or as agent for any person."

* * * * *

Public trustee not required to give bond.

11.—(4) Where any bond or security would be required from a private person upon the grant to him of administration, or upon his appointment to act in any capacity, the public trustee, if administration is granted to him or if he is appointed to act in

such capacity as aforesaid, shall not be required to give such bond or security, but shall be subject to the same liabilities and duties as if he had given such bond or security. 6 Edw. 7, c. 55.

* * * * *

15. In this Act, unless the context otherwise requires— Definitions.

the expression "court" means the High Court and, as respects trusts within its jurisdiction, the county court:

the expression "letters of administration" means letters of administration of the estate and effects of a deceased person, whether general or with a will annexed, or limited either in time or otherwise:

the expression "trust" includes an executorship or administratorship; and the expression "trustee" shall be construed accordingly; and the expression "trust property" shall include all property in the possession or under the control wholly or partly of the public trustee by virtue of any trust:

the expression "private trustee" means a trustee other than the public trustee:

the expression "expenses" includes costs and charges:

the expression "prescribed" means prescribed for the time being by rules under this Act:

other expressions have the same meaning as in the Trustee Act, 1893.

16. This Act shall come into operation on the first day of January one thousand nine hundred and eight. Commencement of Act.

17.—(1) This Act may be cited as the Public Trustee Act, 1906. Short title and extent.

(2) This Act shall not extend to Ireland or Scotland.

NAVY AND MARINES (WILLS) ACT, 1914.

(5 & 6 Geo. 5, c. 17.) 5 & 6 Geo. 5, c. 17.

An Act to enable the Admiralty to dispense with compliance with the requirements of the Navy and Marines (Wills) Acts, 1865 and 1897, in the case of Seamen and Marines dying during or in consequence of the present War.

[27th November, 1914.]

Be it enacted, etc., as follows:—

1. Notwithstanding anything in the Navy and Marines (Wills) Acts, 1865 and 1897, the Admiralty may, in the case of a will made by any person being or having been a seaman or marine who may have died or may hereafter die during or in consequence of the present war, pay or deliver any wages, grant, or other allowance, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will though not made in conformity with the provisions of the said Acts, if the Admiralty are of opinion that compliance with the requirements of those Acts may be properly dispensed with. Power of Admiralty to dispense with provisions of Navy and Marines (Wills) Acts. 28 & 29 Vict. c. 72. 60 & 61 Vict. c. 15.

2. This Act may be cited as the Navy and Marines (Wills) Act, 1914. Short title.

STATUTORY RULES AND ORDERS, 1915, No. 930.

NAVY.

Disposal of Money and Effects on Death.

ORDER IN COUNCIL UNDER THE NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865 (28 & 29 VICT. C. 111), AMENDING ORDER IN COUNCIL OF DECEMBER 28TH, 1865, SO FAR AS REGARDS DUTIES OF INSPECTOR OF SEAMEN'S WILLS.

At the Court at Buckingham Palace, the 14th day of September, 1915.

It is hereby ordered, as follows:—

In investigating claims to Naval Assets the Inspector of Seamen's Wills may in any case, in substitution for the investigations prescribed by the said Order in Council of the 28th December, 1865, require the claimant to make a declaration suited to the circumstances of the case before a Magistrate or a Minister of Religion, and to obtain a certificate from two householders certifying to the claimant's identity, and to their belief in the truth of the statement declared to.

STATUTORY RULES AND ORDERS, 1916, No. 132.

NAVY.

Disposal of Money and Effects on Death.

ORDER IN COUNCIL UNDER SECTION 17 OF THE NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865 (28 & 29 VICT. C. 111), AS TO DISPOSAL OF MEDALS NOT ISSUED BEFORE DEATH OF OFFICER, SEAMAN, OR MARINE ENTITLED THERETO.

At the Court at Buckingham Palace, the 15th day of February, 1916.

It is hereby ordered, that Clause 33 of the Order in Council of the 28th December, 1865, shall be cancelled from the date of this Order, and in lieu thereof shall be substituted the following:—

"33. Any medal to which an Officer, Seaman, or Marine is entitled, but which is not issued at the time of his death, shall be disposed of as follows:—

"(1) When bequeathed by Will, the medal shall be sent to the Legatee.

"(2) When not bequeathed by Will, the medal shall be sent to the person standing nearest in the following order of relationship:—

1. Widow.
2. Eldest surviving son.
3. Eldest surviving daughter.
4. Father.
5. Mother.
6. Eldest surviving brother.
7. Eldest surviving sister.
8. Eldest surviving half-brother.
9. Eldest surviving half-sister.

" (3) When the medal cannot be disposed of as above, it may be sent to some other relative or interested party at the discretion of the Lords Commissioners of the Admiralty.

" The same procedure shall be followed in the case of unissued decorations, except where specific direction as to their disposal is contained in the statutes or rules of the various Orders."

STATUTORY RULES AND ORDERS, 1916, No. 627.

NAVY.

Disposal of Money and Effects on Death.

ORDER IN COUNCIL UNDER SECTION 17 OF THE NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865 (28 & 29 VICT. C. 111), AMENDING ORDER IN COUNCIL OF DECEMBER 28TH, 1865, SO FAR AS REGARDS BASTARDS.

At the Court at Windsor Castle, the 7th day of September, 1916.

It is hereby ordered, as follows:—

Clause 30 of the Order in Council dated the 28th December, 1865, is hereby cancelled, and the following Clause substituted therefor:—

" 30. Where a person subject to the Navy and Marines (Property of Deceased) Act, 1865, dies intestate, being a bastard, and not leaving a Widow or Children or Descendants, and leaving Naval Assets, the following provisions shall have effect:—

" Where the Naval Assets do not exceed £100 the Inspector may issue a Certificate authorising payment of the Naval Assets to the person who would (in the judgment of the Inspector) obtain a grant according to the practice observed by the Lords Commissioners of His Majesty's Treasury."

WILLS (SOLDIERS AND SAILORS) ACT, 1918.

(7 & 8 GEO. 5, C. 58.)

7 & 8 Geo. 5, c. 58.

An Act to amend the Law with respect to Testamentary Dispositions by Soldiers and Sailors. [6th February, 1918.]

Be it enacted, etc., as follows:—

Explanation of s. 11 of 7 Will 4 & 1 Vict. c. 26.

1. In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorises and always has authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years.

7 & 8 Geo. 5, c. 58.

Extension of s. 11 of Wills Act, 1837.

2. Section eleven of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section.

Validity of testamentary dispositions of real property made by soldiers and sailors.

3.—(1) A testamentary disposition of any real estate in England or Ireland made by a person to whom section eleven of the Wills Act, 1837, applies, and who dies after the passing of this Act, shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid.

(2) A testamentary disposition of any heritable property in Scotland made after the passing of this Act by a person to whom section eleven of the Wills Act, 1837, applies or to whom it would apply if he were domiciled in England, shall not be invalid by reason only of the fact that such person is under twenty-one years of age, provided always that he is of such age that he could, if domiciled in Scotland, have made a valid testamentary disposition of moveable property.

Power to appoint testamentary guardians.

4. Where any person dies after the passing of this Act having made a will which is, or which, if it had been a disposition of property, would have been rendered valid by section eleven of the Wills Act, 1837, any appointment contained in that will of any person as guardian of the infant children of the testator shall be of full force and effect.

Short title and interpretation.

5.—(1) This Act may be cited as the Wills (Soldiers and Sailors) Act, 1918.

(2) For the purposes of section eleven of the Wills Act, 1837, and this Act the expression "soldier" includes a member of the Air Force, and references in this Act to the said section eleven include a reference to that section as explained and extended by this Act.

GRANT OF ADMINISTRATION (BONDS) ACT, 1919 (*p*).

9 & 10 Geo. 5, c. 26.

(9 & 10 Geo. 5, c. 26.)

An Act to amend the Law with respect to Bonds given by persons to whom administration is granted. [22nd July, 1919.]

Be it enacted, etc., as follows:—

Amendments of

1.—(1) *The bond required under section eighty-one of Court of Probate Act*, 1857, *to be given by a person to whom a grant of*

(*p*) The whole Act repealed by the Administration of Justices Act, 1925, s. 29, and Sched. 5. See now Judicature (Consolidation) Act, 1925, s. 167.

administration has been committed may, during any vacancy in the office of President of the Probate, Divorce and Admiralty division of the High Court, be given to a registrar of the principal probate registry. 9 & 10 Geo. 5, c. 26.

(2) *The powers of a district registrar under the said Act to require sureties to such a bond, and to reduce the amount of such a bond, and to limit the liability of a surety shall be exercisable in the case of a grant of administration from the principal probate registry by a registrar of that registry.* *law with respect to bonds given by administration.* 20 & 21 *Vict.* c. 77.

(3) *An application for the assignment of such a bond to some person in order to enable him to sue on it may be made to a registrar of the principal probate registry on summons.*

(4) *For the purpose of carrying out the provisions hereinbefore contained, the sections of the said Act mentioned in the first column of the Schedule to this Act shall have effect, subject to the amendments therein specified in the second column of that schedule.*

2. *This Act may be cited as the Grant of Administration (Bonds) Act,* 1919. *Short title.*

SCHEDULE.

AMENDMENTS OF COURT OF PROBATE ACT, 1857. Section 1.

Section.	
81	*After the words "judge of the Court of Probate" there shall be inserted the words "or in the case of a vacancy in that office to a registrar of the principal Probate Registry," and for the words "in the case of a grant from the district registry the district registrar" there shall be substituted the words "a registrar."*
82	*For the words "district registrar," wherever they occur, there shall be substituted the words "a registrar."*
83	*For the words "motion or petition in a summary way," there shall be substituted the word "summons," the words "order one of the registrars of the court to" shall be omitted, and after the words "judge of the court" there shall be inserted the words "or a registrar."*

THE GOVERNMENT OF IRELAND (RESEALING OF PROBATES, &c.) ORDER, 1922 (*q*).

S. R. & O., 1922, No. 81.

At the Court at Buckingham Palace, the 31st day of January, 1922.

It is hereby ordered, as follows:—

1.—(1) *This Order may be cited as the Government of Ireland (Resealing of Probates, &c.) Order,* 1922.

(*q*) Superseded, as to persons dying on or after April 1, 1923, by the Government of Ireland (Resealing of Probates, etc.) Order, 1923, *post*, p. 733.

(2) *In this Order unless the context otherwise requires,*

The expression "the Act of 1857*" means the Probates and Letters of Administration Act (Ireland)* 1857*, including any enactments, rules and regulations by which that Act has been extended, amended or applied.*

The expression "the Act of 1858*" means the Confirmation of Executors (Scotland) Act,* 1858*, including any enactments, rules and regulations by which that Act has been extended, amended or applied.*

2.—(1) *Section ninety-four of the Act of* 1857 *shall extend and apply to the resealing in Southern Ireland of Probates and Letters of Administration granted in Northern Ireland, and to the resealing in Northern Ireland of Probates and Letters of Administration granted in Southern Ireland, in like manner as it applies to the resealing in Ireland of Probates and Letters of Administration granted in England.*

(2) *References in the Act of* 1857 *or in the Act of* 1858 *to Ireland shall be construed as references to Southern Ireland or Northern Ireland as the case may be.*

3.—(1) *Where in pursuance of the provisions of section ninety-four or ninety-five of the Act of* 1857*, or of Article* 2 *of this Order, Probate or Letters of Administration granted by the Court in Northern Ireland are deposited for the purpose of being resealed under those provisions in England or Southern Ireland, or Probate or Letters of Administration granted by the court in England or Southern Ireland are deposited for the purpose of being resealed under those provisions in Northern Ireland, then in lieu of a certificate showing that estate duty has been paid on the issue of the original grant in respect of the assets situate in the country in which the grant is to be resealed there shall be delivered to the authority charged with resealing, together with the grant to be resealed, an affidavit accounting for the estate duty, or duty in the nature of estate duty (if any) in respect of the assets situate within the jurisdiction of the resealing authority in like manner as upon an application for an original grant of representation to such authority.*

(2) *Where in pursuance of section thirteen of the Act of* 1858 *Scottish confirmation is produced for the purpose of being sealed in Northern Ireland, then before the confirmation is so sealed an affidavit shall be filed and the Northern Irish estate duty, or duty in the nature of estate duty (if any) payable in respect of the assets situate in Northern Ireland shall be paid in the same manner as if an application was being made for an original grant.*

(3) *Where in pursuance of section fourteen of the Act of* 1858 *a Northern Ireland grant of representation is produced for the purpose of being certified in Scotland, then before the grant is so certified an inventory shall be filed and British estate duty (if any) payable in respect of the assets situate in Scotland shall be paid in the same manner as if an original application was being made for confirmation.*

(4) *Notwithstanding the provisions of section forty-eight of the Finance (No.* 2*) Act,* 1915*, grants of representation by any court in Great Britain or Southern Ireland shall not have effect with respect to Government stock in Northern Ireland, and grants*

of representation in Northern Ireland shall not have effect with respect to Government stock outside Northern Ireland, unless sealed or certified in the country where the stock is situate, in accordance with the provisions of the Acts of 1857 *and* 1858 *as modified by this Article.*

(5) *This Article does not apply where the person in respect of whom the representation is granted died before the twenty-second day of November nineteen hundred and twenty-one.*

THE GOVERNMENT OF IRELAND (RESEALING OF PROBATES, &c.) ORDER, 1923 (*r*).

S. R. AND O., 1923, No. 613.

At the Court at Buckingham Palace, the 25th day of May, 1923.

Whereas in pursuance of the powers conferred by section sixty-nine and section twenty-eight of the Government of Ireland Act, 1920, His Majesty in Council was pleased to make an Order to be cited as The Government of Ireland (Resealing of Probates &c.) Order, 1922.

And whereas in consequence of the establishment of the Irish Free State, and by reason of the Government of Ireland Act, 1920, ceasing to apply to any part of Ireland other than Northern Ireland, it is necessary to make other provision with respect to the resealing or certification in Great Britain of representations granted in Northern Ireland, and the resealing in Northern Ireland of representations granted in Great Britain:

And whereas the provisions of section one of the Rules Publication Act, 1893, have been complied with:

Now, therefore, etc., it is hereby ordered, as follows:—

1.—(1) This Order may be cited as the Government of Ireland (Resealing of Probates, &c.) Order 1923.

(2) In this Order, unless the context otherwise requires—

The expression "the Act of 1857" means the Probates and Letters of Administration Act (Ireland), 1857, including any enactments, rules and regulations by which that Act has been extended, amended or applied.

The expression "the Act of 1858" means the Confirmation of Executors (Scotland) Act, 1858, including any enactments, rules and regulations by which that Act has been extended, amended or applied.

2. This Order shall apply in the case of persons dying on or after the 1st April, 1923, and save as respects persons dying before that date the Government of Ireland (Resealing of Probates, &c.) Order, 1922, shall cease to have effect.

3.—(1) Where in pursuance of the provisions of section ninety-four of the Act of 1857 probate or letters of administration

(*r*) Superseded by the Judicature (Consolidation) Act, 1925, s. 169, so far as the order deals with the resealing in England of grants made in Northern Ireland.

granted by the Court in England are deposited for the purpose of being resealed under those provisions in Northern Ireland, then in lieu of a certificate showing that estate duty has been paid on the issue of the original grant in respect of the assets situate in Northern Ireland, there shall be delivered to the authority charged with resealing, together with the grant to be resealed, an affidavit accounting, in like manner as upon an application for an original grant of representation, for the estate duty or duty in the nature of estate duty (if any) payable in Northern Ireland in respect of the personal property of which the deceased was competent to dispose at his death.

(2) Where in pursuance of the provisions of section ninety-five of the Act of 1857 probate or letters of administration granted by the Court in Northern Ireland are deposited for the purpose of being resealed under those provisions in England, then in lieu of a certificate showing that estate duty has been paid on the issue of the original grant in respect of the assets situate in England, there shall be delivered to the authority charged with resealing, together with the grant to be resealed, an Inland Revenue affidavit accounting, in like manner as upon an application for an original grant of representation, for the estate duty (if any) payable in Great Britain in respect of the personal or moveable property of which the deceased was competent to dispose at his death:

Provided always that if the British estate duty has already been paid on a prior certification of the Northern Irish grant in Scotland under the terms of sub-section (4) of this article, then the Inland Revenue affidavit shall be endorsed to this effect by the Commissioners of Inland Revenue.

(3) Where in pursuance of section thirteen of the Act of 1858 Scottish confirmation is produced for the purpose of being sealed in Northern Ireland, then before the confirmation is so sealed an affidavit shall be filed accounting, in like manner as upon an application for an original grant of representation, for the estate duty or duty in the nature of estate duty (if any) payable in Northern Ireland in respect of the personal property of which the deceased was competent to dispose at his death.

(4) Where in pursuance of section fourteen of the Act of 1858 a Northern Irish grant of representation is produced for the purpose of being certified in Scotland, then before the grant is so certified an inventory shall be filed accounting, in like manner as if an original application were being made for confirmation, for the estate duty (if any) payable in Great Britain in respect of the moveable or personal property of which the deceased was competent to dispose at his death:

Provided that if the British estate duty has already been paid on a prior resealing of the Northern Irish grant in England under the terms of sub-section 2 of this article, then the inventory shall be endorsed to this effect by the Commissioners of Inland Revenue.

(5) Notwithstanding the provisions of section forty-eight of the Finance (No. 2) Act, 1915, grants or representation by any Court in Great Britain shall not have effect with respect to Government Stock in Northern Ireland, and grants of representa-

tion in Northern Ireland shall not have effect with respect to Government stock in Great Britain, unless sealed or certified in the country where the stock is situate, in accordance with the provisions of the Acts of 1857 and 1858 as modified by this article.

THE IRISH FREE STATE (CONSEQUENTIAL ADAPTATION OF ENACTMENTS) ORDER, 1923.

S. R. AND O., 1923, No. 405.

At the Court at Buckingham Palace, the 27th day of March, 1923.

Whereas by section six of the Irish Free State (Consequential Provisions) Act, 1922, it is provided that His Majesty may by Order in Council make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to Him necessary or proper as a consequence of the establishment of the Irish Free State, and that any such Order in Council may contain such supplemental, consequential, and incidental provisions as may appear necessary or proper for the purposes of the Order:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows:—

1. This Order may be cited as the Irish Free State (Consequential Adaptation of Enactments) Order, 1923.

2. Subject to the provisions of this Order and of any subsequent Order in Council made under section six of the Irish Free State (Consequential Provisions) Act, 1922, references in any enactment passed before the establishment of the Irish Free State (*s*) to " the United Kingdom " or " the United Kingdom of Great Britain and Ireland," or " Great Britain and Ireland " or " Great Britain or Ireland," or " the British Islands " or " Ireland " shall, in the application of the enactment to any part of Great Britain and Ireland other than the Irish Free State, be construed as exclusive of the Irish Free State, except that in the Acts mentioned in the Schedule to this Order (*t*) any such expression as aforesaid shall, to the extent specified in that Schedule, be construed as including the Irish Free State:

Provided that nothing in this Article shall—

(a) apply to any enactment so as to affect the liability to, or the assessment or collection of, any tax or duty the liability whereto, or the assessment or collection whereof, is regulated by section two of the Irish Free State Constitution Act, 1922, or to sections ninety-four and ninety-five of the Probates and Letters of Administration (Ireland) Act, 1857, and sections

(*s*) *I.e.*, December 6, 1922.

(*t*) None of the Statutes printed in this Appendix is included in the Schedule.

thirteen and fourteen of the Confirmation of Executors (Scotland) Act, 1858, as respectively modified by the Government of Ireland (Resealing, &c. of Probates) Order, 1922, in relation to cases where death duties payable on the death of the person to whom representation is granted are regulated by the said section two; or

(b) apply to any enactment regulating the administration of any public service the transfer of the administration whereof to the Government of the Irish Free State is, by virtue of Article seventy-nine of the Constitution of the Irish Free State, deferred, so as to affect the administration of that service prior to the transfer; or

(c) apply to any enactment designed for the enforcement of any international convention which is binding on the Irish Free State so as to prejudice the powers of fulfilling the obligations imposed by the convention.

3. Subject as aforesaid, references to "the United Kingdom" or "the United Kingdom of Great Britain and Ireland," or "Great Britain and Ireland," or "Great Britain or Ireland," or "the British Islands" or "Ireland," in any enactment passed before the establishment of the Irish Free State which applies to parts of His Majesty's Dominions outside the United Kingdom, or outside the British Islands, as the case may be, shall, in the application of the enactment to any such part, be construed as references both—

(a) to Great Britain and Ireland or the British Islands exclusive of the Irish Free State, or as the case may be, to Ireland exclusive of the Irish Free State; and

(b) to the Irish Free State.

Provided that where by any such enactment the Isle of Man and the Channel Islands are to be deemed for the purposes of the enactment to form part of the United Kingdom, they shall not for the purposes of this Article be deemed to be parts of His Majesty's Dominions outside the United Kingdom.

* * * * *

8.—(1) The provisions of any enactments which are applicable to—

(a) the endorsement and execution in England, Scotland, the Channel Islands, or the Isle of Man of warrants issued by justices courts or judges of courts in Ireland;

(b) the service in England or Scotland of writs of subpœna of superior courts in Ireland and the punishment in England or Scotland of persons disobeying the same;

(c) the enforcement in England or Scotland of the attendance of witnesses before persons appointed for the examination of witnesses in England or Scotland by a commission, order, or other process of courts in Ireland;

(d) the operation in England of inquisitions taken or writs of supersedeas issued in proceedings in lunacy in Ireland, or the management and administration of property in England or Scotland of a person found

lunatic by inquisition in Ireland, or of property in England of a person of unsound mind in Ireland;

shall apply respectively to—

(i) warrants issued by justices, courts or judges of courts in the Irish Free State;

(ii) writs of subpœna of superior courts in the Irish Free State;

(iii) commissions, orders, or other processes of courts in the Irish Free State;

(iv) inquisitions taken and writs of supersedeas issued in proceedings in lunacy in the Irish Free State, and property of a person found lunatic by inquisition in the Irish Free State, or a person of unsound mind in the Irish Free State;

and such warrants, writs of subpœna, commissions, orders and other processes, and inquisitions and writs of supersedeas shall in Northern Ireland have the like effect and shall be dealt with in like manner and with the like consequences as if they had originated in England.

* * * * *

11. Where any Act applies to or may be applied to, any part of His Majesty's Dominions outside the United Kingdom or the British Islands as the case may be, nothing in this Order shall be construed as applying the Act or making the Act applicable to the Irish Free State as such a part of His Majesty's Dominions as aforesaid unless and until provision is made for the purpose by the Parliament of the Irish Free State in pursuance of the powers conferred by section three of the Irish Free State Constitution Act, 1922: . . .

* * * * *

SETTLED LAND ACT, 1925.

(15 Geo. 5, c. 18.)

15 Geo. 5, c. 18.

An Act to consolidate the enactments relating to Settled Land in England and Wales. [9th April, 1925.]

Be it enacted, etc., as follows:—

Part I.

General Preliminary Provisions.

Settlements and Settled Land.

What constitutes a settlement.

1.—(1) Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being—

(i) limited in trust for any persons by way of succession; or

(ii) limited in trust for any person in possession—

(a) for an entailed interest whether or not capable of being barred or defeated;

15 Geo. 5, c. 18.

(b) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(c) for a base or determinable fee or any correspondinterest in leasehold land;

(d) being an infant, for an estate in fee simple or for a term of years absolute; or

(iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or

(iv) limited to or in trust for a married woman of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or

(v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;

creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires:

Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires.

(2) Where an infant is beneficially entitled to land for an estate in fee simple or for a term of years absolute and by reason of an intestacy or otherwise there is no instrument under which the interest of the infant arises or is acquired, a settlement shall be deemed to have been made by the intestate, or by the person whose interest the infant has acquired.

(3) An infant shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (not assigned by metes and bounds) affecting the land, and such a right of dower shall be deemed to be an interest comprised in the subject of the settlement and coming to the dowress under or by virtue of the settlement.

Where dower has been assigned by metes and bounds, the letters of administration or probate granted in respect of the estate of the husband of the dowress shall be deemed a settlement made by the husband.

(4) An estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under him, is for the purposes of this Act an estate or interest comprised in the subject of the settlement and coming to the settlor or such person under or by virtue of the settlement.

(5) Where—

(a) a settlement creates an entailed interest which is incapable of being barred or defeated, or a base or

determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land; or

(b) the subject of a settlement is an entailed interest, or a base or determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land;

the reversion or right of reverter upon the cesser of the interest so created or settled shall be deemed to be an interest comprised in the subject of the settlement, and limited by the settlement.

(6) Sub-sections 4 and 5 of this section bind the Crown.

(7) This section does not apply to land held upon trust for sale.

Sub-section 7 added by the Law of Property (Amendment) Act, 1926, s. 7, and Sched. Section 1 of the Settled Land Act, 1925, replaces section 1, sub-sections 1 and 2, of the Settled Land Act, 1882.

What is settled land.

2. Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land.

Replaces section 2, sub-section 3, of the Settled Land Act, 1882.

Duration of settlements

3. Land [not held upon trust for sale] which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—

(a) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised; or

(b) the person who, if of full age, would be entitled as beneficial owner to have that land vested in him for a legal estate is an infant.

Words in square brackets added by Law of Property (Amendment) Act, 1926, s. 7, and Sched. The section replaces section 2, sub-section 4, of the Settled Land Act, 1882.

Authorised method of settling land *inter vivos*.

4.—(1) Every settlement of a legal estate in land inter vivos shall, save as in this Act otherwise provided, be effected by two deeds, namely, a vesting deed and a trust instrument and if effected in any other way shall not operate to transfer or create a legal estate.

(2) By the vesting deed the land shall be conveyed to the tenant for life or statutory owner (and if more than one as joint tenants) for the legal estate the subject of the intended settlement:

Provided that, where such legal estate is already vested in the tenant for life or statutory owner, it shall be sufficient, without any other conveyance, if the vesting deed declares that the land is vested in him for that estate.

(3) The trust instrument shall—

(a) declare the trusts affecting the settled land;

(b) appoint or constitute trustees of the settlement;

(c) contain the power, if any, to appoint new trustees of the settlement;

(d) set out, either expressly or by reference, any powers intended to be conferred by the settlement in extension of those conferred by this Act;

15 Geo. 5, c. 18.

(e) bear any ad valorem stamp duty which may be payable (whether by virtue of the vesting deed or otherwise) in respect of the settlement.

Contents of vesting deeds.

5.—(1) Every vesting deed for giving effect to a settlement or for conveying settled land to a tenant for life or statutory owner during the subsistence of the settlement (in this Act referred to as a "principal vesting deed") shall contain the following statements and particulars, namely:—

(a) A description, either specific or general, of the settled land;

(b) A statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land;

(c) The names of the persons who are the trustees of the settlement;

(d) Any additional or larger powers conferred by the trust instrument relating to the settled land which by virtue of this Act operate and are exercisable as if conferred by this Act on a tenant for life;

(e) The name of any person for the time being entitled under the trust instrument to appoint new trustees of the settlement.

(2) The statements or particulars required by this section may be incorporated by reference to an existing vesting instrument, and, where there is a settlement subsisting at the commencement of this Act, by reference to that settlement and to any instrument whereby land has been conveyed to the uses or upon the trusts of that settlement, but not (save as last aforesaid) by reference to a trust instrument nor by reference to a disentailing deed.

(3) A principal vesting deed shall not be invalidated by reason only of any error in any of the statements or particulars by this Act required to be contained therein.

Procedure in the case of settlements by will.

6. Where a settlement is created by the will of an estate owner who dies after the commencement of this Act—

(a) the will is for the purposes of this Act a trust instrument; and

(b) the personal representatives of the testator shall hold the settled land on trust, if and when required so to do, to convey it to the person who, under the will, or by virtue of this Act, is the tenant for life or statutory owner, and, if more than one, as joint tenants.

Procedure on change of ownership.

7.—(1) If, on the death of a tenant for life or statutory owner, or of the survivor of two or more tenants for life or statutory owners, in whom the settled land was vested, the land remains settled land, his personal representatives shall hold the settled land on trust, if and when required so to do, to convey it to the person who under the trust instrument or by virtue of this Act becomes the tenant for life or statutory owner and, if more than one, as joint tenants.

(2) If a person by reason of attaining full age becomes a tenant for life for the purposes of this Act of settled land, he shall be

entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him. 15 Geo. 5, c. 18.

(3) If a person who, when of full age, will together with another person or other persons constitute the tenant for life for the purposes of this Act of settled land attains that age, he shall be entitled to require the tenant for life, trustees of the settlement, personal representatives or other persons in whom the settled land is vested to convey the land to him and the other person or persons who together with him constitute the tenant for life as joint tenants.

(4) If by reason of forfeiture, surrender, or otherwise the estate owner of any settled land ceases to have the statutory powers of a tenant for life and the land remains settled land, he shall be bound forthwith to convey the settled land to the person who under the trust instrument, or by virtue of this Act, becomes the tenant for life or statutory owner and, if more than one, as joint tenants.

(5) If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers, and charges taking effect under the settlement, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him, and if more persons than one being of full age become so entitled to the settled land they shall be entitled to require such persons as aforesaid to convey the land to them as joint tenants.

Mode and costs of conveyance, and saving of rights of personal representatives and equitable charges.

8.—(1) A conveyance by personal representatives under either of the last two preceding sections may be made by an assent in writing signed by them which shall operate as a conveyance.

(2) Every conveyance under either of the last two preceding sections shall be made at the cost of the trust estate.

(3) The obligations to convey settled land imposed by the last two preceding sections are subject and without prejudice—

(a) where the settlement is created by a will, to the rights and powers of the personal representatives for purposes of administration; and

(b) in any case, to the person on whom the obligation is imposed being satisfied that provision has been or will be made for the payment of any unpaid death duties in respect of the land or any interest therein for which he is accountable, and any interest and costs in respect of such duties, or that he is otherwise effectually indemnified against such duties, interest and costs.

(4) Where the land is or remains settled land a conveyance under either of the last two preceding sections shall—

(a) if by deed, be a principal vesting deed; and

(b) if by an assent, be a vesting assent, which shall contain the like statements and particulars as are required by this Act in the case of a principal vesting deed.

(5) Nothing contained in either of the last two preceding sections affects the right of personal representatives to transfer or create such legal estates to take effect in priority to a con-

veyance under either of these sections as may be required for giving effect to the obligations imposed on them by statute.

(6) A conveyance under either of the last two preceding sections, if made by deed, may contain a reservation to the person conveying of a term of years absolute in the land conveyed, upon trusts for indemnifying him against any unpaid death duties in respect of the land conveyed or any interest therein, and any interest and costs in respect of such duties.

(7) Nothing contained in either of the last two preceding sections affects any right which a person entitled to an equitable charge for securing money actually raised, and affecting the whole estate the subject of the settlement, may have to require effect to be given thereto by a legal mortgage, before the execution of a conveyance under either of those sections.

Procedure in the case of settlements and of instruments deemed to be trust instruments.

9.—(1) Each of the following settlements or instruments shall for the purposes of this Act be deemed to be a trust instrument, and any reference to a trust instrument contained in this Act shall apply thereto, namely:—

(i) An instrument executed, or, in case of a will, coming into operation, after the commencement of this Act which by virtue of this Act is deemed to be a settlement;

(ii) A settlement which by virtue of this Act is deemed to have been made by any person after the commencement of this Act;

(iii) An instrument inter vivos intended to create a settlement of a legal estate in land which is executed after the commencement of this Act, and does not comply with the requirements of this Act with respect to the method of effecting such a settlement; and

(iv) A settlement made after the commencement of this Act (including a settlement by the will of a person who dies after such commencement) of any of the following interests—

(a) an equitable interest in land which is capable, when in possession, of subsisting at law; or

(b) an entailed interest; or

(c) a base or determinable fee or any corresponding interest in leasehold land,

but only if and when the interest settled takes effect free from all equitable interests and powers under every prior settlement (if any).

(2) As soon as practicable after a settlement, or an instrument which for the purposes of this Act is deemed to be a trust instrument, takes effect as such, the trustees of the settlement may, and on the request of the tenant for life or statutory owner shall, execute a principal vesting deed, containing the proper statements and particulars, declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named, being the tenant for life or statutory owner, and including themselves if they are the statutory owners, and such deed shall, unless the legal estate is already so vested, operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants.

(3) If there are no trustees of the settlement, then (in default

of a person able and willing to appoint such trustees) an application under this Act shall be made to the court for the appointment of such trustees. 15 Geo. 5, c. 18.

(4) The provisions of the last preceding section with reference to a conveyance shall apply, so far as they are applicable, to a principal vesting deed under this section.

10. [Procedure on acquisition of land to be made subject to a settlement.]

11. [As to contracts for the settlement of land.]

12. [Power to make vesting orders as to settled land.]

13. [Dispositions not to take effect until vesting instrument is made.]

Amended by Law of Property (Amendment) Act, 1926, ss. 6, 7, and Sched.

14. [Forfeiture and stamps.]

15. Examples of instruments framed in accordance with the provisions of this Act are contained in the First Schedule to this Act. Examples of instruments.

* * * * *

Tenants for Life and Persons with Powers of Tenant for Life.

19.—(1) The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement. Who is tenant for life.

(2) If in any case there are two or more persons of full age so entitled as joint tenants, they together constitute the tenant for life for the purposes of this Act.

(3) If in any case there are two or more persons so entitled as joint tenants and they are not all of full age, such one or more of them as is or are for the time being of full age is or (if more than one) together constitute the tenant for life for the purposes of this Act, but this subsection does not affect the beneficial interests of such of them as are not for the time being of full age.

(4) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent, and notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement, whether before or after it came into possession, other than an assurance which extinguishes that estate or interest.

Replaces (with amendments) section 2, sub-sections 5, 6 and 7 of the Settled Land Act, 1882.

20.—(1) Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, (namely):— Other limited owners having powers of tenant for life.

(i) A tenant in tail, including a tenant in tail after possibility of issue extinct, and a tenant in tail who is by Act of Parliament restrained from barring or defeating his

15 Geo. 5, c. 18.

estate tail, and although the reversion is in the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services;

(ii) A person entitled to land for an estate in fee simple or for a term of years absolute with or subject to, in any of such cases, an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(iii) A person entitled to a base or determinable fee, although the reversion or right of reverter is in the Crown, or to any corresponding interest in leasehold land;

(iv) A tenant for years determinable on life, not holding merely under a lease at a rent;

(v) A tenant for the life of another, not holding merely under a lease at a rent;

(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for any purpose;

(vii) A tenant by the curtesy;

(viii) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale;

(ix) A person beneficially entitled to land for an estate in fee simple or for a term of years absolute subject to any estates, interests, charges, or powers of charging, subsisting or capable of being exercised under a settlement;

(x) A married woman entitled to land for an estate in fee simple or for a term of years absolute subject to a restraint on anticipation.

(2) In every such case as is mentioned in subsection (1) of this section, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, shall extend to each of the persons aforesaid, and any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of the estate or interest of the person on whom the powers of a tenant for life are conferred by this section.

(3) For the purposes of this Act the estate or interest of a tenant by the curtesy shall be deemed to be an estate or interest arising under a settlement made by his wife.

(4) Where the reversion or right of reverter or other reversionary right is in the Crown, the exercise by a person on whom the powers of a tenant for life are conferred by this section of his powers under this Act, binds the Crown.

Replaces (with amendments) section 58 of the Settled Land Act, 1882, and section 8 of the Settled Land Act, 1884. 15 Geo. 5, c. 18.

21. [Absolute owners subject to certain interests to have the powers of tenant for life.]

22. [Provisions applicable where interest in settled land is restored.]

23. [Powers of trustees, &c., when there is no tenant for life.]

24. [As to a tenant for life who has parted with his interest.]

25. [Married woman, how to be affected.]

Infants, how to be affected.

26.—(1) Where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute or would if of full age be a tenant for life of or have the powers of a tenant for life over settled land, then, during the minority of the infant—

(a) if the settled land is vested in a personal representative, the personal representative, until a principal vesting instrument has been executed pursuant to the provisions of this Act; and

(b) in every other case, the trustees of the settlement;

shall have, in reference to the settled land and capital money, all the powers conferred by this Act and the settlement on a tenant for life, and on the trustees of the settlement.

(2) If the settled land is vested in a personal representative, then, if and when during the minority the infant, if of full age, would have been entitled to have the legal estate in the settled land conveyed to or otherwise vested in him pursuant to the provisions of this Act, a principal vesting instrument shall, if the trustees of the settlement so require, be executed, at the cost of the trust estate, for vesting the legal estate in themselves, and in the meantime the personal representatives shall, during the minority, give effect to the directions of the trustees of the the settlement, and shall not be concerned with the propriety of any conveyance directed to be made by those trustees if the conveyance appears to be a proper conveyance under the powers conferred by this Act or by the settlement, and the capital money, if any, arising under the conveyance is paid to or by the direction of the trustees of the settlement or into court, but a purchaser dealing with the personal representative and paying the capital money, if any, to him shall not be concerned to see that the money is paid to trustees of the settlement or into court, or to inquire whether the personal representative is liable to give effect to any such directions, or whether any such directions have been given.

(3) Subsection (2) of this section applies whether the infant becomes entitled before or after the commencement of this Act, and has effect during successive minorities until a person of full age becomes entitled to require the settled land to be vested in him.

(4) This section does not apply where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute jointly with a person of full age (for which

15 Geo. 5, c. 18.

15 Geo. 5, c. 20.

case provision is made in the Law of Property Act, 1925), but it applies to two or more infants entitled as aforesaid jointly, until one of them attains full age.

(5) This section does not apply where an infant would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, but it applies to two or more infants who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life, until one of them attains full age.

(6) Nothing in this section affects prejudicially any beneficial interest of an infant.

Substituted for section 59 of the Settled Land Act, 1882.

27. [Effect of conveying legal estate to infant.]

28. [Tenant for life lunatic.]

29. [Charitable and public trusts.]

Trustees of Settlement.

Who are trustees for purposes of Act.

30.—(1) Subject to the provisions of this Act, the following persons are trustees of a settlement for the purposes of this Act, and are in this Act referred to as the "trustees of the settlement" or "trustees of a settlement," namely—

(i) the persons, if any, who are for the time being under the settlement, trustees with power of sale of the settled land (subject or not to the consent of any person), or with power of consent to or approval of the exercise of such a power of sale, or if there are no such persons; then

(ii) the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, or this Act, or if there are no such persons; then

(iii) the persons, if any, who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold or otherwise dealt with, or with power of consent to or approval of the exercise of such a power of sale, or, if there are no such persons; then

(iv) the persons, if any, who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the settled land, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not, or, if there are no such persons; then

(v) the persons, if any, appointed by deed to be trustees of the settlement by all the persons who at the date of the deed were together able, by virtue of their beneficial interests or by the exercise of an equitable power, to dispose of the settled land in equity for the whole estate the subject of the settlement.

(2) Paragraphs (i) (iii) and (iv) of the last preceding subsection take effect in like manner as if the powers therein referred to had not by this Act been made exercisable by the tenant for life or statutory owner.

15 Geo. 5, c. 18

(3) Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy, and apart from this sub-section there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly.

Replaces section 2, sub-section 8, of the Settled Land Act, 1882, and section 16 of the Settled Land Act, 1890.

As to trustees of compound settlements.

31.—(1) Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation.

[Where there are trustees for the purposes of this Act of the instrument under which there is a tenant for life or statutory owner but there are no trustees for those purposes of a prior instrument, being one of the instruments by which a compound settlement is constituted, those trustees shall, unless and until trustees are appointed of the prior instrument or of the compound settlement, be the trustees for the purposes of this Act of the compound settlement.]

(2) This section applies to instruments coming into operation before as well as after the commencement of this Act, but shall have effect without prejudice to any appointment made by the court before such commencement of trustees of a settlement constituted by more than one instrument, and to the power of the court in any case after such commencement to make any such appointment, and where any such appointment has been made before such commencement or is made thereafter this section shall not apply or shall cease to apply to the settlement consisting of the instruments to which the appointment relates.

Words in square brackets added by the Law of Property (Amendment) Act, 1926, s. 7, and Sched.

32. [As to trustees of referential settlements.]

33. [Continuance of trustees in office, and as to certain compound settlements.]

Appointment of trustees by court.

34.—(1) If at any time there are no trustees of a settlement, or where in any other case it is expedient, for the purposes of this Act, that new trustees of a settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life, statutory owner, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder or otherwise, or, in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees of the settlement.

(2) The persons so appointed, and the survivors and survivor

15 Geo. 5, c. 18.

of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall become and be the trustees or trustee of the settlement.

Replaces section 38 of the Settled Land Act, 1882.

Procedure on appointment of new trustees.

35.—(1) Whenever a new trustee for the purposes of this Act is appointed of a trust instrument or a trustee thereof for the purposes aforesaid is discharged from the trust without a new trustee being appointed, a deed shall be executed supplemental to the last or only principal vesting instrument containing a declaration that the persons therein named, being the persons who after such appointment or discharge, as the case may be, are the trustees of the trust instrument for the purposes aforesaid, are the trustees of the settlement for those purposes; and a memorandum shall be endorsed on or annexed to the last or only principal vesting instrument in accordance with the Trustee Act, 1925.

15 Geo. 5, c. 19.

(2) Every such deed as aforesaid shall, if the trustee was appointed or discharged by the court, be executed by such person as the court may direct, and, in any other case, shall be executed by—

(i) the person, if any, named in the principal vesting instrument as the person for the time being entitled to appoint new trustees of the settlement, or if no person is so named, or the person is dead or unable or unwilling to act, the persons who if the principal vesting instrument had been the only instrument constituting the settlement would have had power to appoint new trustees thereof;

(ii) the persons named in the deed of declaration as the trustees of the settlement; and

(iii) any trustee who is discharged as aforesaid or retires.

(3) A statement contained in any such deed of declaration as is mentioned in this section to the effect that the person named in the principal vesting instrument as the person for the time being entitled to appoint new trustees of the settlement is unable or unwilling to act, or that a trustee has remained outside the United Kingdom for more than twelve months, or refuses or is unfit to act, or is incapable of acting, shall in favour of a purchaser of a legal estate be conclusive evidence of the matter stated.

* * * * *

Transitional Provisions.

Transitional provisions with respect to existing settlements, &c.

37. The transitional provisions set out in the Second Schedule to this Act shall have effect as regards settlements existing at the commencement of this Act.

* * * * *

15 Geo. 5, c. 18.

PART IX.

SUPPLEMENTARY PROVISIONS.

Definitions.

117.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

* * * * *

(xviii) "Personal representative" means the executor, original or by representation, or administrator, for the time being of a deceased person, and where there are special personal representatives for the purposes of settled land means those personal representatives;

* * * * *

(xxiv) "Settled land" includes land which is deemed to be settled land; "settlement" includes an instrument or instruments which under this Act or the Acts which it replaces is or are deemed to be or which together constitute a settlement, and a settlement which is deemed to have been made by any person or to be subsisting for the purposes of this Act; "a settlement subsisting at the commencement of this Act" includes a settlement created by virtue of this Act immediately on the commencement thereof; and "trustees of the settlement" mean the trustees thereof for the purposes of this Act howsoever appointed or constituted;

* * * * *

(xxvi) "Statutory owner" means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life, have the powers of a tenant for life under this Act, but does not include the trustees of the settlement, where by virtue of an order of the court or otherwise the trustees have power to convey the settled land in the name of the tenant for life;

* * * * *

(xxviii) "Tenant for life" includes a person (not being a statutory owner) who has the powers of a tenant for life under this Act, and also (where the context requires) one of two or more persons who together constitute the tenant for life, or have the powers of a tenant for life; and "tenant in tail" includes a person entitled to an entailed interest in any property; and "entailed interest" has the same meaning as in the Law of Property Act, 1925;

* * * * *

(xxx) "Trust corporation" means the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under subsection (3) of section four of the Public Trustee Act, 1906, to act as custodian trustee, and "trust for sale" "trustees for sale" and "power to postpone a sale" 6 Edw. 7, c. 55.

15 Geo. 5, c. 18.

have the same meaning as in the Law of Property Act, 1925;

Amended as to "trust corporation," Law of Property (Amendment) Act, 1926, s. 3.

(xxxi) In relation to settled land "vesting deed" or "vesting order" means the instrument whereby settled land is conveyed to or vested or declared to be vested in a tenant for life or statutory owner; "vesting assent" means the instrument whereby a personal representative, after the death of a tenant for life or statutory owner, or the survivor of two or more tenants for life or statutory owners, vests settled land in a person entitled as tenant for life or statutory owner; "vesting instrument" means a vesting deed, a vesting assent or, where the land affected remains settled land, a vesting order; "principal vesting instrument" includes any vesting instrument other than a subsidiary vesting deed; and "trust instrument" means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments and a settlement or instrument which is deemed to be a trust instrument;

(xxxii) "United Kingdom" means Great Britain and Northern Ireland;

(xxxiii) "Will" includes codicil.

(2) . . . . .

(3) . . . . .

118. [Retrospective amendment of certain provisions of Settled Land Acts.]

119. [Repeals, savings, and construction.]

Short title, commencement and extent.

120.—(1) This Act may be cited as the settled Land Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

Section 37.

SECOND SCHEDULE.

Transitional Provisions affecting Existing Settlements.

Paragraph 1.

Provisions for vesting legal estate in tenant for Life or Statutory Owner.

1.—(1) A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument.

(2) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the

statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants. 15 Geo. 5, c. 18.

(3) If there are no trustees of the settlement then (in default of a person able and willing to appoint such trustees), an application shall be made to the court by the tenant for life or statutory owner, or by any other person interested, for the appointment of such trustees.

(4) If default is made in the execution of any such principal vesting deed, the provisions of this Act relating to vesting orders of settled land shall apply in like manner as if the trustees of the settlement were persons in whom the settled land is wrongly vested.

(5) This paragraph does not apply where, at the commencement of this Act, settled land is held at law or in equity in undivided shares vested in possession.

(6) In the case of settlements subsisting at the commencement of this Act, all the estates, interests and powers thereby limited which are not by statute otherwise converted into equitable interests or powers, shall, as from the date of the principal vesting deed or the vesting order, take effect only in equity. [This sub-paragraph shall not apply to any legal estate or interest vested in a mortgagee or other purchaser for money or money's worth.]

Words in square brackets added by Law of Property (Amendment) Act, 1926, s. 7, and Sched.

(7) This paragraph does not apply where settled land is vested in personal representatives at the commencement of this Act, or where settled land becomes vested in personal representatives before a principal vesting deed has been executed pursuant to this paragraph.

(8) No ad valorem stamp duty shall be payable in respect of a vesting deed or order made for giving effect to an existing settlement.

Paragraph 2.

PROVISIONS WHERE SETTLED LAND IS AT COMMENCEMENT OF ACT VESTED IN PERSONAL REPRESENTATIVES.

2.—(1) Where settled land remains at the commencement of this Act vested in the personal representatives of a person who dies before such commencement, or becomes vested in personal representatives before a principal vesting deed has been executed pursuant to the last preceding paragraph, the personal representatives shall hold the settled land on trust, if and when required so to do, to convey the same to the person who, under the trust instrument, or by virtue of this Act, is the tenant for life or statutory owner and, if more than one, as joint tenants.

(2) A conveyance under this paragraph shall be made at the cost of the trust estate and may be made by an assent in writing signed by the personal representatives which shall operate as a conveyance. No stamp duty is payable in respect of a vesting assent.

(3) The obligation to convey settled land imposed on the personal representatives by this paragraph is subject and without prejudice—

(a) to their rights and powers for purposes of administration, and

(b) to their being satisfied that provision has been or will be made for the payment of any unpaid death duties in respect of the land or any interest therein for which they are accountable, and any interest and costs in respect of such duties, or that they are otherwise effectually indemnified against such duties, interest and costs.

(4) A conveyance under this paragraph shall—

(a) if by deed, be a principal vesting deed, and

(b) if by an assent, be a vesting assent, which shall contain the

15 Geo. 5, c. 18.

like statements and particulars as are required by this Act in the case of a principal vesting deed.

(5) Nothing contained in this paragraph affects the rights of personal representatives to transfer or create such legal estates to take effect in priority to a conveyance under this paragraph as may be required for giving effect to the obligations imposed on them by statute.

(6) A conveyance by personal representatives under this paragraph, if made by deed, may contain a reservation to themselves of a term of years absolute in the land conveyed upon trusts for indemnifying them against any unpaid death duties in respect of the land conveyed or any interest therein, and any interest and costs in respect of such duties.

(7) Nothing contained in this paragraph affects any right which a person entitled to an equitable charge for securing money actually raised, and affecting the whole estate the subject of the settlement, may have to require effect to be given thereto by a legal mortgage, before the execution of a conveyance under this section.

Paragraph 3.

PROVISIONS AS TO INFANTS.

3.—(1) Where, at the commencement of this Act, an infant is beneficially entitled to land in possession for an estate in fee simple or for a term of years absolute, or would, if of full age, be a tenant for life or have the powers of a tenant for life, the settled land shall, by virtue of this Act, vest in the trustees (if any) of the settlement upon such trusts as may be requisite for giving effect to the rights of the infant and other persons (if any) interested:

Provided that, if there are no such trustees, then—

(i) Pending their appointment, the settled land shall, by virtue of this Act, vest in the Public Trustee upon the trusts aforesaid:

(ii) The Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner unless and until requested in writing to act on behalf of the infant by his parents or parent or testamentary or other guardian in the order named:

(iii) After the Public Trustee has been so requested to act, and has accepted the trust, he shall become the trustee of the settlement, and no trustee shall (except by an order of the court) be appointed in his place without his consent:

(iv) If there is no other person able and willing to appoint trustees the parents or parent or testamentary or other guardian of the infant, if respectively able and willing to act, shall (in the order named) have power by deed to appoint trustees of the settlement in the place of the Public Trustee in like manner as if the Public Trustee had refused to act in the trust, and to vest the settled land in them on the trusts aforesaid, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees, and the vesting of trust property shall apply as if the persons aforesaid (in the order named) had been nominated by the settlement for the purpose of appointing new trustees thereof; and in default of any such appointment the infant by his next friend, may, at any time during the minority, apply to the court for the appointment of trustees of the settlement, and the court may make such order as it thinks fit, and if thereby trustees of the settlement are appointed, the settled land shall, by virtue of this Act, vest in the trustees as joint tenants upon the trusts aforesaid:

Provided that in favour of a purchaser a statement in the

deed of appointment that the father or mother or both are dead or are unable or unwilling to make the appointment shall be conclusive evidence of the fact stated. 15 Geo. 5, c. 18.

(v) If land to which an infant is beneficially entitled in possession for an estate in fee simple or for a term of years absolute vests in the Public Trustee, but the Public Trustee does not become the trustee of the settlement, and trustees of the settlement are not appointed in his place, then, if and when the infant attains the age of twenty-one years, the land shall vest in him.

(2) The provisions of this paragraph shall extend to the legal estate in the settled land, except where such legal estate is, at or immediately after the commencement of this Act, vested in personal representatives, in which case this paragraph shall have effect without prejudice to the provisions of paragraph two of this Schedule.

(3) Where, at the commencement of this Act, any persons appointed under section sixty of the Settled Land Act, 1882, have power to act generally or for any specific purpose on behalf of an infant, then those persons shall, by virtue of this Act, become and be the trustees of the settlement.

(4) Notwithstanding that the settled land is by virtue of this paragraph vested in the trustees of the settlement, they shall, at the cost of the trust estate, in accordance with this Act, execute a principal vesting deed declaring that the settled land is vested in them.

(5) This paragraph does not apply where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute jointly with a person of full age (for which case provision is made in the Law of Property Act, 1925), but it applies to two or more infants entitled as aforesaid jointly.

(6) This paragraph does not apply where an infant would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, but it applies to two or more infants who would, if all of them were of full age, together constitute the tenants for life or have the powers of a tenant for life.

TRUSTEE ACT, 1925.

(15 Geo. 5, c. 19.) 15 Geo. 5, c. 19.

Part V.

General Provisions.

64.—(1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act, 1925, and trustees for the purpose of the management of land during a minority, whether such trustees are appointed by the court or by the settlement, or under provisions contained in any instrument. Application of Act to Settled Land Act Trustees.

(2) Where, either before or after the commencement of this Act, trustees of a settlement have been appointed by the court for the purposes of the Settled Land Acts, 1882 to 1890, or of the Settled Land Act, 1925, then, after the commencement of this Act—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any,

15 Geo. 5, c. 19.

creating the settlement, though no trustees for the purposes of the said Acts were thereby appointed; or

(b) if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being for the purposes of the said Acts, or the personal representatives of the last surviving or continuing trustee for those purposes,

shall have the powers conferred by this Act to appoint new or additional trustees of the settlement for the purposes of the said Acts.

(3) Appointments of new trustees for the purposes of the said Acts made or expressed to be made before the commencement of this Act by the trustees or trustee or personal representatives referred to in paragraph (b) of the last preceding subsection or by the persons referred to in paragraph (a) of that subsection are, without prejudice to any order of the court made before such commencement, hereby confirmed.

* * * * *

Short title, commencement, extent.

71.—(1) This Act may be cited as the Trustee Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act, except where otherwise expressly provided, extends to England and Wales only.

(4) The provisions of this Act bind the Crown.

LAW OF PROPERTY ACT, 1925.

(15 Geo. 5, c. 20.)

Part X.

Wills.

175. [Contingent and future testamentary gifts to carry the intermediate income.]

Power for tenant in tail in possession to dispose of property by specific devise or bequest.

176.—(1) A tenant in tail of full age shall have power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally—

(a) of all property of which he is tenant in tail in possession at his death; and

(b) of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death;

in like manner as if, after barring the entail, he had been tenant in fee-simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed.

(2) This section applies to entailed interests authorised to be created by this Act as well as to estates tail created before the commencement of this Act, but does not extend to a tenant in

tail who is by statute restrained from barring or defeating his estate tail, whether the land or property in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services or not, or to a tenant in tail after possibility of issue extinct, and does not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities. 15 Geo. 5. c. 20.

(3) In this section " tenant in tail " includes an owner of a base fee in possession who has power to enlarge the base fee into a fee-simple without the concurrence of any other person.

(4) This section only applies to wills executed after the commencement of this Act, or confirmed or republished by codicil executed after such commencement.

177.—(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated. Wills in contemplation of marriage. 7 Will. 4, & 1 Vict. c. 26.

(2) This section only applies to wills made after the commencement of this Act.

178. Section three of the Wills Act, 1837, shall (without prejudice to the rights and interests of a personal representative) authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next of kin surviving him. Power for persons having no issue to dispose of real estate by will.

179. The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will. Prescribed forms for reference in wills.

Part XI.

Miscellaneous.

* * * * *

184. In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. Presumption of survivorship in regard to claims to property.

* * * * *

209.—(1) This Act may be cited as the Law of Property Act, 1925. Short title, commencement, extent.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

ADMINISTRATION OF ESTATES ACT, 1925.

15 Geo. 5, c. 23.

(15 Geo. 5, c. 23.)

An Act to consolidate Enactments relating to the Administration of the Estates of Deceased Persons. [9th April 1925.]

Be it enacted, etc., as follows:—

Part I.

Devolution of Real Estate.

Devolution of real estate on personal representative.

1.—(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person.

(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

(3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate.

Application to real estate of law affecting chattels real.

2.—(1) Subject to the provisions of this Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of this Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before the commencement of this Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be exercisable by the personal representatives or representative of the deceased with respect to his real estate.

(2) Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act shall not, save as otherwise provided as respects trust estates including settled land, be made without the concurrence therein of all such representatives or an order of the court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein.

15 Geo. 5, c. 23.

(3) Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative in regard to real estate shall not, save as hereinafter provided, affect—

(a) any rule as to marshalling or as to administration of assets;

(b) the beneficial interest in real estate under any testamentary disposition;

(c) any mode of dealing with any beneficial interest in real estate, or the proceeds of sale thereof;

(d) the right of any person claiming to be interested in the real estate to take proceedings for the protection or recovery thereof against any person other than the personal representative.

Interpretation of Part I.

3.—(1) In this Part of this Act "real estate" includes—

(i) Chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and

(ii) Real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land.

(2) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will, or operates under the testamentary power conferred by statute to dispose of an entailed interest.

(3) An entailed interest of a deceased person shall (unless disposed of under the testamentary power conferred by statute) be deemed an interest ceasing on his death, but any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will shall not be deemed to be an interest so ceasing.

As to dispositions of entailed interests by will, see Law of Property Act, 1925, s. 176, and as to devolution of an entailed interest not disposed of by will, see Law of Property Act, 1925, s. 130, sub-s. 4.

(4) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death.

(5) On the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death and shall devolve to his successor.

This subsection applies on the demise of the Crown as respects all property, real and personal, vested in the Crown as a corporation sole.

PART II.

EXECUTORS AND ADMINISTRATORS.

General Provisions.

4. [*Summons to executor to prove or renounce.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6, and superseded by section 159 of that Act.

15 Geo. 5, c. 23.

Cesser of right of executor to prove.

5. Where a person appointed executor by a will—

(i) survives the testator but dies without having taken out probate of the will; or

(ii) is cited to take out probate of the will and does not appear to the citation; or

(iii) renounces probate of the will;

his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor.

Court of Probate Act, 1857, s. 79; Court of Probate Act, 1858, s. 16.

Withdrawal of renunciation.

6.—(1) Where an executor who has renounced probate has been permitted, whether before or after the commencement of this Act, to withdraw the renunciation and prove the will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be endorsed on the original probate or letters of administration.

(2) This section applies whether the testator died before or after the commencement of this Act.

Executor of executor represents original testator.

7.—(1) An executor of a sole or last surviving executor of a testator is the executor of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by—

(a) an intestacy; or

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator—

(a) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor.

25 Edw. 3, stat. 5, c. 5; Court of Probate Act, 1858, s. 16.

Right of proving executors to exercise powers.

8.—(1) Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall

be as effectual as if all the persons named as executors had concurred therein.

(2) This section applies whether the testator died before or after the commencement of this Act.

Cf. section 2 of the Act.

Vesting of estate of intestate between death and grant of administration.

9. Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Probate Judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary.

Stat. West. II (13 Edw. 1), c. 19; Court of Probate Act, 1858, s. 19. For definition of "Probate Judge" see section 55 (xv).

10. [*Discretion of court as to persons to whom administration is to be granted.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 162 of that Act.

11. [*Administration bonds.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 167, sub-section 7, of that Act.

12. [*Provisions as to the number of personal representatives.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 160 of that Act.

13. [*Power to grant representation of real and personal estate separately or together.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 155 of that Act.

14. [*Grant of representation to a trust corporation.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 161 of that Act.

Executor not to act while administration is in force.

15. Where administration has been granted in respect of any real or personal estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked.

Court of Probate Act, 1857, s. 75.

16. [*Administration pending litigation.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 163 of that Act.

Continuance of legal proceedings after revocation of temporary administration.

17. If, while any legal proceeding is pending in any court by or against an administrator to whom a temporary administration has been granted, that administration is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against him, but subject to such conditions and variations, if any, as that court directs.

Court of Probate Act, 1857, s. 76.

18. [*Grant of special administration where personal representative is abroad.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 164 of that Act.

15 Geo. 5, c. 23.

19. [*Administration with will annexed.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched. 6. Superseded by section 166 of that Act.

20. [*Administration during minority of executor.*]

Repealed by Judicature (Consolidation) Act, 1925, s. 226, and Sched 6. Superseded by section 165 of that Act.

Rights and liabilities of administrator.

21. Every person to whom administration of the real and personal estate of a deceased person is granted, shall, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.

31 Edw. 3, stat. 1, c. 11; Stat. of Distribution (22 & 23 Car. 2, c. 10), s. 1; 1 Jac. 2, c. 17, s. 6; Administration of Estates Act, 1798, s. 7.

Special Provisions as to Settled Land (*a*).

Special executors as respects settled land.

22.—(1) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land.

In this subsection "settled land" means land vested in the testator which was settled previously to his death and not by his will.

(2) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets.

Provisions where, as respects settled land, representation is not granted to the trustees of the settlement.

23.—(1) Where settled land becomes vested in a personal representative, not being a trustee of the settlement, upon trust to convey the land to or assent to the vesting thereof in the tenant for life or statutory owner in order to give effect to a settlement created before the death of the deceased and not by his will, or would, on the grant of representation to him, have become so vested, such representative may—

(a) before representation has been granted, renounce his office in regard only to such settled land without renouncing it in regard to other property;

(b) after representation has been granted, apply to the court for revocation of the grant in regard to the settled land without applying in regard to other property.

(2) Whether such renunciation or revocation is made or not, the trustees of the settlement, or any person beneficially interested thereunder, may apply to the High Court for an order appointing a special or additional personal representative in respect of the settled land, and a special or additional personal representative, if and when appointed under the order, shall be in the same position as if representation had originally been granted to him alone in place of the original personal representative, if any, or to him jointly with the original personal

(*a*) Sections 22 to 24 are from section 161 of the Law of Property Act, 1922, and Schedule 7 of the Law of Property (Amendment) Act, 1924.

representative, as the case may be, limited to the settled land, but without prejudice to the previous acts and dealings, if any, of the personal representative originally constituted or the effect of notices given to such personal representative. 15 Geo. 5, c. 23.

(3) The court may make such order as aforesaid subject to such security, if any, being given by or on behalf of the special or additional personal representative, as the court may direct, and shall, unless the court considers that special considerations apply, appoint such persons as may be necessary to secure that the persons to act as representatives in respect of the settled land shall, if willing to act, be the same persons as are the trustees of the settlement, and an office copy of the order when made shall be furnished to the Principal Probate Registry for entry, and a memorandum of the order shall be endorsed on the probate or administration.

(4) The person applying for the appointment of a special or additional personal representative shall give notice of the application to the Principal Probate Registry in the manner prescribed.

(5) Rules of court may be made for prescribing for all matters required for giving effect to the provisions of this section, and in particular—

(a) for notice of any application being given to the proper officer;

(b) for production of orders, probates, and administration to the registry;

(c) for the endorsement on a probate or administration of a memorandum of an order, subject or not to any exceptions;

(d) for the manner in which the costs are to be borne;

(e) for protecting purchasers and trustees and other persons in a fiduciary position, dealing in good faith with or giving notices to a personal representative before notice of any order has been endorsed on the probate or administration or a pending action has been registered in respect of the proceedings.

Power for special personal representatives to dispose of settled land.

24.—(1) The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property and assets of the deceased without the concurrence of the special personal representatives.

(2) In this section the expression " special personal representatives " means the representatives appointed to act for the purposes of settled land and includes any original personal representative who is to act with an additional personal representative for those purposes.

Duties, Rights, and Obligations.

Duty of personal representative as to inventory.

25. The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the court, a true and perfect inventory and account of the real and personal estate of the deceased, and the court shall have power as heretofore to require personal representatives to bring in inventories.

21 Hen. 8, c. 5.

15 Geo. 5, c. 23.

26. [Rights of action by and against personal representative.]

Protection of persons acting on probate or administration.

27.—(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

Court of Probate Act, 1857, ss. 77, 78. See section 55, sub-section 1 (xx) ("representation").

28. [Liability of person fraudulently obtaining or retaining estate of deceased.]

29. [Liability of estate of personal representative.]

Provisions applicable where administration granted to nominee of the Crown.

30.—(1) . . . . .

(2) . . . . .

(3) The Treasury Solicitor shall not be required, when applying for or obtaining administration of the estate of a deceased person for the use or benefit of His Majesty, to deliver, nor shall the Probate, Divorce and Admiralty Division of the High Court or the Commissioners of Inland Revenue be entitled to receive in connexion with any such application or grant of administration, any affidavit, statutory declaration, account, certificate, or other statement verified on oath; but the Treasury Solicitor shall deliver and the said Division and Commissioners respectively shall accept, in lieu thereof, an account or particulars of the estate of the deceased signed by or on behalf of the Treasury Solicitor.

39 & 40 Vict. c. 18. 10 & 11 Geo. 5, c. 51.

(4) References in sections two, four, six and seven of the Treasury Solicitor Act, 1876, and in subsection (3) of section three of the Duchy of Lancaster Act, 1920, to "personal estate" shall include real estate.

Power to make rules.

31. Provision may be made by rules of court for giving effect to the provisions of this Part of this Act so far as relates to real estate and in particular for adapting the procedure and practice on the grant of letters of administration to the case of real estate.

Part III.

Administration of Assets.

32. [Real and personal estate of deceased are assets for payment of debt.]

Trust for sale.

33.—(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—

(a) as to the real estate upon trust to sell the same; and

(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, 15 Geo. 5, c. 23.

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason.

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

(3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature.

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate."

(5) The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman.

(6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Crown in respect of death duties.

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will.

34. [Administration of assets.]

35. [Charges on property of deceased to be paid primarily out of the property charged.]

15 Geo. 5, c. 23.

36. [Effect of assent or conveyance by personal representative.]

Validity of conveyance not affected by revocation of representation.

37.—(1) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration.

(2) This section takes effect without prejudice to any order of the court made before the commencement of this Act, and applies whether the testator or intestate died before or after such commencement.

38. [Right to follow property and powers of the court in relation thereto.]

39. [Powers of management.]

40. [Powers of personal representative for raising money, etc.]

41. [Powers of personal representative as to appropriation.]

Power to appoint trustees of infants' property.

42.—(1) Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called " the deceased ") to a devise or legacy, or to the the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.

15 Geo. 5, c. 18.

On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue, or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.

(2) Where a personal representative has before the commencement of this Act retained or sold any such devise, legacy, residue or share, and invested the same or the proceeds thereof in any investments in which he was authorised to invest money subject to the trust, then, subject to any order of the court made before such commencement, he shall not be deemed to have incurred any liability on that account, or by reason of not having paid or transferred the money or property into court.

43. [Obligations of personal representative as to giving possession of land and powers of the court.]

15 Geo. 5, c. 23.

44. Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.

Stat. of Distribution, 1670, s. 5.

Power to postpone distribution.

Part IV.

Distribution of Residuary Estate.

Abolition of descent to heir, curtesy dower and escheat.

45.—(1) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—

(a) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

(b) Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

(c) Dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise: Provided that where a right (if any) to freebench or other like right has attached before the commencement of this Act which cannot be barred by a testamentary or other disposition made by the husband, such right shall, unless released, remain in force as an equitable interest; and

(d) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord for want of heirs.

(2) Nothing in this section affects the descent or devolution of an entailed interest.

See sections 130 and 176 of the Law of Property Act, 1925.

Succession to real and personal estate on intestacy.

46.—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—

(i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

(a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life;

15 Geo. 5, c. 23.

(b) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life:

(ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

(iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

(iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;

(v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:—

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Sixthly, for the surviving husband or wife of the intestate absolutely;

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision. 15 Geo. 5, c. 23. 10 Edw. 7, and 1 Geo. 5, c. 28.

(2) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons.

Statutory trusts in favour of issue and other classes of relatives of intestate.

47.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—

(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

(ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;

(iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

15 Geo. 5, c. 23.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

(a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

(b) references in this Part of this Act to the intestate "leaving no issue" shall be construed as "leaving no issue who attain an absolutely vested interest";

(c) references in this Part of this Act to the intestate "leaving issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested interest."

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

Powers of personal representative in respect of interests of surviving spouse.

48.—(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

(2) The personal representatives may raise—

(a) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(b) in like manner the capital sum, if any, required for the purchase or redemption of the life interest of the surviving husband or wife of the intestate, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate;

and in either case the amount, if any, properly required for the payment of the costs of the transaction. 15 Geo. 5, c. 23.

Application to cases of partial intestacy.

49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—

(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons:

(b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.

Construction of documents.

50.—(1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act.

(2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act. 53 & 54 Vict. c. 29.

Savings.

51.—(1) Nothing in this Part of this Act affects the right of any person to take beneficially, by purchase, as heir either general or special.

(2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.

For the purposes of this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged.

(3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection

15 Geo. 5, c. 23.

he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly.

(4) This Part of this Act does not affect the devolution of an entailed interest as an equitable interest.

Interpretation of Part IV.

52. In this Part of this Act "real and personal estate" means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will.

PART V.

SUPPLEMENTAL.

General savings.

53.—(1) Nothing in this Act shall derogate from the powers of the High Court which exist independently of this Act or alter the distribution of business between the several divisions of the High Court, or operate to transfer any jurisdiction from the High Court to any other court.

(2) Nothing in this Act shall affect any unrepealed enactment in a public general Act dispensing with probate or administration as respects personal estate not including chattels real.

(3) Nothing in this Act shall—

(a) alter any death duty payable in respect of real estate or impose any new duty thereon:

(b) render any real estate liable to legacy duty or exempt it from succession duty:

(c) alter the incidence of any death duties.

Application of Act.

54. Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before the commencement of this Act.

Definitions.

55. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(1) (i) "Administration" means, with reference to the real and personal estate of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise:

(ii) "Administrator" means a person to whom administration is granted:

(iii) "Conveyance" includes a mortgage, charge by way of legal mortgage, lease, assent, vesting, declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will, and "convey" has a corresponding meaning, and "disposition"

includes a " conveyance " also a devise bequest and an appointment of property contained in a will, and " dispose of " has a corresponding meaning: 15 Geo. 5, c. 23

(iv) " the Court " means the High Court, and also the county court, where that court has jurisdiction, and as respects the administration of estates " court " also includes the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham where those courts respectively have jurisdiction:

(v) " Income " includes rents and profits:

(vi) " Intestate " includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate:

(vii) " Legal estates " mean the estates charges and interests in or over land (subsisting or created at law) which are by statute authorised to subsist or to be created at law; and " equitable interests " mean all other interests and charges in or over land or in the proceeds of sale thereof:

(viii) " Lunatic " includes a lunatic whether so found or not, and in relation to a lunatic not so found; " committee " includes a person on whom the powers of a committee are conferred under section one of the Lunacy Act, 1908; and " defective " includes every person affected by the provisions of section one hundred and sixteen of the Lunacy Act, 1890, as extended by section sixty-four of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed: 8 Edw. 7, c. 47. 53 & 54 Vict. c. 5. 3 & 4 Geo. 5, c. 28.

(ix) " Pecuniary legacy " includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect:

(x) " Personal chattels " mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money:

(xi) " Personal representative " means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any

15 Geo. 5, c. 23.

liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court, and "executor" includes a person deemed to be appointed executor as respects settled land:

(xii) "Possession" includes the receipt of rents and profits or the right to receive the same, if any:

(xiii) "Prescribed" means prescribed by rules of court or by probate rules made pursuant to this Act:

(xiv) "Probate" means the probate of a will:

(xv) "Probate judge" means the President of the Probate, Divorce and Admiralty Division of the High Court:

(xvi) "Probate rules" mean rules and orders made by the Probate Judge for regulating the procedure and practice of the High Court in regard to non-contentious or common form probate business:

(xvii) "Property" includes a thing in action and any interest in real or personal property:

(xviii) "Purchaser" means a lessee, mortgagee or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser and "valuable consideration" includes marriage, but does not include a nominal considera- in money:

(xix) "Real estate" save as provided in Part IV. of this Act means real estate, including chattels real, which by virtue of Part I. of this Act devolves on the personal representative of a deceased person:

(xx) "Representation" means the probate of a will and administration, and the expression "taking out representation" refers to the obtaining of the probate of a will or of the grant of administration:

(xxi) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, or annual or periodical payment in money or money's worth, issuing out of or charged upon land, but does not include mortgage interest; and "rentcharge" includes a fee farm rent:

(xxii) "Rules of Court" include, in relation to non-contentious or common form probate business, probate rules:

(xxiii) "Securities" include stocks, funds, or shares:

(xxiv) "Tenant for life," "statutory owner," "land," "settled land," "settlement," "trustees of the settlement," "term of years absolute," "death duties," and "legal mortgage," have the same meanings as in the Settled Land Act, 1925, and "entailed interest" and "charge by way of legal mortgage" have the same meanings as in the Law of Property Act, 1925:

15 Geo. 5, c. 18.

15 Geo. 5, c. 20.

(xxv) "Treasury solicitor" means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster: 15 Geo. 5, c. 23.

(xxvi) "Trust corporation" means the public trustee or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under subsection (3) of section four of the Public Trustee Act, 1906, to act as custodian trustee: 6 Edw. 7, c. 55.

Amended by Law of Property (Amendment) Act, 1926, s. 3.

(xxvii) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion:

(xxviii) "Will" includes codicil.

(2) References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death.

(3) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment (including the statutory power to dispose of entailed interests) by his will.

Repeal.

56. The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule, but as respects the Acts mentioned in Part I. of that Schedule only so far as they apply to deaths occurring after the commencement of this Act.

Application to Crown.

57.—(1) The provisions of this Act bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall for the time being, as respects the estates of persons dying after the commencement of this Act, but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on His Majesty in right of His Crown, or His Duchy of Lancaster, or on the Duke of Cornwall, may be instituted.

(2) Nothing in this Act in any manner affects or alters the descent or devolution of any property for the time being vested in His Majesty either in right of the Crown or of the Duchy of Lancaster or of any property for the time being belonging to the Duchy of Cornwall.

Short title, commencement and extent.

58.—(1) This Act may be cited as the Administration of Estates Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

15 Geo. 5, c. 23.

Section 56.

SECOND SCHEDULE.

Enactments repealed.

Part I.

Repeals not affecting Cases where the Death occurred before the Commencement of this Act.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
13 Edw. 1 (*Stat. Westm. sec.*) c. 19.	The ordinary chargeable to pay the debts of an intestate.	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 23.	Writ of accompt for executors -	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 34.	Dower forfeited by elopement with adulterer.	From "and if a wife willingly leave her husband" to "in which case she shall be restored to her action."
25 Edw. 1. c. 7.	Widow; her marriage estate; quarantine; estovers; dower; re-marriage.	The whole chapter.
25 Edw. 1. c. 18.	The King's tenant, his debtor -	From "and the residue" to "reasonable parts."
Statute (*temp. incert.*).	Statute concerning tenants by the Curtesy of England.	The whole statute.
Statute Prerogativa Regis (*temp. incert.*) c. 18.	Customs of Gloucester and Kent.	From "Nevertheless it is used" to the end of the chapter.
4 Edw. 3. c. 7.	Executors shall have an action of trespass for a wrong done to their testator.	The whole chapter.
25 Edw. 3. st. 5. c. 5.	Executors of executors shall have the same rights and duties as the first executors.	The whole chapter.
31 Edw. 3. st. 1. c. 11.	The ordinary shall commit administration upon an intestacy. The adminstrators shall have the same rights and charges as executors.	The whole chapter.
21 Hen. 8. c. 4.	An Acte concninge Executors of Laste Willes and Testamente.	The whole Act.
21 Hen. 8. c. 5.	An Acte concninge Fynes & sōmes of Moneye to be taken by the Ministers of Busshops and other Ordinaries of Holye Churche for the pbate of Testamte.	The whole Act.
32 Hen. 8. c. 37.	For recoving of Arrerage by Executors and Administrators.	Sections one, two and three.
1 Edw. 6. c. 12.	An Acte for the repeale of certaine statutes concerninge treasons, felonyes, &c.	Section sixteen.
5 & 6 Edw. 6. c. 11.	An Acte for the punyshment of divse treasons.	Section eleven.
5 & 6 Edw. 6. c. 12.	An Acte for the declaracon of a statute made for the marriage of Prieste and for the legittimacon of their children.	Section two.

SECOND SCHEDULE—*continued.*

15 Geo. 5, c. 23.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
43 Eliz. c. 8.	An Acte against fraudulent administracon of intestates goodes.	The whole Act.
12 Chas. 2. c. 24.	An Acte taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance and for settling a Revenue upon His Majesty in Lieu thereof.	Section seven from "tenures in franke almoigne" to "nor to take away."
22 & 23 Chas. 2. c. 10.	The Statute of Distribution - -	The whole Act.
29 Chas. 2. c. 3	The Statute of Frauds - -	Sections ten, eleven, twenty-three, twenty-four, so far as unrepealed.
30 Chas. 2. c. 7.	An Act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong.	The whole Act.
1 Jas. 2. c. 17.	An Act for reviveing and continuance of severall Acts of Parlyament therein mentioned.	The whole Act.
4 Will. & Mar. c. 24.	An Act for reviving cotinuing and explaining several laws therein mentioned that are expired and neare expiring.	Section twelve.
38 Geo. 3. c. 87.	The Administration of Estates Act, 1798.	The whole Act.
11 Geo. 4 & 1 Will. 4. c. 40.	The Executors Act, 1830 - -	The whole Act.
11 Geo. 4 & 1 Will. 4. c. 47.	The Debts Recovery Act, 1830 -	The whole Act.
3 & 4 Will. 4. c. 27.	The Real Property Limitation Act, 1833.	Section forty-one.
3 & 4 Will. 4. c. 42.	The Civil Procedure Act, 1833 -	Sections two, thirty-seven and thirty-eight.
3 & 4 Will. 4. c. 74.	The Fines and Recoveries Act, 1833.	In section twenty-seven the words "no woman in respect of her dower and"
3 & 4 Will. 4. c. 104.	The Administration of Estates Act, 1833.	The whole Act.
3 & 4 Will. 4. c. 105.	The Dower Act, 1833 - -	The whole Act.
2 & 3 Vict. c. 60.	The Debts Recovery Act, 1839 -	The whole Act.
11 & 12 Vict. c. 87.	The Debts Recovery Act, 1848 -	The whole Act.
17 & 18 Vict. c. 113.	The Real Estate Charges Act, 1854.	The whole Act.
20 & 21 Vict. c. 77.	The Court of Probate Act, 1857.	Sections seventy to eighty.
21 & 22 Vict. c. 95.	The Court of Probate Act, 1858.	Sections sixteen, eighteen, nineteen, twenty-one, and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections fourteen to eighteen.

15 Geo. 5, c. 23.

SECOND SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
30 & 31 Vict. c. 69.	The Real Estate Charges Act, 1867.	The whole Act.
32 & 33 Vict. c. 46.	The Administration of Estates Act, 1869.	The whole Act.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section ten.
40 & 41 Vict. c. 34.	The Real Estate Charges Act, 1877.	The whole Act.
47 & 48 Vict. c. 71.	The Intestates Estates Act, 1884.	The whole Act.
53 & 54 Vict. c. 29.	The Intestates Estates Act, 1890.	The whole Act.
4 & 5 Geo. 5. c. 59.	The Bankruptcy Act, 1914 - -	Section one hundred and thirty.

PART II.

REPEALS APPLYING WHERE THE DEATH OCCURRED BEFORE OR AFTER THE COMMENCEMENT OF THIS ACT.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
10 & 11 Geo. 5. c. 81.	The Administration of Justice Act, 1920.	Section seventeen.
12 & 13 Geo. 5. c. 16.	The Law of Property Act, 1922 -	Subsection (7) of section one hundred and ten; Part VIII. except section one hundred and fifty-two; and Part IX. except subsection (13) of section one hundred and fifty-six; and sub-paragraphs (2) and (3) of paragraph five of the Sixth Schedule.
15 Geo. 5. c. 5.	The Law of Property (Amendment) Act, 1924.	Section seven and the Seventh Schedule.

GUARDIANSHIP OF INFANTS ACT, 1925.

15 & 16 Geo. 5, c. 45.

(15 & 16 Geo. 5, c. 45.)

An Act to amend the Law with respect to the Guardianship, Custody and Marriage of Infants. [31st July, 1925.]

9 & 10 Geo. 5, c. 71.

Whereas Parliament by the Sex Disqualification (Removal) Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this

principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby: 15 & 16 Geo. 5, c. 45.

Be it therefore enacted, etc., as follows:—

* * * * *

Rights of surviving parent as to guardianship.

4.—(1) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the mother.

(2) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.

(3) Section two of the Guardianship of Infants Act, 1886, is hereby repealed.

Power of father and mother to appoint testamentary guardians.

5.—(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.

(2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.

(3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.

(5) Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.

(6) If under the preceding section a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

15 & 16 Geo. 5, c. 45.

(7) Section three of the Guardianship of Infants Act, 1886, is hereby repealed.

* * * * *

Short title, construction, commencement and extent.

11.—(1) This Act may be cited as the Guardianship of Infants Act, 1925.

(2) This Act shall (except so far as it amends the law relating to the marriage of infants) be construed as one with the Guardianship of Infants Act, 1886, and that Act and this Act may be cited together as the Guardianship of Infants Acts, 1886 and 1925.

(3) This Act shall come into operation on the expiration of two months after the passing thereof.

(4) This Act shall not extend to Northern Ireland.

SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925.

(15 & 16 Geo. 5, c. 49),

An Act to consolidate the Judicature Acts, 1873 to 1910, and other enactments relating to the Supreme Court of Judicature in England and the administration of justice therein. [31st July, 1925.]

Be it enacted, etc., as follows:—

Part I.

Constitution of the Supreme Court.

The Supreme Court.

Supreme Court of Judicature.

1. There shall be a Supreme Court of Judicature in England consisting of His Majesty's High Court of Justice (in this Act referred to as "the High Court") and His Majesty's Court of Appeal (in this Act referred to as "the Court of Appeal"), with such jurisdiction as is conferred on those courts respectively by this Act.

Judicature Act, 1873, ss. 3, 4.

The High Court.

2. [Constitution of High Court.]

3. [Judges of Court of Appeal and ex-judges of Supreme Court qualified to sit as judges of High Court.]

Divisions of High Court.

4.—(1) For the more convenient despatch of business in the High Court there shall be in the High Court three Divisions, namely:—

(i) The Chancery Division, consisting of the Lord Chancellor, who shall be president thereof, and six puisne judges;

(ii) The King's Bench Division, consisting of the Lord Chief Justice, who shall be president thereof, and (subject to the provisions of this Act) seventeen puisne judges;

(iii) The Probate, Divorce and Admiralty Division consisting of a president and two puisne judges.

(2) Any judge of any of the said Divisions may be transferred by His Majesty, under His Royal Sign Manual, from one to another of the said Divisions. 15 & 16 Geo. 5, c. 49.

(3) Nothing in this section shall operate to prevent a judge of any Division from sitting whenever required in a divisional court or for any judge of another Division.

Judicature Act, 1873, s. 31; Appellate Jurisdiction Act, 1876, s. 18; Judicature Act, 1877, ss. 2, 3; Order in Council, 1880; Judicature Act, 1881, ss. 5, 6; Judicature Act, 1910, s. 1; Administration of Justice Act, 1925, s. 5.

* * * * *

20. Subject to the provisions of this Act the High Court shall, in relation to probates and letters of administration, have the following jurisdiction (in this Act referred to as "probate jurisdiction"), that is to say:— Probate jurisdiction of High Court.

(a) all such voluntary and contentious jurisdiction and authority in relation to the granting or revoking of probate and administration of the effects of deceased persons as was at the commencement of the Court of Probate Act, 1857, vested in or exerciseable by any court or person in England, together with full authority to hear and determine all questions relating to testamentary causes and matters: 20 & 21 Vict. c. 77.

(b) all such powers throughout England in relation to the personal estate in England of deceased persons as the Prerogative Court of Canterbury had immediately before the commencement of the Court of Probate Act, 1857, in the Province of Canterbury or in the parts thereof within its jurisdiction in relation to those testamentary causes and matters and those effects of deceased persons which were at that date within the jurisdiction of that court:

(c) such like jurisdiction and powers with respect to the real estate of deceased persons as are hereinbefore conferred with respect to the personal estate of deceased persons:

(d) all probate jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873:

and the court shall, in the exercise of the probate jurisdiction perform all such like duties with respect to the estates of deceased persons as were immediately before the commencement of the Court of Probate Act, 1857, to be performed by ordinaries generally or by the Prerogative Court of Canterbury in respect of probates, administrations and testamentary causes and matters which were at that date within their respective jurisdictions.

Court of Probate Act, 1857, ss. 4, 23; Judicature Act, 1873, s. 16; Law of Property Act, 1922, s. 156, sub-s. 2.

* * * * *

32. The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in Rules as to exercise of jurisdiction.

15 & 16 Geo. 5, c. 49.

this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.

Court of Probate Act, 1857, s. 29; Judicature Act, 1873, s. 23.

* * * * *

Determination of matter completely and finally.

43. The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, shall, in every cause or matter pending before the court, grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided.

Judicature Act, 1873, s. 24, sub-s. 7.

* * * * *

Part III.

Sittings, Distribution of Business, and Assizes.

* * * * *

Distribution of Business.

Distribution of business.

55. Without prejudice to any other provision of this Act, all causes and matters in the High Court shall, subject to the power of transfer, be distributed among the several Divisions and judges of the High Court, in such manner as may be directed by rules of court, and subject thereto all such causes and matters shall be assigned to the said Divisions respectively in the manner hereinafter provided.

Judicature Act, 1873, s. 33.

Assignment of business to Divisions.

56. Without prejudice to any other provision of this Act, there shall be assigned—

(1) To the Chancery Division—

. . . . .

(b) All causes and matters for any of the following purposes:

The administration of the estates of deceased persons;

. . . . .

The execution of trusts, charitable or private;

. . . . .

(2) To the King's Bench Division—

. . . . .

(3) To the Probate Division—

(a) All causes and matters which, if the Act of 1873 had

not passed, would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty:

(b) All causes and matters within the jurisdiction of the High Court as a prize court:

(c) All causes and matters which under, by virtue of or in pursuance of any enactment for the time being in force are assigned to that Division.

Judicature Act, 1873, s. 34; Judicature Act, 1891, s. 4, sub-s. 2.

57. [Power of Lord Chancellor to re-distribute business among Divisions.]

Option for plaintiff to choose Division.

58. Subject to rules of court and to the provisions of this Act, every person by whom any cause or matter is commenced in the High Court shall assign the cause or matter to such Division as he thinks fit by marking the document by which the cause or matter is commenced with the name of that Division and giving notice thereof to the proper officer:

Provided that—

(1) All interlocutory and other steps and proceedings in or before the High Court in any cause or matter subsequent to the commencement thereof, shall, subject to rules of court and to the power of transfer, be taken in the Division to which the cause or matter is for the time being attached; and

(2) If any plaintiff or petitioner assigns his cause or matter to any Division to which, according to rules of court or the provisions of this Act, it ought not to be assigned, the court or any judge of that Division, on being informed thereof, may, on a summary application at any stage of the cause or matter, direct the cause or matter to be transferred to the Division to which, according to those rules or provisions, it ought to have been assigned, or may retain it in the Division in which it was commenced; and

(3) All steps and proceedings taken by the plaintiff or petitioner or by any other party in any cause or matter and all orders made therein by the court or any judge thereof before any transfer shall be valid and effectual to all intents and purposes in the same manner as if the steps and proceedings had been taken and the orders had been made in the Division to which the cause or matter ought to have been assigned; and

(4) Subject to rules of court, a person commencing any cause or matter shall not assign it to the Probate Division, unless he would have formerly been entitled to commence that cause or matter in the Court of Probate or the Court for Divorce and Matrimonial Causes, or unless the cause or matter is within the admiralty jurisdiction of the High Court.

Judicature Act, 1875, s. 11.

15 & 16 Geo. 5, c. 49.

Power of transfer.

59. Any cause or matter may at any time and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as rules of court may direct from one Division or judge of the High Court to any other Division or judge thereof, or may by the like authority be retained in the Division in which it was commenced, although not the Division to which it ought in the first instance to have been assigned.

Judicature Act, 1873, s. 36.

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Circuits and Assizes.

Commissions of assize and jurisdiction of commissioners.

70.—(1) His Majesty may, by commission of assize or any other commission, either general or special, assign to such judges of the High Court or other persons as are named therein, the duty of trying and determining within any place or district specially fixed for that purpose by the commission, any causes or matters, or any questions or issues of fact or of law or partly of fact and partly of law in any cause or matter, depending in the High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the High Court, and any commission so granted by His Majesty shall have effect as if enacted in this Act.

14 Hen. 6, c. 1; 4 Will. & M. c. 4, s. 3; Judicature Act, 1873, s. 29.

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Rules of Court.

Rules of court.

99.—(1) Rules of court may be made under this Act for the following purposes:—

(a) For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the offices of the Supreme Court and in district registries), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which under this or any other Act are to be made to the Court of Appeal or to the High Court shall be made:

(b) For regulating and prescribing the procedure on appeals from any court or person to the Court of Appeal or the High Court, and the procedure in connection with the transfer of proceedings from any inferior court to the High Court or from the High Court to an inferior court:

(c) For regulating the sittings of the Court of Appeal and the High Court, of the divisional courts of the High Court,

and of the judges of the High Court whether sitting in court or in chambers:

(d) For prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges of the High Court in chambers may be transacted or exercised by masters of the Supreme Court, registrars of the Probate Division, or other officers of the Supreme Court:

(e) For regulating any matters relating to the costs of proceedings in the Court of Appeal or the High Court:

(f) For regulating and prescribing the procedure and practice to be followed in the Court of Appeal or the High Court in cases in which the procedure or practice is regulated by enactments in force immediately before the commencement of this Act or by any provisions of this Act re-enacting any such enactments (including so much of any of the Acts set out in the First Schedule to this Act as is specified in the third column of that Schedule):

(g) For repealing any enactments which relate to matters with respect to which rules are made under this section:

(h) For prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury:

(i) For regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, in any proceedings or on any application in connection with or at any stage of any proceedings:

(j) For regulating or making provision with respect to any other matters which were regulated or with respect to which provision was made by the rules of the Supreme Court in force on the thirtieth day of September, nineteen hundred and twenty-five, or by any rules or regulations so in force with respect to practice and procedure in matrimonial causes and matters or with respect to applications and proceedings relating to legitimacy declarations.

(2) No rule of the Supreme Court which may involve an increase of expenditure out of public funds shall be made except with the concurrence of the Treasury, but the validity of a rule of the Supreme Court shall not in any proceedings in any court be called in question either by the court or by any party to the proceedings on the ground only that it was a rule to which the concurrence of the Treasury was necessary and that the Treasury did not concur or are not expressed to have concurred in the making thereof.

(3) Rules of court made under this section shall apply to all proceedings by or against the Crown.

(4) Rules of court may be made by the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the

15 & 16 Geo. 5, c. 49.

other a member of the Law Society and also of a Provincial Law Society.

The four other judges and the barristers and solicitors to act as aforesaid shall be appointed by the Lord Chancellor in writing under his hand and shall hold office for the time specified in the appointment.

(5) Rules of court made under this section shall be laid before Parliament, but section one of the Rules Publication Act, 1893 (which requires notice to be given of a proposal to make statutory rules), shall not apply to rules so made.

56 & 57 Vict. c. 66.

(6) Nothing in this section shall affect the power conferred by section two hundred and thirty-seven of the Companies (Consolidation) Act, 1908, or by section one hundred and thirty-two of the Bankruptcy Act, 1914, of making general rules for carrying into effect the objects of those Acts respectively, or the power conferred on the President of the Probate Division by the next following section of this Act of making probate rules and orders, and the power to make rules of court under this section shall not extend to the matters with respect to which rules or orders may be made by virtue of the enactments mentioned in this subsection.

8 Edw. 7, c. 69.

4 & 5 Geo. 5, c. 59.

Administration of Justice Act, 1925, s. 15.

Rules of court with respect to procedure in non-contentious probate business.

100.—(1) The President of the Probate Division may, with the concurrence of the Lord Chancellor and the Lord Chief Justice or any judge of the High Court named by the Lord Chief Justice on his behalf, make rules and orders (in this Act referred to as "probate rules and orders") for regulating the procedure and practice of the High Court with respect to non-contentious or common form probate business.

(2) Every rule or order made under this section shall be laid before Parliament.

Court of Probate Act, 1857, ss. 30, 119.

Evidence, Juries, Foreign Law, and Saving.

101. [Act not to affect rules of evidence or juries.]

102. [Questions of foreign law to be decided by judge.]

Saving for former procedure.

103.—(1) Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or with rules of court, may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective courts.

Judicature Act, 1875, s. 21.

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15 & 16 Geo. 5, c. 49.

Principal Probate Registry and District Probate Registries.

Principal probate registry.

107. The principal registry of the High Court for the purpose of the exercise of the probate jurisdiction (in this Act referred to as "the principal probate registry") shall be at such place in the County of London as His Majesty may by Order in Council from time to time appoint.

Court of Probate Act, 1857, s. 4.

District probate registries.

108.—(1) For the purposes of this Act there shall be district probate registries which shall be attached to and under the control of the High Court.

(2) Subject as hereinafter provided, district probate registries shall be established at the places mentioned in, and otherwise in accordance with, the Scheme set out in the Second Schedule to this Act:

Provided that a district probate registry to be established at a place at which no such registry was established by the Court of Probate Act, 1857, shall be established at such date as the President of the Probate Division may, with the concurrence of the Lord Chancellor, determine, and no district probate registry which was established by the said Act and is in existence at the commencement of this Act shall be discontinued until such date as may be so determined.

(3) The President of the Probate Division may from time to time, with the concurrence of the Lord Chancellor and the Treasury, by order modify or vary the said Second Schedule:

Provided that before any order is made under this subsection a draft thereof shall be laid before both Houses of Parliament, and the order shall not be made unless both Houses by resolution approve the draft either without modification or addition or with modifications or additions to which both Houses agree, and on the draft being so approved the order may be made in the form of the draft as approved.

(4) His Majesty may by Order in Council make such adaptations of any enactments as may appear to him to be rendered necessary or expedient by reason of the passing of section seventeen of the Administration of Justice Act, 1925, or of anything done under the provisions of this section.

15 & 16 Geo. 5, c. 28.

(5) Any order made by the Lord Chancellor or the President of the Probate Division under the foregoing provisions of this section may be revoked, varied or amended by a subsequent order so made.

Court of Probate Act, 1857, s. 13, Sched. A.; Administration of Justice Act, 1925, s. 17.

Clerks of district probate registries.

109.—(1) The President of the Probate Division may from time to time—

(a) with the sanction of the Treasury give directions as to the number of clerks to be employed in the several district probate registries and as to the amounts of their respective salaries; and

(b) prescribe the qualifications to be possessed by any person appointed a clerk in a district probate registry; and

(c) regulate the establishment of the district probate

15 & 16 Geo. 5, c. 49.

registries with respect to the duties to be performed therein.

(2) The clerks in a district probate registry shall be appointed by the district probate registrar with the approval of the President of the Probate Division and shall be removable by the President or by the district probate registrar with the approval of the President.

Court of Probate Act, 1857, s. 110.

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Part VII.

Probate Causes and Matters.

Grants of Probate and Administration.

Application for grants.

150. An application for the grant or revocation of probate or administration may be made through the principal probate registry:

Provided that—

(a) Where, in any contentious matter arising out of the application, the court is satisfied that the state of the property and the place of abode of the deceased were such as to give jurisdiction in the matter to a county court, the court may remit the matter to that county court and the judge thereof shall proceed in the matter as if the application had been made to the county court in the first instance:

(b) Where a registrar of the principal probate registry is satisfied by affidavit that the personal estate of the person in respect of whose estate the application for the grant or revocation is made exclusive of what he was possessed of or entitled to as a trustee and not beneficially, but without any deduction on account of his debts, was at the time of his death under the value of two hundred pounds, and that at that time he was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the county court having jurisdiction in the place of abode of the deceased shall have the jurisdiction of the High Court in respect of any contentious matter arising in connection with the said grant or revocation.

Court of Probate Act, 1857, s. 59; Court of Probate Act, 1858, ss. 10, 12. See also as to jurisdiction of the County Court, sections 55 to 58 of the Court of Probate Act, 1857, still unrepealed.

Grants in district probate registries.

151.—(1) Grants may be made in common form by district probate registrars in the name of the High Court and under the seal of the registry, and any such grant shall have effect over the personal estate of the deceased, and, subject to the provisions of this Part of this Act, over the real estate of the deceased, in all parts of England.

Court of Probate Act, 1857, ss. 46, 47; Law of Property Act, 1922, s. 156, sub-s. 7; Administration of Justice Act, 1925, s. 18.

(2) No grant shall be made by a district probate registrar in any case in which there is contention until the contention is disposed of, or in any case in which it appears to him that a grant ought not to be made without the direction of the court. 15 & 16 Geo. 5, c. 49.

Court of Probate Act, 1857, s. 48.

(3) In any case where it appears doubtful to a district probate registrar whether an application for a grant of probate or administration should or should not be granted, or where any question arises in relation to a grant, or an application for a grant, the district probate registrar shall send a statement of the matter in question to the principal probate registry for the directions of the court, and the court may direct the district probate registrar to proceed with the matter in accordance with such instructions as the court may think necessary, or may forbid any further proceedings by the district probate registrar in relation to the matter, leaving the party applying for the grant to apply to the High Court through the principal probate registry or, if the case is within the jurisdiction of a county court, to the county court.

Court of Probate Act, 1857, s. 50.

Duties of district probate registrars.

152.—(1) A district probate registrar shall send to the principal probate registry a notice in the prescribed form of every application made in the registry for a grant as soon as may be after the application has been made, and no grant shall be made by him until he has received from the principal probate registry a certificate that no other application appears to have been made in respect of the estate of the testator or intestate.

Court of Probate Act, 1857, s. 49.

(2) The certificate aforesaid shall be forwarded as soon as may be to the district probate registrar, and may be issued from the principal probate registry under a stamp provided for that purpose and approved by the President of the Probate Division.

Court of Probate Act, 1858, s. 26.

(3) All notices so transmitted to the principal probate registry shall be filed and kept in that registry.

Court of Probate Act, 1857, s. 49.

(4) Where any such notice is received from any district probate registry the registrars of the principal probate registry shall examine all notices of applications for grants received from the several other district probate registries and all applications for grants made at the principal probate registry, so far as may be necessary for the purpose of ascertaining whether application for a grant in respect of the estate of the same deceased person has been made in more than one registry, and shall communicate with the district probate registrar as occasion may require in relation thereto.

Court of Probate Act, 1857, s. 49.

(5) A district probate registrar shall, once in every month, or oftener if required by probate rules or orders, transmit to the

15 & 16 Geo. 5, c. 49.

principal probate registry a list in the prescribed form of the grants made by him and not included in a previous return, and also copies of the wills to which the grants relate, certified by him to be correct under a stamp provided by the district probate registrar for that purpose and approved by the President of the Probate Division.

Court of Probate Act, 1857, s. 51; Court of Probate Act, 1858, s. 25.

(6) A district probate registrar shall file and preserve all original wills of which probate or administration with the will annexed has been granted by him, subject to such regulations with respect to the preservation and inspection of the wills as may from time to time be made by the President of the Probate Division.

Court of Probate Act, 1857, s. 52.

Second and subsequent grants.

153. Second and subsequent grants shall be made in the principal probate registry or in the district probate registry where the original will is registered or the original grant was made, or to which the original will or a registered copy thereof or the record of the original grant has been transmitted in pursuance of section eighty-nine of the Court of Probate Act, 1857, or of this Part of this Act.

Court of Probate Act, 1858, s. 20, as amended by Administration of Justice Act, 1925, ss. 18, 29, and Sched. 5.

Caveats.

154.—(1) A caveat against a grant of probate or administration may be entered in the principal probate registry or in any district probate registry.

(2) On a caveat being entered in a district registry, the district probate registrar shall immediately send a copy thereof to the principal probate registry, to be entered among the caveats in that registry.

Court of Probate Act, 1857, s. 53, as amended by Administration of Justice Act, 1925, s. 18, sub-s. 2.

Power to grant representation of real and personal estate separately or together.

155.—(1) Probate or administration in respect of the real estate of a deceased person, or any part thereof, may be granted either separately or together with probate or administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of a trust estate only, and a grant of administration to real estate may be limited in any way the court thinks proper:

Provided that where the estate of the deceased is known to be insolvent, the grant of representation to the estate shall not be severed except as regards a trust estate.

(2) Provision may be made by probate rules and orders for adapting to the case of real estate the procedure and practice on the grant of administration.

Law of Property Act, 1922, s. 156, sub-ss. 7, 9; Administration of Estates Act, 1925, s. 13.

Calendars of grants.

156.—(1) The President of the Probate Division shall cause to be prepared and printed from time to time in the principal probate registry calendars of the grants made in that registry and in the several district probate registries for such periods as the President of the Probate Division may direct.

(2) Every such calendar shall contain a note of every probate or administration with the will annexed and of every other administration granted within the period specified in the calendar, setting forth the date of the grant, the registry in which it was made, the name and the place and time of death of the testator or intestate, the names and descriptions of the executors or administrators, and the value of the estate. 15 & 16 Geo. 5, c. 49.

(3) A printed copy of every calendar so prepared shall be sent by post or otherwise to every district probate registry, to the probate registry in Belfast, to the office of the commissary clerk of Edinburgh, and to such other offices as the President shall from time to time direct, and every copy so transmitted shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected.

Court of Probate Act, 1857, ss. 67, 68.

Copies of wills to be delivered to Commissioners of Inland Revenue.

157. Subject to any arrangements which may from time to time be made between the President of the Probate Division and the Commissioners of Inland Revenue, every probate registry shall, within such period after a grant as the President may direct, deliver to the Commissioners of Inland Revenue or their proper officer the following documents—

(a) In the case of a probate or of letters of administration with a will annexed, the Inland Revenue affidavit and a copy of the will:

(b) In the case of letters of administration without a will annexed, the Inland Revenue affidavit:

(c) In every case of letters of administration a copy or extract of the letters of administration:

(d) In every case such certificate or note of the grant as the said Commissioners may require.

Court of Probate Act, 1857, s. 93.

Temporary provisions.

158. The foregoing provisions of this Part of this Act shall have effect subject to the temporary provisions set out in Part I. of the Fifth Schedule to this Act, and the extension of the power to make grants in district probate registries which will come into operation when the temporary provisions cease to have effect shall be subject to probate rules and orders.

By Order, dated January 1, 1926 (see [1926] W. N. 37), the President with the concurrence of the Lord Chancellor directed that Part I. of the Fifth Schedule should cease to have effect forthwith.

Provisions as to Executors and Administrators.

Summons of executor to prove or renounce.

159. The High Court shall have power to summon any person named as executor in a will to prove or renounce probate of the will, and to do such other things concerning the will as were customary before the commencement of this Act.

21 Hen. 8, c. 5, s. 6; Administration of Estates Act, 1925, s. 4.

Provisions as to the

160.—(1) Probate or administration shall not be granted to more than four persons in respect of the same property, and

15 & 16 Geo. 5, c. 49.

administration shall, if there is a minority or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals.

number of personal representatives.

Provided that the court in granting administration may act on such primâ facie evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by probate rules and orders.

(2) If there is only one personal representative (not being a trust corporation) then, during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, the court may, on the application of any person interested or of the guardian, committee or receiver of any such person, appoint one or more personal representatives in addition to the original personal representative in accordance with probate rules and orders.

(3) This section shall apply to grants made after the date of the commencement of this Act, whether the testator or intestate died before or after that date.

Law of Property Act, 1922, s. 155, sub-s. 7; Administration of Estates Act, 1925, s. 12.

Power to grant representation to a trust corporation.

161.—(1) The High Court may—

(a) where a trust corporation is named in a will as executor, whether alone or jointly with another person, grant probate to the corporation either solely or jointly with another person, as the case may require; and

(b) grant administration to a trust corporation, either solely or jointly with another person,

and the corporation may act accordingly as executor or administrator, as the case may be.

(2) Probate or administration shall not be granted to a syndic or nominee on behalf of a trust corporation.

(3) Any officer authorised for the purpose by a trust corporation or the directors or governing body thereof may, on behalf of the corporation, swear affidavits, give security and do any other act or thing which the court may require with a view to the grant to the corporation of probate or administration, and the acts of an officer so authorised shall be binding on the corporation.

(4) Where, at the commencement of this Act, any interest in any estate is vested in a syndic on behalf of a trust corporation acting as the personal representatives of a deceased person, the said interest shall, by virtue of this Act, vest in the corporation, and the syndic shall be kept indemnified by the corporation in respect of the said interest.

This subsection shall not apply to securities registered or inscribed in the name of a syndic or to land or a charge registered under the Land Registration Act, 1925, in the name of a syndic, but any such securities, land or charge, shall be transferred by the syndic to the corporation or as the corporation may direct.

15 & 16 Geo. 5, c. 21.

(5) This section shall have effect whether the intestate died before or after the commencement of this Act, and no such vesting or transfer as aforesaid shall operate as a breach of

a covenant or condition against alienation or give rise to a forfeiture. 15 & 16 Geo. 5, c. 49.

Administration of Justice Act, 1920, s. 17; Administration of Estates Act, 1925, s. 14. For definition of "trust corporation" see *infra*, section 175, sub-section 1, and Law of Property (Amendment) Act, 1926, s. 3.

Discretion of court as to persons to whom administration is to be granted.

162.—(1) In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and any such administration may be limited in any way the court thinks fit:

Provided that where the deceased died wholly intestate as to his estate, administration shall—

(a) unless by reason of the insolvency of the estate or other special circumstances the court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose; and

(b) as regards land settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement if willing to act.

(2) This section shall apply only in the case of persons dying after the date of the commencement of this Act, and the High Court in granting administration in the case of persons dying at any time before that date shall act in accordance with the principles and rules in accordance with which it would have acted if this Act had not passed.

31 Edw. 3, stat. 1, c. 11; 21 Hen. 8, c. 5, s. 2; Court of Probate Act, 1857, s. 73; Law of Property Act, 1922, s. 156, sub-s. 8; Administration of Estates Act, 1925, s. 10.

Administration pendente lite.

163.—(1) Where any legal proceedings touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any grant, are pending, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the court and act under its direction.

(2) The Court may, out of the estate of the deceased, assign to an administrator appointed under this section such reasonable remuneration as the court thinks fit.

Court of Probate Act, 1857, ss. 70, 71, 72; Court of Probate Act, 1858, ss. 21, 22; Administration of Estates Act, 1925, s. 16.

Grant of special administration where personal representative is abroad.

164.—(1) If at the expiration of twelve months from the death of a person any personal representative of the deceased to whom a grant has been made is residing out of the jurisdiction of High Court, the court may on the application of any creditor or person interested in the estate of the deceased, grant to him

15 & 16 Geo. 5, c. 49.

in the prescribed form special administration of the estate of the deceased.

(2) The court may, for the purpose of any legal proceedings to which the administrator under the special administration is a party, order the transfer into court of any money or securities belonging to the estate of the deceased person, and all persons shall obey any such order.

(3) If the personal representative capable of acting as such returns to and resides within the jurisdiction of the High Court while any legal proceedings to which a special administrator is a party are pending, that personal representative shall be made a party to the legal proceedings, and the costs of and incidental to the special administration and the legal proceedings shall be paid by such person and out of such fund as the court in which the proceedings are pending may direct.

Administration of Estates Act, 1789, ss. 1, 5; Court of Probate Act, 1857, s. 74; Court of Probate Act, 1858, s. 18; Administration of Estates Act, 1925, s. 18.

Administration during minority of executor.

165.—(1) Where an infant is sole executor of a will, administration with the will annexed shall be granted to his guardian, or to such other person as the court thinks fit, until the infant attains the age of twenty-one years, and on his attaining that age, and not before, probate of the will may be granted to him.

(2) Where a testator by his will appoints an infant to be an executor, the appointment shall not operate to transfer any interest in the property of the deceased to the infant or to constitute him a personal representative for any purpose unless and until probate is granted to him under this section.

Administration of Estates Act, 1789, ss. 6, 7; Law of Property Act, 1922, Sched. VI, paragraph 5, sub-paragraph 2; Administration of Estates Act, 1925, s. 20.

Administration with will annexed.

166. Subject to the provisions of any enactment relating to special executors in the case of settled land, administration with the will annexed shall continue to be granted in every case where such a grant was customary before the commencement of this Act, and in such case the will of the deceased shall be performed and observed in like manner as if probate thereof had been granted to an executor.

22 & 23 Chas. 2, c. 10, s. 6; Administration of Estates Act, 1925, s. 19.

Administration bonds.

167.—(1) Every person to whom a grant of administration is made shall give a bond (in this section referred to as "an administration bond") to the senior registrar of the Probate Division by the name of "the principal probate registrar," and, subject to the provisions of this section, if the principal probate registrar, or, where the grant was made in a district registry, the district probate registrar, so requires, with one or more sureties conditioned for duly collecting, getting in, and administering the real and personal estate of the deceased.

(2) The principal probate registrar for the time being shall have power to enforce any administration bond or to assign it in accordance with the provisions of this section to some other person.

15 & 16 Geo. 5, c. 49.

(3) An administration bond shall be in such form as may be directed by probate rules and orders.

(4) Where it appears to the satisfaction of the court or a judge that the condition of an administration bond has been broken, the court or judge may, on an application in that behalf, order that the bond shall be assigned to such person as may be specified in the order, and the person to whom the bond is assigned in pursuance of the order shall be entitled to sue thereon in his own name as if it had been originally given to him instead of to the principal probate registrar, and to recover thereon as trustee for all persons interested the full amount recoverable in respect of the breach of the condition thereof.

(5) Without prejudice to any proceedings instituted before the first day of October, nineteen hundred and twenty-five, any administration bond given before that date under any enactment repealed by the Administration of Justice Act, 1925, or which is to be enforceable as if it had been given under any such enactment, may be enforced or assigned as if it had been given to the principal probate registrar under this section.

(6) Nothing in this section shall require the Solicitor for the affairs of His Majesty's Treasury or the Solicitor for the affairs of the Duchy of Lancaster, when applying for or obtaining administration for the use or benefit of His Majesty, to give an administration bond.

(7) Probate rules and orders may be made for providing that sureties to administration bonds shall not be required when the grant is made to a trust corporation or to two or more individuals, or in any other proper case.

Court of Probate Act, 1857, ss. 81, 82, 83; Grant of Administration (Bonds) Act, 1919; Administration of Justice Act, 1920, s. 18; Administration of Justice Act, 1925, s. 24; Administration of Estates Act, 1925, s. 11.

Resealing of Grants made in other Countries.

Resealing of Scottish confirmations.

168.—(1) If a confirmation of the executor of a person who died domiciled in Scotland, which includes besides the estate situate in Scotland also personal estate situate in England, is produced to the High Court, and a copy thereof deposited in the principal probate registry, the confirmation shall, if there is inserted therein or noted thereon a statement signed by the sheriff clerk to the effect that the deceased died domiciled in Scotland, be sealed with the seal of the principal probate registry and returned to the person producing it, and shall on being so sealed have the like effect in England as if it were a grant made by the High Court.

Confirmation of Executors (Scotland) Act, 1858, s. 12.

(2) The foregoing provisions of this section shall apply—

(a) to an additional confirmation granted in a sheriff court in Scotland of estate situate in England of a person who died domiciled in Scotland, whether the original confirmation has been sealed with the seal of the principal probate registry or not, and notwithstanding that the additional inventory confirmed does not

15 & 16 Geo. 5, c. 49.

contain any estate of the deceased situate in Scotland; and

(b) to a confirmation or additional confirmation of personal estate situate in Scotland which contains or has appended thereto and signed by the sheriff clerk a note or a statement of funds in England held by the deceased in trust, being a note or statement which has been set forth in any inventory recorded in the books of the court of which the sheriff clerk is clerk;

as they apply with respect to confirmations which include personal estate situate in England.

Sheriff Courts (Scotland) Act, 1876, ss. 42, 43.

38 & 39 Vict. c. 41. 39 & 40 Vict. c. 24.

(3) Where a confirmation granted under the Intestates Widows and Children (Scotland) Act, 1875, or the Small Testate Estates (Scotland) Act, 1876, contains estate in England, the principal probate registrar shall, on the confirmation being sent to him for the purpose by the commissary clerk or sheriff clerk together with a fee of two shillings and sixpence, affix thereto the seal of the principal probate registry.

Intestates Widows and Children (Scotland) Act, 1875, s. 3; Small Testate Estates (Scotland) Act, 1876, s. 3.

Resealing of Irish grants.

169.—(1) If probate or letters of administration granted by the High Court of Justice in Northern Ireland is or are produced to the High Court and a copy thereof is deposited with the principal probate registry, the grant shall, subject to the provisions of this section, be sealed with the seal of the principal probate registry, and shall have the like effect in England as if it had been originally made by the High Court.

Probates and Letters of Administration (Ireland) Act, 1857, s. 95.

57 & 58 Vict. c. 30.

(2) Where a grant has been made under section sixteen of the Finance Act, 1894, by the High Court of Justice in Northern Ireland in respect of the estate of any person and there is estate of that person in England, the principal probate registrar, if the case is one in which a grant might have been made under the said section sixteen in England, shall, subject to the provisions of this section, on the grant being sent to him for the purpose together with a fee of two shillings and sixpence, affix thereto the seal of the principal probate registry.

Finance Act, 1894, s. 16, sub-s. 4.

(3) No grant shall be resealed under the provisions of this section unless and until there is delivered to the principal probate registry, together with the grant, an Inland Revenue affidavit accounting, as on an application for an original grant, for the estate duty, if any, payable in Great Britain in respect of the personal estate of which the deceased was competent to dispose at his death, except that if the estate duty has previously been paid on a prior certification in Scotland of the grant in question, the Inland Revenue affidavit shall be endorsed to that effect by the Commissioners of Inland Revenue.

5 & 6 Geo. 5, c. 89.

(4) Notwithstanding the provisions of section forty-eight of the Finance (No. 2) Act, 1915, a grant made by the High Court of Justice in Northern Ireland shall not have effect with respect

to Government stock in England unless it is re-sealed under the provisions of this section. 15 & 16 Geo. 5, c. 49.

(5) This section shall apply to grants in respect of the estates of persons dying on or after the first day of April, nineteen hundred and twenty-three.

Government of Ireland (Resealing of Probates, etc.) Order, 1923.

Miscellaneous.

Place of deposit of original wills.

170. There shall be one place of deposit under the control of the High Court, at such place in the County of London as His Majesty may by Order in Council direct, in which—

(a) all original wills brought into the High Court or of which probate or administration with the will annexed has been granted in the principal probate registry;

(b) copies of all wills the originals of which are to be preserved in any district registry; and

(c) such other documents as the High Court may direct,

shall be deposited and preserved, and in which, subject to the control of the High Court and to probate rules and orders, they may be inspected.

Court of Probate Act, 1857, s. 66.

Official copies of wills.

171. An official copy of the whole or any part of a will or an official certificate of any grant of administration may, on payment of the prescribed fee, be obtained from the registry where the will was proved or the administration granted.

Court of Probate Act, 1857, s. 69.

Depositories of wills of living persons.

172. There shall, under the control and direction of the High Court, be provided safe and convenient depositories for the custody of the wills of living persons, and any person may deposit his will therein on payment of such fees and subject to such regulations as may from time to time be prescribed by the President of the Probate Division.

Court of Probate Act, 1857, s. 91.

Transmission of documents to High Court.

173.—(1) Every person having the custody of documents which belonged to any court or person who had jurisdiction, immediately before the commencement of the Court of Probate Act, 1857, to grant probate or administration shall, upon receiving a requisition from any probate registrar under the seal of the principal probate registry transmit to the principal probate registry or to any other place mentioned in the requisition, at the time and in the manner therein mentioned, any one or more of any documents relating exclusively or principally to testamentary causes or matters which may be in his possession or control, and any document so requisitioned shall be deposited and arranged in the principal probate registry or the district probate registry, as the case may be, under the control and direction of the High Court so as to be easy of reference.

(2) If any person refuses or neglects to comply with a requisition made under this section he shall be liable to a penalty of one hundred pounds, which (together with the costs of the

15 & 16 Geo. 5, c. 49.

proceedings) shall be recoverable in the High Court by a probate registrar.

(3) The Treasury may, out of moneys provided by Parliament, pay such expenses of arranging, classifying, indexing, transmitting or otherwise connected with the removal of documents in consequence of any requisition under this section as the President of the Probate Division may from time to time certify to the Treasury to be proper and necessary.

(4) Notwithstanding anything in this section, it shall be lawful for the University of Oxford to retain the custody of any such documents belonging to the court of the Chancellor of Oxford University as are included in the index of which a copy has been transmitted to the principal probate registrar under section two of the Oxford University Act, 1860:

23 & 24 Vict. c. 91.

Provided that any person shall at all convenient times, under the authority of a registrar of the principal probate registry or of the district probate registrar at Oxford, be entitled to inspect and to take extracts or copies therefrom on payment of the same fees as would be payable if the documents had been deposited in the principal probate registry or in the district probate registry at Oxford, and all such fees shall be payable to the persons who would in that event be entitled to receive them, and no officer of the University or of the said court shall be entitled to receive any such fees.

Court of Probate Act, 1857, ss. 89, 90; Court of Probate Act, 1858, ss. 27, 37; Oxford University Act, 1860, s. 2.

Seals for use in probate registries.

174.—(1) In the principal probate registry and in every district probate registry there shall be used such seal as the President of the Probate Division may from time to time direct.

(2) All probates, letters of administration, orders and other instruments and copies thereof and all exemplifications purporting to be sealed with any such seal as aforesaid shall be received in evidence in all parts of the United Kingdom without further proof.

Court of Probate Act, 1857, s. 22.

Interpretation of terms in Part VII and saving.

175.—(1) In this Part of this Act, and in the other provisions of this Act relating to probate causes and matters, unless the context otherwise requires, the following expressions shall have the meaning hereby assigned to them respectively, that is to say—

"Administration" includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes:

"The court" means the High Court or a judge:

"Estate" means real and personal estate, and the expression "real estate" includes—

(a) chattels real and land in possession, remainder or reversion and every interest in or over land to which the deceased person was entitled at the time of his death; and

(b) real estate held on trust or by way of mortgage, whether by demise or sub-demise, or of security, but not

money to arise under a trust for sale of land, nor money secured or charged on land: 15 & 16 Geo. 5, c. 49.

"Grant" means a grant of probate or of administration:

"Inland Revenue affidavit" has the same meaning as in Part I of the Finance Act, 1894: 57 & 58 Vict. c. 30.

"Non-contentious or common form probate business" means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, and all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration:

"Prescribed" means prescribed by probate rules and orders:

"Settled land" and "trustees of the settlement" have the same meaning as in the Settled Land Act, 1925: 15 & 16 Geo. 5, c. 18.

"Testamentary cause or matter" includes all cases or matters relating to the grant or revocation of probate or administration:

"Trust corporation" means the public trustee or a corporation either appointed by the court in any particular case to be a trustee or authorised by rules made under subsection (3) of section four of the Public Trustee Act, 1906, to act as custodian trustee: 6 Edw. 7, c. 55.

Amended Law of Property (Amendment) Act, 1926, s. 3.

"Will" includes any testamentary instrument of which probate may be granted.

Court of Probate Act, 1857, s. 2.

(2) Nothing in this Act shall operate to extend to any real estate to which any person dying before the first day of January, eighteen hundred and ninety-eight, or any person dying on or after that day and before the commencement of this Act was entitled, any enactments or rules of law which did not immediately before the said first day of January or the commencement of this Act, as the case may be, extend to the real estate of such a person or to confer on the High Court with respect to any such real estate any probate jurisdiction which was not immediately before the said first day of January or immediately before the commencement of this Act, as the case may be, vested in the High Court constituted under the Act of 1873.

(3) The provisions set out in Part II. of the Fifth Schedule to this Act shall, subject in the case of a person dying on or after the first day of January, eighteen hundred and ninety-eight, and before the commencement of this Act to the provisions of the Land Transfer Act, 1897, have effect with respect to the probate or revocation of the probate of the will of any person dying as is mentioned in subsection (2) of this section which affects real estate and with respect to the evidentiary effect in actions concerning real estate of probate or administration granted in respect of the estate of a person so dying. 60 & 61 Vict. c. 65.

Court of Probate Act, 1857, ss. 61—64.

* * * * *

15 & 16 Geo. 5, c. 49.

Repeal and savings.

52 & 53 Vict. c. 63.

226.—(1) The enactments set out in the Sixth Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that, subject as in this Act otherwise expressly provided and without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:—

(a) Nothing in this repeal shall affect any Order in Council, rule, order or regulation made, commission issued, direction given, or thing done, under any enactment repealed by this Act, or deemed to have been made, issued, given or done respectively under any such enactment, and every such Order, rule, order, regulation, commission or direction shall continue in force, and, so far as it could have been made, issued or given under this Act, shall have effect as if made, issued or given under this Act:

(b) Nothing in this repeal shall affect any right of appointment vested in any judge or circuit officer or in the Master of the Rolls as Keeper of the Records:

(c) Any document referring to any Act or enactment repealed by this Act shall be construed as referring to this Act or to the corresponding enactment in this Act.

(2) Any person holding office or serving, or deemed to be serving, under any enactment repealed by this Act, shall continue in office or service as if he had been appointed under this Act, and nothing in this repeal shall affect the terms and conditions on and subject to which any person held office immediately before the commencement of this Act or prejudice or affect any right to pension, compensation or allowance which a person would otherwise have had on the abolition of, or on retirement from, his office or otherwise, or the amount thereof.

(3) References in any enactment or document to the Supreme Court, Court of Appeal or High Court constituted under the Judicature Acts, 1873 to 1910, or to the Divisions or offices thereof, shall be construed respectively as references to the Supreme Court, Court of Appeal, or High Court constituted under this Act, or the Divisions or offices thereof, and any act done or proceedings taken in respect of any cause or matter whatsoever before the commencement of this Act in the Supreme Court constituted under the Judicature Acts, 1873 to 1910, shall be deemed to have been done or taken in the Supreme Court constituted under this Act.

(4) Nothing in this Act shall affect the office of marshal attending any commissioner of assize.

(5) Save as therein otherwise expressly provided, nothing in this Act shall affect the operation of any enactment which is in force at the commencement of this Act and is not expressly repealed by this Act.

Short title and commencement.

227.—(1) This Act may be cited as the Supreme Court of Judicature (Consolidation) Act, 1925.

(2) This Act shall come into force on the first day of January, nineteen hundred and twenty-six.

15 & 16 Geo. 5, c. 49.

SCHEDULES.

FIRST SCHEDULE.

Section 99.

ENACTMENTS CONTAINING AND REGULATING MATTERS WITH RESPECT TO WHICH RULES OF COURT MAY BE MADE.

Session and Chapter.	Title or Short Title.	Enactments affected.
* * *	* * * *	* * * *
20 & 21 Vict. c. 77.	The Court of Probate Act, 1857.	Sections twenty-four, twenty-six and thirty-one.
* * *	* * * *	* * * *
21 & 22 Vict. c. 95.	The Court of Probate Act, 1858.	Section twenty-three.
* * *	* * * *	* * * *

SECOND SCHEDULE.

Section 108.

SCHEME FOR ESTABLISHMENT OF DISTRICT PROBATE REGISTRIES.

Group.	Registries.	Sub-registries.
1	Newcastle. Durham. Carlisle.	
2	Leeds. Sheffield. York.	
3	Manchester.	
4	Liverpool. Lancaster.	
5	Chester	Bangor. Shrewsbury.
6	Lincoln Nottingham. Leicester.	Derby.
7	Peterborough. Norwich. Ipswich.	
8	Birmingham Oxford.	Northampton.
9	Cardiff	Hereford. Gloucester. Carmarthen.
10	Bristol Exeter.	Bodmin.
11	Southampton Lewes.	Salisbury.

15 & 16 Geo. 5, c. 49.

NOTES.

1. The place first mentioned in the second column of the foregoing Table in relation to each group shall be the chief registry of the group, and the registrar of that place shall by virtue of his office be the registrar of the other registries and of any sub-registries in the group.

2. If the President of the Probate Division, with the concurrence of the Lord Chancellor and the Treasury and after consultation with the Council of the Borough of Cardiff, thinks fit so to direct, Llandaff shall be substituted for Cardiff as the chief registry of Group 9.

3. In addition to the places mentioned in the third column of the said Table, there shall be a district probate sub-registry at Canterbury which shall be under the management of the principal probate registry.

* * * * *

Section 158.

FIFTH SCHEDULE.

PART I.

TEMPORARY PROVISIONS WITH RESPECT TO GRANTS IN DISTRICT PROBATE REGISTRIES.

1. During such time as this Part of this Schedule continues in operation—

(i) The following shall be substituted for proviso (b) to section one hundred and fifty of this Act :—

"(b) Where a registrar of the principal probate registry is satisfied by affidavit that the person in respect of whose estate the application for the grant or revocation is made had at the time of his death his fixed place of abode in one of the districts for which there is a district probate registry, and that his personal estate, exclusive of what he was possessed of or entitled to as a trustee and not beneficially, but without any deduction on account of his debts, was at the time of his death under the value of two hundred pounds, and that at that time he was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the county court having jurisdiction in the said place of abode shall have the jurisdiction of the High Court in respect of any contentious matter arising in connection with the said grant or revocation."

Court of Probate Act, 1858, s. 10.

(ii) The following subsections shall be substituted for subsection (1) of section one hundred and fifty-one of this Act :—

"(1) Where it appears by the affidavit of any person making an application to a district probate registrar for the grant of probate or administration that the testator or intestate had at the time of his death a fixed place of abode within the district of the registry in which the application is made, a grant may be made in common form by the district probate registrar in the name of the High Court and under the seal of the registry, and the grant shall have effect over the personal estate of the deceased, and, subject to the provisions of this Part of this Act, over the real estate of the deceased, in all parts of England.

(2) The place of abode must be stated in the affidavit.

(3) The affidavit shall be conclusive for the purpose of authorising the grant by the district probate registrar, and the grant—

(a) shall not be liable to be recalled, revoked, or otherwise impeached by reason that the deceased had no fixed place of abode within the district at the time of his death; and

(b) shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of, or any defect in, the affidavit required under this section."

Court of Probate Act, 1857, ss. 46, 47.

(iii) The following subsection shall be added to section one hundred and fifty-three of this Act :—

"(2) Where a second or subsequent grant is made in a district probate registry, it shall not be necessary to show by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made." 15 & 16 Geo. 5, c. 49.

Court of Probate Act, 1858, s. 20.

(iv) The following subsection shall be added to section one hundred and fifty-four of this Act :—

"(3) On a caveat being entered in the principal probate registry, notice thereof shall be given to the district probate registrar of any district in which it is alleged that the deceased resided at the time of his decease, and to any other district probate registrar to whom it is in the opinion of the principal probate registrar expedient that notice of the entry of the caveat should be sent."

Court of Probate Act, 1857, s. 53.

2. This Part of this Schedule shall cease to have effect on such date as the President of the Probate Division, with the concurrence of the Lord Chancellor, may direct (*a*).

Part II.

Provisions to apply in the case of Persons Dying before the commencement of the Act with respect to the Probate of Wills affecting Real Estate and with respect to the evidentiary effect of Probate and Letters of Administration. Section 175.

1. The following provisions (*b*) shall have effect in relation to any proceedings taken for proving in solemn form a will affecting real estate or for revoking probate of such a will on the ground of invalidity, or where the validity of such a will is disputed in any other contentious cause or matter :—

(a) The heir-at-law, devisee, and other persons having or pretending interest in the real estate affected by the will shall, subject as hereinafter provided and to rules of court, be cited to see proceedings or otherwise summoned in like manner as the next of kin or others having or alleging interest in the personal estate affected by a will, and may be permitted by the court, subject to rules of court, to become parties or to intervene for their respective interests :

Provided that the court may proceed without citing any such persons as aforesaid, unless the court is satisfied that the deceased

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(*a*) The extension of the power to make grants in district probate registries contained in section 18 of the Administration of Justice Act, 1925, was to come into operation on such date as the President, with the concurrence of the Lord Chancellor, should direct. Until that direction had been given, it was necessary to keep in force the provisions of the Court of Probate Acts. The following Order has, however, now been published :

Jurisdiction of District Probate Registrars with respect to Grants of Probate and Administration.

Whereas by section one hundred and fifty-eight of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that the foregoing provisions of Part VII. of that Act shall have effect subject to certain temporary provisions set out in Part I. of the fifth Schedule to that Act :

And whereas by paragraph 2 of Part I. of the said Fifth Schedule it is provided that the said Part I. shall cease to have effect on such date as the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, with the Concurrence of the Lord Chancellor, may direct :

And whereas it is expedient that the said Part I. should cease to have effect forthwith :

Now therefore, I, Henry Edward, Baron Merrivale, President of the Probate, Divorce and Admiralty Division of the High Court of Justice, in pursuance of the power vested in me by the said Act, do hereby order and direct that Part I. of the Fifth Schedule to the said Act shall cease to have effect forthwith.

Dated the 1st day of January, 1926.

(Sgd.) Merrivale, P.

I concur. (Sgd.) Cave, C.

(*b*) The provisions are those of the Court of Probate Act, 1857, ss. 61-64.

15 & 16 Geo. 5, c. 49.

was at the time of his death seised of or entitled to, or had power to appoint by will, real estate beneficially, or that the will in question would affect real estate, but in any case where the court proceeds without citing any such persons the probate or decree of the court shall not affect any of those persons in respect of his interest in real estate unless he derives title under or through a person who has been so cited;

(b) Where probate of the will has been granted or its validity otherwise decreed, the probate or decree shall enure for the benefit of all persons interested in the real estate affected by the will;

(c) The probate copy of the will or the letters of administration with the will annexed, or a copy thereof respectively, stamped with the seal of the court, shall, in all courts and in all proceedings affecting real estate (other than proceedings by way of appeal in any such proceedings as are first mentioned in this Part of this Schedule or for revocation of probate or administration), be conclusive evidence of the validity and contents of the will in like manner as a probate is evidence in matters relating to real estate;

(d) Where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared, the decree declaring the invalidity shall enure for the benefit of the heir-at-law or other persons against whose interests in real estate the will might operate, and the will shall not be received in evidence in any proceeding affecting real estate other than in any proceeding by way of appeal from the decree.

2.—(a) A party to any proceeding who seeks to establish a devise or other testamentary disposition affecting real estate may give to the opposite party, ten days at least before the trial or proceeding in which the proof is intended to be adduced, notice that he intends to give in evidence, as proof of the devise or other testamentary disposition, the probate of the will or the letters of administration with the will annexed, or a copy thereof stamped with the seal of the court.

(b) Where any such notice has been given, the probate, letters of administration, or a copy thereof, stamped as aforesaid, shall be sufficient evidence of the will and of its validity and contents, notwithstanding that it has not been proved in solemn form or otherwise declared valid in a contentious cause or matter, unless the party receiving the notice, within four days after the receipt thereof, gives notice that he disputes the validity of the devise or testamentary disposition.

Section 226.

SIXTH SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
31 Edw. 3.	The Statute made at Westminster on the Monday next after the Feast of Easter in the thirty-first year, Statute the first.	Chapter eleven.
* * *	* * * * *	* * * *
20 & 21 Vict. c. 77.	The Court of Probate Act, 1857.	Sections four, thirteen, twenty to twenty-three, twenty-nine, thirty, and forty-six to fifty-three, in section fifty-eight the the words "and the decision of the Court of Probate on such appeal shall be final," sections fifty-nine, sixty-one to sixty-four and sixty-six to sixty-nine, eighty-seven, eighty-nine to ninety-three, one hundred and ten and one hundred and nineteen, and Schedule A.

SIXTH SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
20 & 21 Vict. c. 79.	The Probates and Letters of Administration (Ireland) Act, 1857.	Section ninety-five so far as it relates to grants made in respect of the estates of persons dying on or after the the first day of April, nineteen hundred and twenty-three.
* * *	* * * *	* * * *
21 & 22 Vict. c. 56.	The Confirmation of Executors (Scotland) Act, 1858.	Section twelve.
* * *	* * * *	* * * *
21 & 22 Vict. c. 95.	The Court of Probate Act, 1858.	Sections three, eight, ten, twelve, twenty, twenty-four to twenty-seven, section twenty-nine so far as it relates to grants made in respect of the estates of persons dying on or after the first day of April, nineteen hundred and twenty-three, and sections thirty-five and thirty-seven.
* * *	* * * *	* * * *
38 & 39 Vict. c. 41.	The Intestates Widows and Children (Scotland) Act, 1875.	Section three so far as it relates to the resealing of confirmations in England.
* * *	* * * *	* * * *
39 & 40 Vict. c. 24.	The Small Testate Estates (Scotland) Act, 1876.	Section three so far as it relates to the resealing of confirmations in England.
* * *	* * * *	* * * *
10 & 11 Geo. 5, c. 81.	The Administration of Justice Act, 1920.	Sections one, five, six, seven and eight; section fifteen so far as it relates to the High Court; and sections nineteen and twenty.
* * *	* * * *	* * * *
15 & 16 Geo. 5, c. 23.	The Administration of Estates Act, 1925.	Sections four, ten to fourteen, sixteen, and eighteen to twenty.
15 & 16 Geo. 5, c. 28.	The Administration of Justice Act, 1925.	Sections one to eighteen, twenty-one, twenty-four to twenty-six and Schedules one to three.

LAW OF PROPERTY (AMENDMENT) ACT, 1926.

16 & 17 Geo. 5, c. 11.

(16 & 17 GEO. 5, c. 11.)

* * * * *

Meaning of "trust corporation."
15 Geo. 5, c. 19.
15 Geo. 5, c. 23.
15 & 16 Geo. 5, c. 49.

3.—(1) For the purposes of the Law of Property Act, 1925, the Settled Land Act, 1925, the Trustee Act, 1925, the Administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925, the expression "Trust Corporation" includes the Treasury Solicitor, the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor, and in relation to the property of a bankrupt and property subject to a deed of arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation.

(2) For the purposes of this provision, the expression "Treasury Solicitor" means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster.

* * * * *

Amendment of 15 Geo. 5, c. 18, s. 13.

6. Section thirteen of the Settled Land Act, 1925 (which relates to dispositions not taking effect until a vesting instrument is made), shall have effect as if at the end thereof the following proviso were inserted:—

> "Nothing in this section affects the creation or transfer of a legal estate by virtue of an order of the court or the Minister or other competent authority."

Minor amendments.

7. The amendments specified in the second column of the Schedule to this Act, being amendments of a minor nature, shall be made in the enactments mentioned in the first column of that Schedule and shall have effect without prejudice to any title acquired by a purchaser, or any registration effected, before the passing of this Act (*a*).

Short title, construction and commencement.

8.—(1) This Act may be cited as the Law of Property (Amendment) Act, 1926, and so far as it amends any Act shall be construed as one with that Act.

(2) The provisions of this Act except sections four and five shall be deemed to have come into operation on the first day of January, nineteen hundred and twenty-six.

(*a*) The amendments specified in this Schedule have been incorporated in the sections of the Acts affected printed in this Appendix.

LEGITIMACY ACT, 1926.

(16 & 17 Geo. 5, c. 60.)

16 & 17 Geo. 5, c. 60.

An Act to amend the law relating to children born out of wedlock.

[15th December, 1926.]

Be it enacted, etc., as follows:—

Legitimation by subsequent marriage of parents.

1.—(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.

(2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

(3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.

(4) The provisions contained in the Schedule to this Act shall have effect with respect to the re-registration of the births of legitimated persons.

Declarations of legitimacy of legitimated persons.

21 & 22 Vict. c. 93.

2.—(1) A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in England or elsewhere and whether a natural-born British subject or not, present a petition under the Legitimacy Declaration Act, 1858, and that Act, subject to such necessary modifications as may be prescribed by rules of court, shall apply accordingly.

(2) A petition under the said Act may be presented by any such person as aforesaid to the county court instead of to the High Court, and the county court on such a petition being presented shall have all such jurisdiction as by the said Act is conferred upon the High Court:

Provided that, where a petition is presented to the county court, the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court, and on such transfer the proceeding shall be continued in the High Court as if it had been originally commenced therein.

Rights of legitimated persons, &c., to take interests in property.

3.—(1) Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest—

(a) in the estate of an intestate dying after the date of legitimation;

(b) under any disposition coming into operation after the date of legitimation;

(c) by descent under an entailed interest created after the date of legitimation;

16 & 17 Geo. 5, c. 60.

in like manner as if the legitimated person had been born legitimate.

(2) Where the right to any property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons shall rank as if he or they had been born on the day when he or they became legitimated by virtue of this Act, and if more than one such legitimated person became legitimated at the same time, they shall rank as between themselves in order of seniority.

(3) Where property real or personal or any interest therein is limited in such a way that, if this Act had not been passed, it would (subject or not to any preceding limitations or charges) have devolved (as nearly as the law permits) along with a dignity or title of honour, then nothing in this Act shall operate to sever the property or any interest therein from such dignity, but the same shall go and devolve (without prejudice to the preceding limitations or charges aforesaid) in like manner as if this Act had not been passed. This subsection applies, whether or not there is any express reference to the dignity or title of honour and notwithstanding that in some events the property, or some interest therein, may become severed therefrom.

(4) This section applies only if and so far as a contrary intention is not expressed in the disposition, and shall have effect subject to the terms of the disposition and to the provisions therein contained.

Succession on intestacy of legitimated persons and their issue.

4. Where a legitimated person or a child or remoter issue of a legitimated person dies intestate in respect of all or any of his real or personal property, the same persons shall be entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate.

Application to illegitimate person dying before marriage of parents.

5. Where an illegitimate person dies after the commencement of this Act and before the marriage of his parents leaving any spouse, children or remoter issue living at the date of such marriage, then, if that person would, if living at the time of the marriage of his parents, have become a legitimated person, the provisions of this Act with respect to the taking of interests in property by, or in succession to, the spouse, children and remoter issue of a legitimated person (including those relating to the rate of death duties) shall apply as if such person as aforesaid had been a legitimated person and the date of the marriage of his parents had been the date of legitimation.

6. [Personal rights and obligations of legitimated persons.]

Death duties.

7. Where a legitimated person or any relative of a legitimated person takes any interest in real or personal property, any succession, legacy or other duty which becomes leviable after the date of legitimation shall be payable at the same rate as if the legitimated person had been born legitimate.

Provisions as to persons legitimated by extraneous law.

8.—(1) Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person

became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.

(2) All the provisions of this Act relating to legitimated persons and to the taking of interests in property by or in succession to a legitimated person and the spouse, children and remoter issue of a legitimated person (including those relating to the rate of death duties) shall apply in the case of a person recognised as having been legitimated under this section, or who would, had he survived the marriage of his parents, have been so recognised; and, accordingly, this Act shall have effect as if references therein to a legitimated person included a person so recognised as having been legitimated.

(3) For the purposes of this section, the expression "country" includes Scotland and any other part of His Majesty's Dominions, as well as a foreign country.

Right of illegitimate child and mother of illegitimate child to succeed on intestacy of the other.

9.—(1) Where, after commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.

(2) Where, after the commencement of this Act, an illegitimate child, not being a legitimated person, dies intestate in respect of all or any of his real or personal property, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.

(3) This section does not apply to or effect the right of any person to take by purchase or descent any entailed interest in real or personal property.

(4) [Application to Scotland.]

Savings.

10.—(1) Nothing in this Act shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title.

(2) Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or affect any rights under the intestacy of a person dying before the commencement of this Act.

Interpretation.

11. For the purposes of this Act, unless the context otherwise requires—

The expression "legitimated person" means a person legitimated by this Act;

The expression "date of legitimation" means the date of the marriage leading to the legitimation, or where the marriage occurred before the commencement of this Act, the commencement of this Act;

16 & 17 Geo. 5, c. 60.

The expression "disposition" means an assurance of any interest in property by any instrument whether inter vivos or by will;

The expression "intestate" has the same meaning as in the administration of Estates Act, 1925, and "will" includes "codicil";

15 Geo. 5, c. 23.

15 Geo. 5, c. 20.

The expression "entailed interest" has the same meaning as in the Law of Property Act, 1925.

Short title and commencement.

12.—(1) This Act may be cited as the Legitimacy Act, 1926.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-seven.

(3) The provisions of this Act shall, save as therein otherwise expressly provided, extend only to England and Wales.

Section 1.

SCHEDULE.

Registration of Births of Legitimated Persons.

1. The Registrar-General may, on production of such evidence as appears to him to be satisfactory, authorise at any time the re-registration of the birth of a legitimated person whose birth is already registered under the Births and Deaths Registration Acts, 1836 to 1901, and such re-registration shall be effected in such manner and at such place as the Registrar-General may by regulations prescribe:

Provided that the Registrar-General shall not authorise the re-registration of the birth of any such person in any case where information with a view to obtaining such re-registration is not furnished to him by both parents, unless—

(a) the name of a person acknowledging himself to be the father of the legitimated person has been entered in the register in pursuance of section seven of the Births and Deaths Registration Act, 1874; or

37 & 38 Vict. c. 88.

(b) the paternity of the legitimated person has been established by an affiliation order or otherwise by a decree of a court of competent jurisdiction; or

(c) a declaration of the legitimacy of the legitimated person has been made under the Legitimacy Declaration Act, 1858, as amended by this Act.

2. It shall be the duty of the parents of a legitimated person, or, in cases where re-registration can be effected on information furnished by one parent and one of the parents is dead, of the surviving parent, within the time hereinafter specified, to furnish to the Registrar-General information with a view to obtaining the re-registration of the birth of that person; that is to say:—

(a) If the marriage took place before the commencement of this Act, within six months of such commencement;

(b) If the marriage takes place after the commencement of this Act, within three months after the date of the marriage.

3. Where the parents, or either of them, fail to furnish the necessary information within the time limited for the purpose, the Registrar-General may at any time after the expiration of that time require the parents of a person whom he believes to have been legitimated by virtue of this Act, or either of them, to give him such information concerning the matter as he may consider necessary, verified in such manner as he may direct, and for that purpose to attend personally either at a registrar's office or at any other place appointed by him within such time, not being less than seven days after the receipt of the notice, as may be specified in the notice.

4. The failure of the parents or either of them to furnish information as required by this schedule in respect of any legitimated person shall not affect the legitimation of that person.

5. No fee for re-registration under this schedule shall be charged if the necessary information for the purpose is furnished within the time above specified; but in any other case there shall be charged in respect of such re-registration such fees, not exceeding in the aggregate ten shillings, as may be prescribed by regulations under this schedule.

6. This schedule shall be construed as one with the Births and Deaths Registration Acts, 1836 to 1901.

APPENDIX II.

STAMP DUTIES

PAYABLE ON OBTAINING GRANTS OF PROBATE AND ADMINISTRATION AND FORMS OF INLAND REVENUE AFFIDAVITS.

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Instructions as to estate duty in respect of persons dying after August 1, 1894 809

NOTE.—*The following instructions are issued by, and are reprinted here by the courtesy of, the Commissioners of Inland Revenue.*

INLAND REVENUE.

INSTRUCTIONS AS TO ESTATE DUTY IN RESPECT OF PROPERTY PASSING ON THE DEATHS OF PERSONS DYING AFTER AUGUST 1, 1894. FINANCE ACTS, 1894 TO 1925 (*a*).

OBSERVE.—(1) *The references in these Instructions are to the Finance Act, 1894, unless it is otherwise stated;* (2) *Throughout these Instructions read for "Great Britain":—*(i) *"the United Kingdom" when the death occurred before November* 22, 1921; *and* (ii) *"Great Britain and Ireland (exclusive of Northern Ireland)" when the death occurred between November* 21, 1921, *and April* 1, 1923.

CHARGE OF DUTY AND PROPERTY LIABLE.

1. Estate duty, except as expressly provided, is leviable upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person who dies after August 1, 1894. [See sections 1 and 24.]

2. Property so passing includes (*inter alia*) the following [see section 2]:—

Competent to dispose.

(i) Property of which the deceased was *competent to dispose* [see section 22, sub-section 2 (a)] at his death, whether he actually disposed of it by his will or not.

Donations. Gifts.

(ii) Donations *mortis causa*.

(iii) *Inter vivos* gifts of property made by the deceased within twelve months of his death without reservation, unless he died on or after April 30, 1909, in which case the period is three years instead of twelve months, exclusive of gifts which (1) were made before April 30, 1908, (2) were made for public or charitable purposes more than twelve months before the death, (3) were made in consideration of marriage, or (4) are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or (5) which, in the case of any donee, do not exceed in the aggregate

(*a*) As to the Finance Act, 1927, *vide post*, p. 816; note.

£100 in value or amount. [See Finance (1909-10) Act, 1910, s. 59.]

Gifts with reservation.

(iv) *Inter vivos* gifts made by the deceased at any time, whereof *bona fide* possession was not immediately taken and thenceforth retained to the entire exclusion of the deceased, but a benefit, either charged upon the property or not, was reserved or secured to the deceased by contract or otherwise, or a power or authority was reserved to the deceased, to restore to himself or to reclaim the absolute interest in such property, or in some part of it. Where, however, the deceased died on or after April 30, 1909, and the benefit reserved or secured to him is afterwards surrendered, so that the property forming the subject-matter of the gift is, subsequent to the date of such surrender, enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise for three years before his death, such property is not to be deemed to pass on his death. [See Finance (1909-10) Act, 1910, s. 59, sub-s. 3.]

Joint investments.

(v) Property which the deceased, having been absolutely entitled thereto, either by himself alone or by arrangement with some other person, caused to be transferred to or vested in himself and some other person jointly, either by disposition, purchase, investment, or otherwise, so that the beneficial interest in such property, or in some part thereof, passed or accrued by survivorship on his death to such other person.

Joint ownerships.

(vi) The deceased's severable share of property of which he was joint tenant or joint owner with another or with others.

Life interests.

(vii)—(a) Property which the deceased had an enjoyment of or interest in for life, or for some period determinable by reference to death under an express or an implied trust in a settlement made by the deceased by instrument *inter vivos*, or under an express or implied trust, created by the deceased in writing or otherwise.

(b) Where the deceased died after March 31, 1900, and before April 30, 1909, and he or any other person had an interest in property limited to cease on the deceased's death, and that interest was disposed of, whether for value or not, to or for the benefit of any person entitled to an interest in remainder or reversion in such property, then the property is nevertheless to be deemed to pass on the deceased's death, unless the disposition was *bona fide* made twelve months before the deceased's death and *bona fide* possession and enjoyment was immediately assumed thereunder, and thenceforward retained to the entire exclusion of the person who had the interest so limited to cease, and of any benefit to him by contract or otherwise. [See Finance Act, 1900, s. 11, sub-s. 1.]

(c) Where the deceased died on or after April 30, 1909, the period is three years, instead of twelve months, unless the interest was disposed of before April 30, 1908. [See Finance (1909-10) Act, 1910, s. 59, sub-s. 1.]

(d) Where the interest was disposed of by any person between August 15, 1914, and April 1, 1915, the provisions of section 11 of the Finance Act, 1900, as amended by section 59 of the Finance (1909-10) Act, 1910, are not to operate so as to make estate duty payable on the death of that person where it would not have been

payable but for the abolition of the relief in respect of settled property effected by section 14 of the Finance Act, 1914. [See Finance Act, 1914, s. 14 (c).]

(viii) Policies which the deceased effected on his life, and kept up wholly or partially for the benefit of a donee, whether nominee or assignee. Policies.

(ix) Annuities (other than [see section 15, sub-section 1] a single annuity not exceeding £25, or the first granted of two or more such annuities), or other interests, which the deceased, either by himself alone, or in concert or by arrangement with some other person, purchased or provided so that a benefit arose or accrued by survivorship or otherwise, on the death of the deceased. Annuities.

And (x) Property not comprised in any of the foregoing classes in which the deceased or some other person had an interest which ceased on the death of the deceased, to the extent to which a benefit accrued or arose by the cesser of such interest, but exclusive of property the interest in which, of the deceased or other person, was only an interest as holder of an office or recipient of the benefits of a charity, or as a corporation sole. Other property.

3. The expression "property" includes real property and personal property, and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale. [See section 22, sub-section 1 (f).] Definition of "property."

4. Property passing on the death includes property passing either immediately on the death, or after any interval, or at a period ascertainable only by reference to death, either certainly or contingently, and either originally or by way of substitutive limitation. [See section 22, sub-section 1 (l).]

5. A person is deemed *competent to dispose* of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos*, or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life of settled land, or as mortgagee. [See section 22, sub-section 2 (a).] Competent to dispose.

6. Money which a person has a general power to charge on property is deemed to be property of which he has power to dispose. [See section 22, sub-section 2 (c).]

7. Immoveable property situate out of Great Britain, devolving on death as such is not chargeable with estate duty. [See section 2, sub-section 2.] Foreign property.

8. Moveable property situate out of Great Britain is not chargeable with estate duty where the deceased was the owner and was domiciled *out* of Great Britain at the time of his death. It is chargeable where the deceased was the owner and was domiciled *in* Great Britain at the time of his death. It is also, speaking generally, chargeable where the deceased was only interested for life, and at his death the property formed the

subject of a British trust or was vested in a British trustee. [See section 2, sub-section 2.]

EXCEPTIONS [See also clauses 2 (iii) 2 (iv) and 2 (vii) (b), (c) and (d).]

Trust property.

9. Estate duty is not payable on property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death—that event occurring before April 30, 1909—where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise. [See section 2, sub-section 3.] Where, however, the deceased died on or after April 30, 1909, the period is three years, instead of twelve months, unless the trust was created before April 30, 1908. [See Finance (1909-10) Act, 1910, s. 59, sub-s. 1.]

10. Estate duty is not payable on property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes, or the falling into possession of the reversion on any lease for lives, or the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee. [See section 3, sub-section 1.] When any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration is allowed as a deduction from the value of the property. [See section 3, sub-section 2.]

Seamen and soldiers.

11. (i) Estate duty is not payable on the property of common seamen, marines, soldiers or airmen who are slain or die in His Majesty's service. [See section 8, sub-section 1.]

Persons killed in war, etc.

(ii) Where the deceased died from wounds inflicted, accidents occurring, or disease contracted within three years before death, while on active service against an enemy, or on service which is of a warlike nature, or which, in the opinion of the Treasury, otherwise involves the same risks as active service, and was a member of His Majesty's Forces and subject either to the Naval Discipline Act, or to military law under Part V of the Army Act, or to the Air Force Act, the Treasury may, on the recommendation of the Secretary of State or the Admiralty, afford total exemption from all death duties in respect of the first £5,000 worth of property passing to the widow and lineal relations or to brothers and sisters and their descendants, and, as to any excess over £5,000 which passed to such persons, the duty is to be discounted for a period equal to the normal expectation of life of the deceased at the time of his death. [See the Finance Act, 1924, s. 38.]

Indian pensions.

12. Estate duty is not payable on any pension or annuity payable by the Government of British India to the widow or

child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid. [See section 15, sub-section 3.]

Where probate or account duty paid.

13. (i) Estate duty is not payable on the death, *prior to August* 16, 1914, of the deceased, in respect of personal property settled by a will or disposition made by a person dying before August 2, 1894, in respect of which property, probate, inventory or account duty has been paid, or is payable, unless in either case the deceased, at the time of his death, or at any time since the will or disposition took effect had been competent to dispose of the property. [See section 21, sub-section 1.]

(ii) The exemption from estate duty in respect of settled personal property conferred by section 21, sub-section 1, of the Finance Act, 1894, is not, however, to apply where the death of the deceased occurs *after August* 15, 1914, unless the duties specified in that sub-section were paid or payable upon the death of one of the parties to a marriage, and the death after August 15, 1914, is that of the other party to the marriage. [See Finance Act, 1914, s. 14.]

Advowsons.

14. Estate duty is not payable in respect of any advowson. [See section 15, sub-section 4.]

Enlargement of interest.

15. Estate duty is not payable where a settlor, who is tenant for life, acquires by the death, on or after July 1, 1896, in his own lifetime, of a subsequent limited owner under the settlement, the immediate reversion, or an absolute power to dispose of the whole property. [See Finance Act, 1896, s. 14.]

Reverter to settlor.

16. Estate duty is not payable where property reverts to a settlor in his lifetime on the death, on or after July 1, 1896, of a person having a limited interest under a settlement provided that no other interest is created by the settlement, and that the person having the limited interest had not, prior to the disposition, been competent to dispose of the property. [See Finance Act, 1896, s. 15, sub-s. 1, 2 and 3.]

Husband and wife. [See also clause 13 (ii).]

17. Estate duty is not payable where the deceased was entitled in right of his wife to the rents of her real estate, and by his death, on or after July 1, 1896, she becomes entitled to the property in virtue of her former interest. [See Finance Act, 1896, s. 15, sub-s. 4.]

18. Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before August 2, 1894, and on his or her death the survivor becomes entitled to the *income* (as distinguished from the capital) of the property settled by such survivor, the estate duty is not payable in respect of that property until the death of the survivor. [See section 21, sub-section 5.]

Gifts to nation, etc. [See also clause 27.]

19. The Treasury may remit the duty on such pictures, prints, books, manuscripts, works of art, or scientific collections, as appear to them to be of national, scientific or historic interest, and given for national purposes, or to any university, or to any

county council or municipal corporation. [See section 15, sub-section 2.]

Objects of national, etc., interest. [See also clause 28.]

20. (i) Objects of national, scientific, or historic interest, admitted by the Treasury to be such, passing on a death on or after July 1, 1896, and before April 30, 1909, and "settled" so as to be enjoyed in succession in kind only, are not to be charged with estate duty until they are actually sold, or are in the possession of some person competent to dispose of them. [See Finance Act, 1896, s. 20, sub-s. 1.]

(ii) Where the deceased died on or after April 30, 1909, any property—"settled" or not—passing on his death which consists of such pictures, prints, books, etc., not yielding income as appear to the Treasury to be of national, scientific, historic or artistic interest is only chargeable with estate duty when the property is sold, and then only in respect of the last death on which the property passed. [See Finance (1909-10) Act, 1910, s. 63.] But sales, on or after August 4, 1921, of such objects to certain national or public institutions are exempted from the charge of duty. [See Finance Act, 1921, s. 44.]

☞ *If it is desired to obtain the benefit referred to in clause* 19 *or clause* 20, *application should be made to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.*2. *The application should be accompanied by a schedule setting forth the particulars and value of the articles, together with a reference to the section or sections under which exemption is sought. If the articles (or any of them) have been sold, the date of the sale and the gross amount realised should be stated.*

If the application falls to be made under the provisions of section 20, *sub-section* 1, *of the Finance Act,* 1896, *it should, in addition, disclose whether the articles are in the possession of a person competent to dispose thereof.*

Timber, trees, wood and underwood.

21. Where an estate, in respect of which estate duty is payable on the death of a person dying on or after April 30, 1909, comprises land on which timber, trees, wood, or underwood are growing, the value of such timber, trees, wood, or underwood is not to be taken into account in estimating the principal value of the estate or the rate of estate duty, and estate duty is not payable on such value, but the estate duty, at the rate due to the principal value of the estate, is payable on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of timber, trees or wood when felled or cut during the period which may elapse until the land, on the death of some other person, again becomes liable to estate duty.

The owners or trustees of the land are to account for and pay the duty as and when the moneys are received, together with interest [see clause 53] from the date of receipt.

If, however, the timber, trees or wood are sold at any time, either with or apart from the land on which they are growing,

estate duty is payable upon the principal value thereof, as at the death of the deceased, after deducting any estate duty already paid upon the proceeds of the sale of any timber felled and sold since that date. [See Finance Act, 1912, s. 9, and Finance (1909-10) Act, 1910, s. 61, sub-s. 5.]

Where estate duty not twice payable under same settlement.

22. (i) If estate duty has already been paid in respect of settled property since the date of the settlement, neither it nor the settlement estate duty is again payable in respect thereof, *where the deceased died before August* 16, 1914, unless he was, at the time of his death, or had been at any time during the continuance of the settlement, *competent to dispose* [see section 22, sub-section 2 (a)] thereof [see section 5, sub-section 2], and unless the deceased, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property. [See Finance Act, 1898, s. 13.]

Abolition of relief in respect of settled property.

(ii) The exemption from a second or subsequent estate duty in respect of settled property conferred by section 5, sub-section 2, of the Finance Act, 1894, is not, however, to apply *where the death of the deceased occurs after August* 15, 1914, unless the estate duty has been paid upon the death of one of the parties to a marriage, and the death after August 15, 1914, is that of the other party to the marriage. [See Finance Act, 1914, s. 14.]

Limitation of relief from estate duty in respect of settled property.

23. (i) In the case of persons dying on or after April 30, 1909, and before August 16, 1914, the payment of or liability to duty in respect of an interest in expectancy in any settled property, whether the payment was made or the liability attached before, on, or after that date, is not to be deemed to be a payment of or liability to duty in respect of the settled property itself, so as to obtain the relief from estate duty conferred by section 5, sub-section 2, or section 21, sub-section 1, of the Finance Act, 1894, unless the owner of the expectant interest was himself the settlor of the property. [See Finance (1909-10) Act, 1910, s. 55.]

(ii) The relief so conferred by section 5, sub-section 2, and section 21, sub-section 1 of the Finance Act, 1894, is withdrawn in the case of any person dying after August 15, 1914. [See Finance Act, 1914, s. 14.]

Where interest fails before possession and settlement continues.

24. In the case of settled property where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property is not deemed to pass on his death. [See section 5, sub-section 3.]

Aggregation [See also clauses 11 (ii), 21 and 50.]

25. (i) For determining the rate of estate duty to be paid in respect of any property passing on the deceased's death, all property so passing, in respect of which estate duty is leviable, is to be aggregated so as to form one estate, and the duty is to be levied at the proper rate on the principal value thereof. Provided that any property so passing in which the deceased

never had an interest, or which, under a disposition not made by the deceased, passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or descendant of the deceased, is not to be aggregated with any other property, but is to be an estate by itself, and the estate duty is to be levied at the proper rate on the principal value thereof, but if any benefit under such a disposition is reserved or given to the wife or husband or a lineal ancestor or descendant of the deceased, such benefit is to be aggregated with property of the deceased for the purpose of determining the rate of estate duty. [See section 4.]

(ii) But where the deceased died on or after April 9, 1900, the exclusion of property from aggregation under section 4 of the Finance Act, 1894, no longer has effect, except as regards property in which the deceased never had an interest. [See Finance Act, 1900, s. 12, sub-s. 1.]

(iii) *Settled* property, however, where the disponer died on or before August 1, 1894, and such property, if he had died after that date, would have been chargeable with estate duty on *his* death, is only to be aggregated on a death after April 8, 1900, and prior to April 19, 1907, to a limited extent. The rate of duty upon such settled property, treated as an "estate by itself," or upon any other property aggregable therewith, by force of section 4 of the Finance Act, 1894, as amended, is not to be enhanced, by reason of such aggregation, more than one-half per cent. [See Finance Act, 1900, s. 12, sub-s. 2.] For a definition of "settled property" see clause 29 (iii). Property over which the deceased had, and exercised, an absolute power of appointment, is considered to be liable to full, and not limited, aggregation. In the case of persons dying on or after April 19, 1907, any *settled* property which would, under sub-section 2 of section 12 of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, is, for the purposes of the principal Act, instead of being so aggregated, to be treated as an estate by itself. [See Finance Act, 1907, s. 16 (*a*).]

Small estates.

[See also clauses 67, 68 and 71.]

26. Where the net value of the property, real and personal, in respect of which estate duty is payable on the death of the deceased—where the death occurs *at any time after* August 1, 1894—including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely, but exclusive of other property settled otherwise than by the will of the deceased, does not exceed £1,000, such property is not to be aggregated with any other property, but is to form an estate by itself. [See section 16, sub-section 3.]

Gifts to nation.

27. Gifts of pictures, prints, books, manuscripts, works of art and scientific collections, of national, scientific, or historic

(*a*) While this book was passing through the press, the Finance Act, 1927, became law, and by section 51 of that Act, property formerly an "estate by itself" under section 16 of the Finance Act, 1907, is rendered liable to full aggregation.

interest, given for national purposes, or to any university, or to any county council or municipal corporation, the estate duty whereon has been remitted by the Treasury, are not to be aggregated with any other property. [See section 15, sub-section 2.] [See also clause 19.]

28. (i) Objects of national, scientific, or historic interest, admitted by the Treasury to be such, as passing on a death on or after July 1, 1896, and before April 30, 1909, and "settled" so as to be enjoyed in succession in kind only, are to form an "estate by itself." [See Finance Act, 1896, s. 20, sub-s. 1.] Objects of national, etc., interest. [See also clause 20.]

(ii) Where the deceased died on or after April 30, 1909, any property—"settled" or not—passing on his death which consists of such pictures, prints, books, etc., not yielding income as appear to the Treasury to be of national, scientific, historic, or artistic interest is not to be aggregated with other property, but is to form an "estate by itself." [See Finance (1909-10) Act, 1910, s. 63.]

29. (i) Where property, in respect of which estate duty is leviable *upon the death of a person dying before May* 12, 1914, is settled by the will of the deceased or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not *competent to dispose* [see section 22, sub-section 2 (a)] of the property, a further estate duty called "settlement estate duty" is leviable upon the principal value of the settled property, except where the only life interest in such property, after the deceased's death, is that of the husband or wife of the deceased [see section 5, sub-section 1 (a)], or where the disposition took effect before August 2, 1894 [see section 21, sub-section 4], or, under the deceased's will, where the net value of the property in respect of which estate duty is leviable on the death of the deceased, exclusive of property settled otherwise than by the deceased's will does not exceed £1,000. [See section 16, sub-section 3.] SETTLEMENT ESTATE DUTY. [See also clause 56.]

(ii) Where on a death on or after July 1, 1898, and before May 12, 1914, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property is to be repaid. [See Finance Act, 1898, s. 14.]

(iii) "Settled property" is property comprised in a "settlement" [see section 22, sub-section 1 (h)], and a "settlement" is any instrument which is a settlement within the meaning of section 2 of the Settled Land Act, 1882, *or* if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. [See section 22, sub-section 1 (i).]

(iv) *In the case of any person dying after May* 11, 1914, settlement estate duty is not to be levied. [See Finance Act, 1914, s. 14.] Abolition of settlement estate duty.

30. The settlement estate duty leviable in respect of personal property settled by the deceased's will (unless the will contains an express provision to the contrary), is, *where the deceased died on or after July* 1, 1896, *and before May* 12, 1914,

to be payable out of the settled property in exoneration of the rest of the deceased's estate. [See Finance Act, 1896, s. 19, sub-s. 1.]

Crown entails. See also clause 39.]

31. Where lands or chattels are so settled by Act of Parliament or Royal grant that no one of the persons successively entitled can alienate the same, settlement estate duty is not payable. [See section 5, sub-section 5.]

Deduction of stamp duty paid on settlement.

32. The *ad valorem* stamp duty (if any) charged on a settlement may be deducted from the settlement estate duty (if any) payable thereunder [see section 5. sub-section 4], but the settlement must be produced in support of the deduction.

Accountable persons. Executor.

33. (i) The executor of the deceased is to pay the estate duty in respect of all personal property, wheresoever situate, of which the deceased was *competent to dispose* [see section 22, sub-section 2 (a)] at his death, except [see Finance Act, 1896, s. 20, sub-s. 2] such objects of national, etc., interest as are within clause 20 above, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty on any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty thereon request him to make such payment. [See section 6, sub-section 2, and section 8, sub-section 3.] The executor is not liable for any estate duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. [See section 8, sub-section 3.] The settlement estate duty (if any) [see clause 29 (iv)] leviable in respect of any personal property "settled" by the deceased's will, is to be collected upon an account to be delivered by the executor within six months after the death. [See Finance Act, 1896, s. 19, sub-s. 2.]

(ii) Where the deceased died on or after January 1, 1926, the executor is also accountable for the estate duty which may become leviable or payable in respect of land in England and Wales (including settled land) which devolves upon him by virtue of any statute or otherwise. [See Law of Property Act, 1925, s. 16, sub-s. 1.]

Other persons accountable.

34. (i) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty thereon, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the estate duty on the property. [See section 8, sub-section 4.] [See also clauses 20 and 21.]

(ii) Where the deceased died on or after January 1, 1926, and the executor is not accountable for the estate duty in respect of land in England and Wales, the estate owner (other than a purchaser who acquires a legal estate after the charge for death

duties has attached and free from such charge) is accountable. [See Law of Property Act, 1925, s. 16, sub-s. 2.]

Purchaser without notice.

35. A *bona fide* purchaser for valuable consideration without notice is not liable to or accountable for duty. [See section 8, sub-section 18.]

An account to be delivered.

36. Estate duty, so far as not paid by the executor, is collected upon an account setting forth the particulars of the property. It is to be delivered to the Commissioners of Inland Revenue within six months after the death by the person accountable for the duty. [See section 6, sub-section 4.] [See also clauses 20 and 21.]

Principal value. [See also clause 68.]

37. (i) Where the deceased died before April 30, 1909, the principal value of any property passing on that event is the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death. Provided that, in the case of any agricultural property, *i.e.*, agricultural land, pastures, and woodland, and such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property [see section 22, sub-section 1 (g)]—where no part of the principal value is due to the expectation of an increased income from such property—the principal value shall not exceed twenty-five times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed. [See section 7, sub-section 5.]

(ii) Where, however, the deceased died on or after April 30, 1909, the Commissioners, in estimating the principal value of any property, are to fix the price according to the market price at the time of the death, without allowing any reduction on the ground that the whole property is to be placed on the market at one and the same time, unless it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, in which case, such depreciation is to be taken into account. [See Finance (1909-10) Act, 1910, s. 60. See also section 18 of Finance Act, 1911, which declares that, in estimating, for the purposes of section 7, sub-section 5 of the Finance Act, 1894, the principal value of any agricultural property which comprises cottages occupied by persons employed solely for agricultural purposes in connection with the property, no account is to be taken of any value attributable to the fact that the cottages are suitable for the residential purposes of any persons other than agricultural labourers or workmen on the estate.]

Agricultural property.

(iii) When the deceased died on or after June 30, 1925, the estate duty payable in respect of agricultural property is charged on the agricultural value thereof at the appropriate rate under the scale of rates in the Finance Act, 1919, and on any amount by which the principal value exceeds the agricultural value (called the excess principal value) at the appropriate rate under

the scale in the Finance Act, 1925. [See Finance Act, 1925, s. 23.]

Cesser of an interest.

38. The value of the benefit accruing or arising on the death of a deceased person from the cesser of an interest in any property is the principal value of the property where the interest extended to the whole income of the property, but where it extended to less than the whole income it is the principal value of an addition to the property equal to the income to which the interest extended. [See section 7, sub-section 7.]

Crown entails. [See also clause 31.]

39. Where lands or chattels are so settled by Act of Parliament or royal grant that no one of the persons successively entitled can alienate the same, the property passing on the death of any person in possession thereof is the interest of his successor, and the value is the life interest value as for succession duty. [See section 5, sub-section 5, and the Succession Duty Act, 1853, s. 21.] The duty may, however, at the option of the person authorised or required to pay the same, be treated as a charge on and be raised and paid out of the corpus of such lands or chattels. [See Finance Act, 1922, s. 44.]

Administration expenses of property out of Great Britain.

40. Where the Commissioners are satisfied that any additional expense in administering or in realising foreign property has been incurred by reason of the property being situate out of Great Britain, an allowance for such expense not exceeding 5 per cent. on the value of the property is made. [See section 7, sub-section 3.]

Foreign duty.

41. Where the Commissioners are satisfied that by reason of the deceased's death any duty in respect of foreign property is payable in the country where the property is situate, an allowance of the amount of the duty is made from the value of the property. [Section 7, sub-section 4.]

Income and interest.

42. Every estate is to include all income upon the property included therein down to and outstanding at the date of the deceased's death. [See section 6, sub-section 5.]

Funeral expenses and debts.

43. Allowance against the gross principal value of an estate is made for reasonable funeral expenses and for debts and incumbrances (including mortgages or terminable charges [see section 22, sub-section 1 (k)]) incurred or created by the deceased *bona fide* for full consideration in money or money's worth wholly for his own use and benefit, and which take effect out of his interest. [See section 7, sub-section 1 (a).]

Apportionment of mortgage debts, etc., on agricultural property.

44. Where any agricultural property is subject to a mortgage, debt or incumbrance in respect of which an allowance is to be made for estate duty purposes, such mortgage, debt or incumbrance, where the deceased died on or after June 30, 1925, is to be apportioned between the agricultural value and the excess principal value for the purposes of the Finance Act, 1925, s. 23, sub-s. 1. [See the Finance Act, 1925, s. 23, sub-s. 3.]

Limitation on debts deductible.

45. Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy in any property passing or deemed to pass on death, and any person whose

interest in expectancy is so purchased, acquired or extinguished becomes entitled to any interest in such property, either under any disposition made by the deceased, or under his intestacy or through devolution of law from him, the value of the estate of the deceased for the purpose of estate duty is, where he died on or after April 29, 1910, to be determined without allowance in respect of such debt or incumbrance, and any property charged therewith is to be deemed to pass freed therefrom.

Provided that—

(i) If part only of the debt or incumbrance was incurred or created for the purpose or consideration stated, this section is to apply only to that part, and

(ii) If a person whose interest in expectancy in the property so purchased, acquired or extinguished becomes entitled to an interest in a part only of that property, this section is to apply only to the same fractional part of the debt or incumbrance as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property. [See Finance (1909-10) Act, 1910, s. 57.]

Debts in respect whereof reimbursement claimable.

46. No allowance can be made for any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained. [See section 7, sub-section 1 (b).]

Foreign debts.

47. An allowance is not made in the first instance for debts due from the deceased to persons resident out of Great Britain unless contracted to be paid in Great Britain or charged on property situate within Great Britain, except out of the value of any personal property of the deceased situate out of Great Britain on which estate duty is paid. No repayment of estate duty is made in respect of any such debts except to the extent to which the personal property of the deceased situate out of Great Britain is shown to be insufficient for their payment. [See section 7, sub-section 2.]

Interests in expectancy.

48. Where an estate includes an interest in expectancy (and this expression covers an estate in remainder or reversion and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases [see section 22, sub-section 1 (j)]), estate duty in respect of that interest is to be paid, at the option of the person accountable for the duty, either with the duty on the rest of the estate or when the interest falls into possession. [See section 7, sub-section 6.] If the duty is not paid with the estate duty on the rest of the estate, then for the purpose of determining the rate of estate duty in respect of the rest of the estate, the value of the interest is to be its value at the date of the death of the deceased. [See section 7, sub-section 6 (a).] The rate of estate duty upon the interest when it falls into possession is to be calculated according to its value at that time, together with the value of the rest of the estate as previously ascertained. [See section 7, sub-section 6 (b).]

Commutation on interest in expectancy.

49. The Commissioners, in their discretion, upon application by a person entitled to an interest in expectancy, may commute the estate duty which would or might, but for the commutation,

become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum they will put a present value upon that duty, regard being had to the contingencies affecting the liability to, and rate and amount of, such duty. [See section 12.]

Where interest in expectancy sold or mortgaged. [See also clause 25.]

50. (i) Where an interest in expectancy has, before August 2, 1894, been *bona fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance Act, 1894, had not passed. In the case of a mortgage, any higher duty payable by the mortgagor is to rank as a charge subsequent to that of the mortgagee. [See section 21, sub-section 3.]

(ii) Each of the undermentioned Finance Acts contains a similar provision as to interests in expectancy *bona fide* sold or mortgaged for full consideration in money or money's worth before a date stated in the appropriate section, as follows:—

Finance Act, 1900, s. 12, sub-s. 1 (proviso), April 9, 1900;
Finance Act, 1907, s. 12 (proviso), April 19, 1907;
Finance (1909-10) Act, 1910, s. 64, April 30, 1909;
Finance Act, 1914, s. 16, May 11, 1914;
Finance Act, 1919, s. 29 (proviso), April 30, 1919;
Finance Act, 1925, s. 22 (proviso), April 28, 1925.

When duty is due.

51. The duty, which is to be collected upon an Inland Revenue affidavit or account, is due on the delivery thereof, or at the expiration of six months from the death, whichever first happens. [See section 6, sub-section 7.] [See also clauses 20, 21 and 56.]

Payment of additional duty.

52. Estate duty is, in the first instance, calculated at the appropriate rate according to the value of the estate, as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little has been paid, the additional duty is payable, and is treated as duty in arrear. [See section 8, sub-section 7.]

Interest on duty. [See also clauses 20 and 21.]

53. Simple interest at 4 per cent. per annum, when accruing due on or after July 31, 1919, or at 3 per cent. per annum when accruing due prior to that date, without deduction for income tax, is payable upon all estate duty from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any later date than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty. [See Finance Act, 1896, s. 18, sub-s. 1, as amended by Finance Act, 1919, s. 30.]

Interest on fixed duty.

54. When the fixed duty of 30s. or 50s. under section 16 is paid within twelve months after the death of the deceased, interest is not charged. [See section 16, sub-section 5.]

Instalments on real property.

55. The estate duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest [see clause 53] from the date at which the first instalment is due, and the first instalment is to be due at the expiration of twelve months from the death, and the interest

on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and, in case the property is sold, is to be paid on completion of the sale, and if not so paid, is to be duty in arrear. On a conveyance of a legal estate in land in England and Wales by way of exchange or legal mortgage, any outstanding instalments of estate duty, in respect of the land dealt with, are similarly at once payable. [See Finance Act, 1894, s. 6, sub-s. 8, Law of Property Act, 1925, s. 17, sub-s. 3, and Land Registration Act, 1925, s. 73, sub-s. 6.]

Power to transfer land in satisfaction of duty.

56. The Commissioners may, if they think fit, on the application of any person liable to pay estate duty or settlement estate duty in respect of any real (including leasehold) property, passing on a death occurring on or after April 30, 1909, accept in satisfaction of the whole or any part of such duties, such part of the property as may be agreed upon between the Commissioners and that person. [See Finance (1909-10) Act, 1910, s. 56, sub-s. 1.]

Instalments on annuities.

57. The estate duty in respect of any annuity or other definite annual sum referred to in section 2, sub-section 1 (d) of the Finance Act, 1894, may be paid by four equal yearly instalments, the first to be due twelve months after the death. Interest on the whole unpaid duty is to be added to the second and subsequent instalments. [See Finance Act, 1896, s. 16.]

Deduction of duty paid out of Great Britain.

58. (i) In the case of moveable property situate in a British possession, and passing on the death of a person dying domiciled in Great Britain, if any duty in respect thereof is payable in the British possession, a sum equal to the amount of that duty is to be deducted from the estate duty payable in respect of that property on the same death; but only where by the law of such possession either no duty is chargeable in respect of property situate in Great Britain when passing on death, or a like allowance as against the duty chargeable in such possession is made in respect of any duty payable in Great Britain. This provision only applies to such British possessions as are from time to time brought within its scope by Order in Council. [See section 20.]

(ii) The section is operative in regard to the following possessions:—Australia (Commonwealth), Australia (South), Australia (Western), Bahamas, Barbadoes, Bermudas, British Columbia, British Guiana, Ceylon, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Grenada, Hong Kong, India (not including the Feudatory Native States), Jamaica, Leeward Islands, Manitoba, Mauritius, New Brunswick, Newfoundland, New South Wales, New Zealand, Nigeria, Nova Scotia, Ontario, Papua, Quebec, Saint Lucia, Sierra Leone, Straits Settlements, Tasmania, Trinidad and Tobago, Victoria and the Yukon Territory (Dominion of Canada).

(iii) Under the Foreign Jurisdiction Act, 1913, the section is also operative in regard to:—East Africa Protectorate (now Kenya), Gambia Protectorate, Nyasaland Protectorate, Southern Rhodesia, Swaziland, Uganda Protectorate, Weihaiwei, Zanzibar.

(iv) In the case of deaths since November 21, 1921, where estate duty is payable in Northern Ireland in respect of property there situate an allowance may be claimed of a sum equal to the amount of that duty against the estate duty payable in Great Britain in respect of that property on the same death. [See Government of Ireland Act, 1920, s. 28.]

(v) Where estate duty is payable in the Irish Free State by reason of a death of a person dying on or after April 1, 1923, in respect of any property situate in the Irish Free State and passing on such death, a sum equal to the amount of that duty is allowed to be deducted from the estate duty payable in Great Britain in respect of that property on the same death. [See the Irish Free State (Consequential Provisions) Act, 1922, s. 5, and Part II of the Schedule to the Relief in respect of Double Taxation (Irish Free State) Declaration, 1923.]

Deduction in respect of prior duties.

59. (i) Deduction against the estate duty payable on a death, on or after July 1, 1896, in respect of settled property, may be taken in respect of any of the following duties, which, prior to August 2, 1894, had been paid, or were payable, under the settlement upon the capital of the property in respect of which the estate duty is payable, *viz.*, the additional succession duties, under section 21 of the Customs and Inland Revenue Act, 1888, the temporary estate duties under sections 5 and 6 of the Customs and Inland Revenue Act, 1889, and the one per cent. legacy and succession duties. [See Finance Act, 1896, s. 21.] But section 15 of the Finance Act, 1907, enacts that the deduction, instead of being the amount of the duty paid or payable, is to be the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable; provided that, if as respects any such deduction the person by whom the duty is payable requires the Commissioners, *on the first delivery of his account*, to calculate the deduction as if this section had not passed, the deduction is to be so calculated.

Allowance of settlement estate duty paid.

(ii) On the first occasion on which estate duty becomes payable upon a death since August 15, 1914, in respect of any property—which duty would not have been payable but for the abolition of settlement estate duty and of relief in respect of settled property—any settlement estate duty which has been paid in respect of that property is to be allowed against the amount of estate duty payable on that occasion, and if it exceeds that amount, the excess is to be repaid to the estate; and, in addition, a sum equal to simple interest on the amount of the settlement estate duty, calculated at the rate of 3 per cent. per annum from August 15, 1914, up to the date of the occasion is to be paid, according to their respective interests, to the several persons or their representatives who would have been entitled to the income arising from that amount, if on August 15, 1914, it had been added to the capital of the settled property. [See Finance Act, 1914, s. 14 (b).]

Payment of interest on settlement estate duty to representatives of life tenants.

MISCELLANEOUS.

Executor to disclose estate.

60. The executor of the deceased is, to the best of his knowledge and belief, to specify in appropriate accounts annexed to the Inland Revenue affidavit *all* the property in respect of which

estate duty is payable upon the death of the deceased, whether he is or is not accountable for the duty thereon. [See section 8, sub-section 3.]

Production of books, etc.

61. Accounts and statements are to be verified on oath, and by production of all necessary books and documents. [See section 8, sub-section 14.]

Power of Commissioners to call for accounts.

62. Every person accountable for estate duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate of the deceased or of the income thereof, is, to the best of his knowledge and belief, if required by the Commissioners, to deliver to them and verify a statement of such particulars, and evidence as they require, relating to any property which they have reason to believe to form part of an estate, in respect of which estate duty is leviable on the death of the deceased. [See section 8, sub-section 5.]

Penalties.

63. Penalties are provided for the wilful failure to deliver accounts or to comply with the requirements which the Commissioners are empowered to make. [See section 8, sub-sections 6 and 14.]

Rates of estate duty.

64. (i) In the case of persons dying on or after August 2, 1894, and before April 19, 1907, the rates of estate duty are according to the following scale. [See section 17.]

Principal Value of the Estate.										Rate per cent.
	£								£	£
				Does	not	exceed			100	0
Exceeds	100	and	does	not	exceed				500	1
,,	500		,,			,,			1,000	2
,,	1,000		,,			,,			10,000	3
,,	10,000		,,			,,			25,000	4
,,	25,000		,,			,,			50,000	4½
,,	50,000		,,			,,			75,000	5
,,	75,000		,,			,,			100,000	5½
,,	100,000		,,			,,			150,000	6
,,	150,000		,,			,,			250,000	6½
,,	250,000		,,			,,			500,000	7
,,	500,000		,,			,,			1,000,000	7½
,,	1,000,000	...	...	...	...	...	...	...	...	8

(ii) In the case of settled property passing on a death on or after April 9, 1900, and before April 19, 1907, where the disponer died on or before August 1, 1894, and such property, if he had died after that date, would have been chargeable with estate duty on his death, the amended law as to aggregation, stated in clause 25 (iii) above, may result in the rates of duty on the settled property, treated as an "estate by itself," and on property aggregable therewith, being raised one-half per cent., except in the case of the 8 per cent. rate.

(iii) In the case of persons dying on or after April 19, 1907, and before April 30, 1909, the rates of estate duty are according to the following scale. [See Finance Act, 1907, s. 12, and the First Schedule to that Act.]

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Does not exceed	100	0
Exceeds	100	and does not exceed	500	1
,,	500	,, ,,	1,000	2
,,	1,000	,, ,,	10,000	3
,,	10,000	,, ,,	25,000	4
,,	25,000	,, ,,	50,000	4½
,,	50,000	,, ,,	75,000	5
,,	75,000	,, ,,	100,000	5½
,,	100,000	,, ,,	150,000	6
,,	150,000	,, ,,	250,000	7
,,	250,000	,, ,,	500,000	8
,,	500,000	,, ,,	750,000	9
,,	750,000	,, ,,	1,000,000	10
,,	1,000,000	,, ,,	1,500,000	£10 on 1 million and £11 on the remainder
,,	1,500,000	,, ,,	2,000,000	£10 on 1 million and £12 on the remainder
,,	2,000,000	,, ,,	2,500,000	£10 on 1 million and £13 on the remainder
,,	2,500,000	,, ,,	3,000,000	£10 on 1 million and £14 on the remainder
,,	3,000,000	... ...		£10 on 1 million and £15 on the remainder

(iv) In the case of persons dying on or after April 30, 1909, and before August 16, 1914, the rates of estate duty are according to the following scale. [See Finance (1909-10) Act, 1910, s. 54, and the Second Schedule to that Act.]

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Does not exceed	100	0
Exceeds	100	and does not exceed	500	1
,,	500	,, ,,	1,000	2
,,	1,000	,, ,,	5,000	3
,,	5,000	,, ,,	10,000	4
,,	10,000	,, ,,	20,000	5
,,	20,000	,, ,,	40,000	6
,,	40,000	,, ,,	70,000	7
,,	70,000	,, ,,	100,000	8
,,	100,000	,, ,,	150,000	9
,,	150,000	,, ,,	200,000	10
,,	200,000	,, ,,	400,000	11
,,	400,000	,, ,,	600,000	12
,,	600,000	,, ,,	800,000	13
,,	800,000	,, ,,	1,000,000	14
,,	1,000,000	... ...		15

(v) In the case of persons dying on or after August 16, 1914, and before July 31, 1919, the rates of estate duty are according to the following scale. [See Finance Act, 1914, s. 12, and the First Schedule to that Act.] The values below which section 13, sub-section 1 of the Finance Act, 1914, comes into operation are also shown. [See clause 66 (iv).]

Principal Value of the Estate.				Rate per cent.	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation.		
£			£	£	£	s.	d.
	Does not exceed		100	0			
Exceeds 100	and does not exceed		500	1	101	0	3
,, 500	,,	,,	1,000	2	505	2	1
,, 1,000	,,	,,	5,000	3	1,010	6	3
,, 5,000	,,	,,	10,000	4	5,052	1	8
,, 10,000	,,	,,	20,000	5	10,105	5	4
,, 20,000	,,	,,	40,000	6	20,212	15	4
,, 40,000	,,	,,	60,000	7	40,430	2	2
,, 60,000	,,	,,	80,000	8	60,652	3	6
,, 80,000	,,	,,	100,000	9	80,879	2	6
,, 100,000	,,	,,	150,000	10	101,111	2	3
,, 150,000	,,	,,	200,000	11	151,685	7	11
,, 200,000	,,	,,	250,000	12	202,272	14	7
,, 250,000	,,	,,	300,000	13	252,873	11	4
,, 300,000	,,	,,	350,000	14	303,488	7	6
,, 350,000	,,	,,	400,000	15	354,117	13	0
,, 400,000	,,	,,	500,000	16	404,761	18	2
,, 500,000	,,	,,	600,000	17	506,024	2	0
,, 600,000	,,	,,	800,000	18	607,317	1	6
,, 800,000	,,	,,	1,000,000	19	809,876	10	11
,, 1,000,000	... ...			20	1,012,500	0	0

(vi) In the case of persons dying on or after July 31, 1919, and before June 30, 1925, the rates of estate duty are according to the following scale. [See Finance Act, 1919, s. 29, and the Third Schedule to that Act.]

Principal Value of the Estate.				Rate per cent.	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation.		
£			£	£	£	s.	d.
	Does not exceed		100	0			
Exceeds 100	and does not exceed		500	1	101	0	3
,, 500	,,	,,	1,000	2	505	2	1
,, 1,000	,,	,,	5,000	3	1,010	6	3
,, 5,000	,,	,,	10,000	4	5,052	1	8
,, 10,000	,,	,,	15,000	5	10,105	5	4
,, 15,000	,,	,,	20,000	6	15,159	11	6
,, 20,000	,,	,,	25,000	7	20,215	1	1
,, 25,000	,,	,,	30,000	8	25,271	14	9
,, 30,000	,,	,,	40,000	9	30,329	13	2
,, 40,000	,,	,,	50,000	10	40,444	8	11
,, 50,000	,,	,,	60,000	11	50,561	16	0
,, 60,000	,,	,,	70,000	12	60,681	16	5
,, 70,000	,,	,,	90,000	13	70,804	12	0
,, 90,000	,,	,,	110,000	14	91,046	10	3
,, 110,000	,,	,,	130,000	15	111,294	2	5
,, 130,000	,,	,,	150,000	16	131,547	12	5
,, 150,000	,,	,,	175,000	17	151,807	4	7
,, 175,000	,,	,,	200,000	18	177,134	3	0
,, 200,000	,,	,,	225,000	19	202,469	2	9
,, 225,000	,,	,,	250,000	20	227,812	10	0
,, 250,000	,,	,,	300,000	21	253,164	11	2
,, 300,000	,,	,,	350,000	22	303,846	3	1
,, 350,000	,,	,,	400,000	23	354,545	9	2
,, 400,000	,,	,,	450,000	24	405,263	3	2
,, 450,000	,,	,,	500,000	25	456,000	0	0
,, 500,000	,,	,,	600,000	26	506,756	15	2

TABLE (vi)—*continued.*

Principal Value of the Estate.	Rate per cent.	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation.
£ £	£	£ s. d.
Exceeds 600,000 and does not exceed 800,000	27	608,219 3 7
,, 800,000 ,, ,, 1,000,000	28	811,111 2 3
,, 1,000,000 ,, ,, 1,250,000	30	1,028,571 8 7
,, 1,250,000 ,, ,, 1,500,000	32	1,286,764 14 2
,, 1,500,000 ,, ,, 2,000,000	35	1,569,230 15 5
,, 2,000,000	40	2,166,666 13 4

(vii) In the case of persons dying on or after June 30, 1925, the rates of estate duty are according to the following scale. [See Finance Act, 1925, s. 22, and the Fourth Schedule to that Act.]

Principal Value of the Estate.	Rate per cent.	Values below which s. 13 (1) of the Finance Act, 1914, comes into operation.
£ £	£	£ s. d.
Does not exceed 100	0	
Exceeds 100 and does not exceed 500	1	101 0 3
,, 500 ,, ,, 1,000	2	505 2 1
,, 1,000 ,, ,, 5,000	3	1,010 6 3
,, 5,000 ,, ,, 10,000	4	5,052 1 8
,, 10,000 ,, ,, 12,500	5	10,105 5 4
,, 12,500 ,, ,, 15,000	6	12,632 19 7
,, 15,000 ,, ,, 18,000	7	15,161 5 10
,, 18,000 ,, ,, 21,000	8	18,195 13 1
,, 21,000 ,, ,, 25,000	9	21,230 15 5
,, 25,000 ,, ,, 30,000	10	25,277 15 7
,, 30,000 ,, ,, 35,000	11	30,337 1 7
,, 35,000 ,, ,, 40,000	12	35,397 14 7
,, 40,000 ,, ,, 45,000	13	40,459 15 5
,, 45,000 ,, ,, 50,000	14	45,523 5 2
,, 50,000 ,, ,, 55,000	15	50,588 4 9
,, 55,000 ,, ,, 65,000	16	55,654 15 3
,, 65,000 ,, ,, 75,000	17	65,783 2 8
,, 75,000 ,, ,, 85,000	18	75,914 12 9
,, 85,000 ,, ,, 100,000	19	86,049 7 8
,, 100,000 ,, ,, 120,000	20	101,250 0 0
,, 120,000 ,, ,, 140,000	21	121,518 19 9
,, 140,000 ,, ,, 170,000	22	141,794 17 6
,, 170,000 ,, ,, 200,000	23	172,207 15 11
,, 200,000 ,, ,, 250,000	24	202,631 11 7
,, 250,000 ,, ,, 325,000	25	253,333 6 8
,, 325,000 ,, ,, 400,000	26	329,391 17 11
,, 400,000 ,, ,, 500,000	27	405,479 9 1
,, 500,000 ,, ,, 750,000	28	506,944 8 11
,, 750,000 ,, ,, 1,000,000	29	760,563 7 8
,, 1,000,000 ,, ,, 1,250,000	30	1,014,285 14 4
,, 1,250,000 ,, ,, 1,500,000	32	1,286,764 14 2
,, 1,500,000 ,, ,, 2,000,000	35	1,569,230 15 5
,, 2,000,000	40	2,166,666 13 4

Rates of settlement estate duty.

65. (i) The rate of settlement estate duty leviable in respect of "settled property" is one per cent. where the deceased died after August 1, 1894, and before April 30, 1909. [See section 17.]

(ii) In the case of persons dying on or after April 30, 1909, and before May 12, 1914, the rate is two per cent. [See Finance (1909-10) Act, 1910, s. 54, and Finance Act, 1914, s. 14.]

66. In ascertaining the value of an estate, whether an aggregated "one estate" or an "estate by itself," as the case may be, for the purpose of determining under section 4 of the Act of 1894 the rate of estate duty chargeable, and the principal value upon which the duty at such rate is to be charged, the following adjustments are, WHERE THE DECEASED DIED BEFORE APRIL 9, 1900, to be made:—

(i) *Where the deceased died* BEFORE *July* 1, 1896:—

Fractions of £100 capital.

(a) Any fraction of £10, in excess of £10, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be increased to £10. [See section 17.] So that an estate of £10,099 would be treated as £10,100, and the rate of duty would be 4 per cent., and the amount £404. An estate of £199 would be treated as £200, and would pay £2.

(b) Where duty is paid in respect of real property as well as personal property, on one affidavit or account, and there is an odd fraction of £10 in the respective capitals, and the two fractions together exceed £10, *each* class of property should be increased to the next multiple of £10. Thus personal £1,482 and real £929 (aggregate £2,411) should be treated as personal £1,490 and real £930, and personal £1,489 and real £922 (aggregate £2,411) should also be treated as personal £1,490 and real £930. Where, however, the two fractions together do *not* exceed £10, whichever of the two classes of property has the larger fraction of £10 should be increased to the next multiple of £10, whilst in the other class of property the fraction should be disregarded. Thus, personal £1,482 and real £926 (aggregate £2,408) should be treated as personal £1,480 and real £930. Whilst personal £1,486 and real £922 (aggregate £2,408) should be treated as personal £1,490 and real £920.

(ii) *Where the deceased died* ON OR AFTER *July* 1, 1896, *but before April* 9, 1900:—

(a) Any fraction of £100 in excess of £100, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be disregarded, except that where the principal value of the estate exceeds £100, but does not exceed £200, the estate duty is to be £1. [See Finance Act, 1896, s. 17.] So that an estate of £10,099 would be treated as £10,000 and the estate duty would be at 3 per cent., and would amount to £300. An estate of £10,100 would, however, be treated as £10,100, and the rate of duty would be 4 per cent., and the amount £404. An estate of £199 would by this rule be treated as £100, but it does not thereby acquire exemption from estate duty as *not exceeding* £100, but pays £1 as stated above.

(b) Where duty is paid in respect of real property as well as personal property, on one affidavit or account, and there is an odd fraction of £100 in the respective capitals, and the two fractions together do not amount to £100, each fraction is to be disregarded. Thus personal £1,422 and real £929 (aggregate £2,351) should be treated as personal £1,400 and real £900. Where, however, the two fractions together amount to or exceed

£100, whichever of the two classes of property has the larger fraction of £100 should be raised to the next multiple of £100, whilst in the other class of property the fraction should be disregarded. Thus personal £1,482 and real £929 (aggregate £2,411) should be treated as personal £1,500 and real £900. Whilst personal £1,429 and real £982 (aggregate £2,411) should be treated as personal £1,400 and real £1,000.

(iii) WHERE, HOWEVER, THE DECEASED DIED ON OR AFTER APRIL 9, 1900, the estate duty is, subject to the exception referred to in the next paragraph, *post*, to be levied on the exact net principal value of the estate, both as regards rate and amount of duty, without the exclusion of any fraction of that value. [See Finance Act, 1900, s. 13, sub-s. 1.]

Reduction of full amount of duty where the margin above the limit of value is small.

(iv) The amount of estate duty payable on an estate at the rate applicable thereto under the scale of rates of duty is, where necessary, to be reduced so as not to exceed the highest amount of duty which would be payable at the next lower rate, with the addition of the amount by which the value of the estate exceeds the value on which the highest amount of duty would be so payable at the lower rate. [See Finance Act, 1914, s. 13, sub-s. 1.] Where, *e.g.*, the net principal value of an estate is £10,001, the duty will be £401 [4% on £10,000 = £400 + £1.] [See clauses 64 (v), (vi) and (vii) for the values below which this provision comes into operation.]

Relief in respect of quick succession where property consists of land or a business.

(v) Where the Commissioners of Inland Revenue are satisfied that estate duty has become payable on any property consisting of land or a business (not being a business carried on by a company) or any interest in land or such a business passing upon the death of any person, and that subsequently within five years estate duty has again become payable on the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of estate duty payable on the second death (if that death occurs after July 31, 1914), in respect of the property so passing shall be reduced as follows:—

Where the second death occurs within one year of the first death, by fifty per cent.;
Where the second death occurs within two years of the first death, by forty per cent.;
Where the second death occurs within three years of the first death, by thirty per cent.;
Where the second death occurs within four years of the first death, by twenty per cent.;
Where the second death occurs within five years of the first death, by ten per cent.;

Provided that where the value, on which the duty is payable, of the property on the second death exceeds the value, on which the duty was payable, of the property on the first death, the latter value shall be substituted for the former for the purpose of calculating the amount of duty on which the reduction under this section is to be calculated. [See Finance Act, 1914, s. 15.]

Before any deduction under this section can be allowed it will be necessary to satisfy the Commissioners of Inland Revenue that the requirements of the section have been complied with.

Particulars of the property in respect of which the deduction is claimed together with the full name and exact date of death of the person upon whose decease the earlier payment of duty was made should be stated in a schedule to be annexed to the Inland Revenue affidavit.

The matter can be more conveniently dealt with if application for repayment is made after the grant of representation to the deceased has been obtained.

Estates not above £500 gross.

67. Where the GROSS value of the property real and personal on which estate duty is payable on the death of the deceased exclusive of property settled otherwise than by the will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30s. *may be* paid, and where it exceeds £300 but does not exceed £500, a fixed duty of 50s. *may be* paid. [See section 16, sub-section 1.] Provided that where any property passing on a death occurring on or after April 30, 1910, is proved to the satisfaction of the Commissioners to be subject to a charge created for the purpose of securing unpaid purchase-money, or money borrowed to pay purchase-money, or to be subject to or liable to be made subject to a charge for securing an advance obtained for the purchase thereof, the GROSS value of such property for the purpose of this sub-section is the principal value after deducting any such charge or liability to which the property is so subject. [See Finance (1909-10) Act, 1910, s. 61, sub-s. 2.] Where the fixed duty of 30s. or 50s. has been paid, and it is afterwards discovered that the gross value of the property exceeds £500, the *ad valorem* duty according to the true value is payable, but if the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, an allowance may be made for the duty paid at first. [See Revenue Act, 1903, s. 14.] Where, however, the deceased died prior to September 1, 1903, no such allowance can be made, save that where 30s. has been paid instead of 50s. the difference only is payable.

Value of agricultural property in small estates. [See also clauses 37 and 69.]

68. Where, in connection with the death of a person dying on or after April 30, 1909, it is necessary to determine the gross or net value of any "agricultural property" for the purpose of section 16 of the Finance Act, 1894, the principal value of such property where no part of the value is due to the expectation of an increased income from the property is not to exceed 25 times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed. [See section 61, sub-section 1 of Finance (1909-10) Act, 1910, incorporating proviso to section 7, sub-section 5 of Finance Act, 1894.]

Definition of agricultural property.

69. The expression "agricultural property" means agricultural land, pastures and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property. [See section 22, sub-section 1 (g).]

Option.

70. The *ad valorem* duty according to the scale may be paid instead of the fixed duty of 30s. or 50s. [See section 16, sub-section 1, and section 16, sub-section 2, embodying and extending the Customs and Inland Revenue Act, 1881, s. 33.] If the net estate is small it may be found that the *ad valorem* duty is less in amount than the fixed duty.

Exemption from certain duties. in cases not over £1,000 net.

[See also clauses 26, 67 and 68.]

71. Where the NET value of the property, real and personal, in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will, if any, of the deceased, does not exceed £1,000, and the fixed duty or *ad valorem* estate duty has been paid upon the principal value of that estate, legacy and succession duties are not payable under the will or intestacy of the deceased in respect of that estate. [See section 16, sub-section 3.]

72. The forms in use in England are:—

Forms in use.

AFFIDAVITS:—

B.—2. Inland Revenue affidavit for probate or administration where there is *no* settled property, and the GROSS principal value of the free and other unsettled property, real and personal (including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely), passing on the death of the deceased does not exceed £500 (except where the *gross* value exceeds £100, but the *net* value does not exceed £100), *and*, if any estate duty is payable thereon, it is desired to pay the fixed duty of 30s. or 50s.

NOTE.—Where, in the circumstances of the case, the *ad valorem* duty in respect of the *net* estate is less than the fixed duty [see clauses 64 and 66], and it is desired to pay the smaller duty, the form A—4, or A—6, whichever is appropriate, should be used, and not the form B—2.

B—3. Inland Revenue affidavit for probate or administration, similar to B—2, but to be used *where the deceased died after August* 1, 1894, *and prior to April* 19, 1907, and where there *is* settled property (not being property over which the deceased had and exercised by will a general power of appointment or property which, by default of exercise of the power of appointment, belonged to the deceased absolutely), in addition.

No. 24. Summary of duty and interest: To accompany form B—3.

B—4. Inland Revenue affidavit for probate or administration, similar to B—3, but to be used *where the deceased died on or after April* 19, 1907.

No. 27. Summary of duty and interest: To accompany form B—4.

A—4. Inland Revenue affidavit for probate or administration, where the property passing on the death of the deceased consists *exclusively* of FREE *personal property* situate *in Great Britain, passing under the deceased's will or*

intestacy and (*or*) *personal property over which the deceased had and exercised by will a general* POWER OF APPOINTMENT; *except* where the net value exceeds £100, but the *gross* value does not exceed £500, *and* the fixed duty of 30s. or 50s. is to be paid.

No. 16. Summary of duty and interest: To accompany form A—4.

A—6. Inland Revenue affidavit for probate or administration, where the property passing on the death of the deceased consists *exclusively* of FREE *personal* and REAL *property* situate *in Great Britain, passing under the deceased's will or intestacy*, and (*or*) *personal and* REAL *property over which the deceased had and exercised by will a general* POWER OF APPOINTMENT; *except* where the net value exceeds £100, but the *gross* value does not exceed £500, *and* the fixed duty of 30s. or 50s. is to be paid.

No. 17. Summary of duty and interest: To accompany form A—6.

A—5. Inland Revenue affidavit for second or subsequent grants, where the property was within the operation of a prior grant. Where it was not so, the same form as for an original grant should be used.

A—3. Inland Revenue affidavit for probate or administration, *where the deceased died after August* 1, 1894, *and prior to April* 19, 1907, except where B—2, B—3, A—4, A—6, or A—5, is applicable.

No. 15. Summary of duty and interest: To accompany form A—3.

A—7. Inland Revenue affidavit for probate or administration, *where the deceased died on or after April* 19, 1907, except where B—2, B—4, A—4, A—6, A—5, Y—1, or Z—1, is applicable.

No. 28. Summary of duty and interest: To accompany Form A—7.

Y—1. Inland Revenue affidavit for probate or administration, where the deceased died domiciled outside Great Britain and no property situate in Great Britain passed at the death, but a grant is required in respect of assets since transmitted to this country.

Z—1. Inland Revenue affidavit for probate or administration, where the grant is required solely in respect of property of which the deceased was trustee only.

D—1. (In duplicate.) Corrective affidavit.

ACCOUNTS:—

C—1. (In duplicate.) Account of property which passed on the death, but the estate duty whereon was not paid on the Inland Revenue affidavit.

C—2. (In duplicate.) Account for settlement estate duty.

C—3. Account for instalments of estate duty and settlement estate duty.

D—2. (In duplicate). Corrective account.

For particulars as to the forms in use in Scotland, application should be made to the Registrar, Estate Duty Office, Inland Revenue, Edinburgh.

Where forms obtainable.

73. All the English forms can be obtained upon application to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2.

74. All the English forms, except B—3, A—3, A—5, Y—1, Z—1, and C—2 can be obtained at English Head Post Offices outside the Metropolitan Postal District, and at the Throgmorton Avenue Post Office, London Wall, E.C.2.

Deaths on or before August 1, 1894.

75. Where a person died on or before August 1, 1894, duties in force immediately prior to the commencement of the Finance Act, 1894, continue to be payable [see section 21, sub-section 2], and the above forms are not applicable. The English forms which are appropriate in such circumstances are shown in the Official Form, No. 18, which is obtainable as stated in clause No. 73.

Delivery of affidavits and accounts and payment of duties.

76. The Inland Revenue affidavit is to be delivered to the Probate Registrar on application for probate or administration.

77. The payment of estate duty on Inland Revenue affidavits for probate, etc., may be made in England in any of the following ways:—

(i) Personally in Room 25, Accountant-General's Office, Inland Revenue, Somerset House, London, W.C.2, after a formal assessment of the amount payable has been made in the Estate Duty Office, Inland Revenue, Somerset House.

(ii) Through the post to the Accountant-General (Cashier), Inland Revenue, Somerset House, London, W.C.2:—

(A) By cheque drawn in favour of the "Commissioners of Inland Revenue or Bearer" and crossed "Bank of England—Inland Revenue."

(B) Where the duty does not exceed £40, by money order (which can be obtained free of commission) drawn in favour of the "Commissioners of Inland Revenue or Bearer" and crossed "Bank of England—Inland Revenue." These money orders can be obtained on production of the affidavit at any Money Order Post Office. Postmasters are restricted, in the receipt of estate duty, to the issue of money orders; they may not otherwise receive the duty, nor may they accept affidavits for the purpose of having them stamped.

In every case the affidavit *and warrant* must accompany the payment.

Where payment of the fixed duty of 30s. or 50s. is made (see clauses 67 and 70), the appropriate estate duty stamp must be used and affixed to the first page of the affidavit

(iii) The Lords Commissioners of His Majesty's Treasury in pursuance of the powers conferred upon them by section 34 of the Finance Act, 1917, as amended by section 42 of the Finance Act, 1918, have by regulations prescribed certain Bonds, War Stock, etc., to be accepted in payment of any Death Duties.

The Regulations are contained in the Death Duties, etc. (Payment in Securities) Regulations (No. 2) 1918, 1919

(No. 2) 1919 and 1921 published as Statutory Rules and Orders, Nos. 1045 of 1918, 122 and 1353 of 1919, and 850 of 1921, which may be purchased through any bookseller or directly from H.M. Stationery Office at the following addresses: Adastral House, Kingsway, London, W.C.2, and 28, Abingdon Street, London, S.W.1; York Street, Manchester; 1, St. Andrew's Crescent, Cardiff; or 120, George Street, Edinburgh.

Under such regulations the following securities are now acceptable subject to the prescribed conditions: 4% National War Bonds, 1927, 1928 and 1929; 5% National War Bonds, 1927, 1928 and 1929; 4% War Loan, 1929-1942, Stock and Bonds; 5% War Loan, 1929-1947, Stock and Bonds; 4% Funding Loan, 1960-1990, Stock and Bonds; and 4% Victory Bonds.

For the purpose of the payment of Death Duties the values, exclusive of accrued interest remaining unpaid, of these securities are as follows:—5% War Loan, 1929-1947, 95%; 4% Funding Loan, 1960-1990, 80%; and all other securities 100%.

Application to pay death duties by means of the transfer of such securities should be made to the Commissioners of Inland Revenue and should be addressed to the Controller, Estate Duty Office, Inland Revenue, Somerset House, W.C.2.

The application should specify the amount and denomination of the securities tendered, including the distinguishing numbers of the certificates or bonds; whether stock or registered bonds or bonds to bearer, and in the first two cases whether transferable by deed or not; whether the securities formed part of the estate passing on the death for at least six months immediately preceding the death, or continuously up to the date of death from the date of original subscription; whether they are subject to any lien or charge whatsoever; and whether they are under the applicant's control and, if not, in whose custody they are.

The option of discharging the death duties by the transfer of war securities authorised for that purpose falls to be exercised once and for all, at the time of the delivery of the Inland Revenue affidavit or account.

It is essential, therefore, that all such applications should be made at that time, as the question of payment cannot be reopened in the event of the duty being paid in cash in the first instance.

78. Accounts and corrective affidavits should be TRANSMITTED BY POST to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C.2. If preferred, they may be left at the office by hand. In suitable cases an appointment will be arranged. The accounts and corrective affidavits will be examined, and any instructions which may be necessary will be issued. *Where duty is to be returned* the corrective affidavit or account should be accompanied by evidence in support of the claim. In corrective affidavit cases, the probate or letters of

administration should be forwarded, and in corrective account cases where a return of duty is claimed, the original stamped account should be sent.

79. For particulars as to the method of payment of estate duty, and of the delivery of accounts, in Scotland, application should be made to the Registrar, Estate Duty Office, Inland Revenue, Edinburgh.

80. The Commissioners may, if they think fit, dispense with an oath in corrections of estate duty. [See Finance Act, 1900, s. 13, sub-s. 2.] Where duty is *to be paid*, the corrective affidavit or corrective account may, if desired, be transmitted unsworn in the first instance.

APPENDIX III.

RULES.

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PART I.—NON-CONTENTIOUS BUSINESS.

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PART I.—NON-CONTENTIOUS BUSINESS.

RULES, ORDERS, AND INSTRUCTIONS

FOR THE REGISTRARS OF

THE PRINCIPAL REGISTRY

OF HER MAJESTY'S COURT OF PROBATE (*a*),

Made under the provisions of the Statutes 20 *&* 21 *Vict. c.* 77, 21 *&* 22 *Vict. c.* 95, 55 *&* 56 *Vict. c.* 6, 57 *&* 58 *Vict. c.* 30, 15 *Geo.* 5, *c.* 23, 15 *&* 16 *Geo.* 5, *c.* 28, *and* 15 *&* 16 *Geo.* 5, *c.* 49.

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

NOTE.—*These are the rules and orders of* 1862, *as amended from time to time, together with subsequent additional rules and orders. The corresponding District Registry Rules, dated the* 27*th January* 1863, *are in many cases identical with these rules. Where they differ they are set out as footnotes to the Principal Registry Rules.*

All rules, orders, and instructions heretofore made and issued for the registrars of the principal registry of Her Majesty's Court of Probate in respect of non-contentious business shall be repealed, on and after the first day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules, orders, and instructions in respect of non-

(*a*) These rules are abbreviated in the preceding chapters thus : "Rule 1, N.-C. B." The District Registry Rules are indicated as follows : "Rule 1, D. R."

contentious business shall take effect on and after the first day of September, 1862.

NON-CONTENTIOUS BUSINESS shall include all common form business as defined by the "Court of Probate Act, 1857," and the warning of caveats.

1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the principal registry in all cases.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent.

3. The registrars are not to allow probate or letters of administration to issue until all the inquiries which they may see fit to institute have been answered to their satisfaction. The registrars are notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

AS TO PROBATE OF WILLS AND CODICILS AND LETTERS OF ADMINISTRATION WITH THE WILL [OR WILL AND CODICILS] ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER DECEMBER 31, 1837.

Execution of a Will.

Amended rules 4 and 4A of January 14, 1871.

4. If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove

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District Registry Rules.

1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the principal registry in all cases. Application may also be made at a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which the application is made, and not otherwise.

[N.B.—But it is to be noted that as from the 1st January, 1926, the territorial limitation of the district probate registries was abolished by order under the Supreme Court of Judicature (Consolidation) Act, 1925.]

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration.

3. The district registrar, before he entertains any application for probate or letters of administration, must ascertain that the deceased had, at the time of his death, a fixed place of abode within his district.

[N.B.—But see note to Rule 1 D. R.]

4. The district registrar is not to allow probate or letters of administration to issue until all the inquiries which he may see fit to institute have been answered to his satisfaction, and this refers more particularly to applications made in person by executors and others. The district registrar is notwithstanding to afford as great facility for

that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution, were in fact complied with.

4a. The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by a registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicil, or as the case may be, have been filed: Provided that in cases presenting difficulty the affidavits themselves may still be registered by direction of a registrar (*a*).

[Rule 4 of 1862 provided that affidavits of due execution should be registered.]

5. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the registrars must refuse probate.

6. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the registrars may require the parties to bring the matter before the judge on motion.

7. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the

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District Registry Rules.

the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

5. No district registrar or clerk in a district registry shall directly or indirectly transact business for himself or as the proctor or solicitor of any other person in the district registry to which he has been appointed.

Execution of a Will.

6. Upon receiving an application for probate or letters of administration with the will annexed, the district registrar must inspect the will and each codicil, and see whether by the terms of the attestation clause (if any) it is shown that the same have been executed in accordance with the provisions of statutes 1 Vict. c. 26 and 15 Vict. c. 24.

7. Similar to Rule 4, N.-C. B.

7A. Similar to Rule 4A, N.-C. B., with the substitution, at the end, of the words "with the consent of a registrar of the principal registry" for the words "by direction of a registrar."

(*a*) Forms of notes to be used in the principal registry when applicable :—

"Affidavits of due execution filed.
A. B.,
Registrar."

"Affidavits of identity of will (*or* codicil *or* memorandum) filed.
A. B.,
Registrar."

'Affidavits of domicil and law filed.
A. B.,
Registrar."

deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

Interlineations and Alterations.

8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

9. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by, the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution, must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and Obliterations.

10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

11. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Deeds, etc., referred to in a Will or Codicil.

12. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it be entitled to probate; and, if not produced, its non-production must be accounted for.

District Registry Rules.

8. Similar to Rule 5, N.-C. B.

9. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the district registrar must transmit a statement of the matter to the registrars of the principal registry, who may require the parties to bring the matter before the Judge on motion.

10. Similar to Rule 7, N.-C. B.

11. Similar to Rule 8, N.-C. B.

12. Similar to Rule 9, N.-C. B.

13. No deed, paper, memorandum, or other document can form part of a will unless it was in existence at the time when the will was executed.

Appearance of the Paper.

14. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and, if not produced, its non-production must be accounted for.

Married Woman's Will.

15. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorised in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy. Amended rule of April 19, 1887.

[The rule of 1862 read as follows: *In granting probate of a married woman's will made by virtue of a power or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.*]

Codicils.

16. The above rules and orders respecting wills apply equally to codicils.

As to Probate of Wills, Codicils, and Testamentary Papers relating to Personalty, and dated before the 1st January, 1838.

Execution of a Will.

17. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed

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District Registry Rules.

13. Similar to Rule 10, N.-C. B.
14. Similar to Rule 11, N.-C. B.
15. Similar to Rule 12, N.-C. B.
16. Similar to Rule 13, N.-C. B.
17. Similar to Rule 14, N.-C. B.

by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition must be clearly proved by circumstances.

18. A will, codicil, or testamentary paper, signed at the end of it by the testator and attested by two disinterested witnesses (although there be no clause of attestation) is prima facie entitled to probate.

19. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to the paper in the presence of one attesting witness, or produced it with his name already subscribed, or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

20. If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

21. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested

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District Registry Rules.

18. Similar to Rule 15, N.-C. B.
19. Similar to Rule 16, N.-C. B.

Doubtful Cases.

20. If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arise in consequence of the appearance of the paper, or on any other point, the district registrar must communicate with the registrars of the principal registry.

Letters of Administration with Will annexed.

21. The right of parties to letters of administration with the will annexed, and letters of administration with the will annexed de bonis non, depends so entirely upon the circumstances of each particular case taken in connection with the wording of the will, that no general rules, other than those which have obtained a judicial sanction, can be laid down for the guidance of the district registrars. Whenever the right of the party applying is at all questionable, a statement of

person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

22. The circumstance of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder.

23. If an attestation clause, or the word "witnesses," appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must prima facie be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

Appearance of Paper.

24. Any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of a paper on the part of the testator must be accounted for.

Alterations and Interlineations.

25. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st December, 1837, are subject to the provisions of 1 Vict. c. 26.

Deeds, etc., referred to in a Will or annexed to a Will.

26. With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to wills bearing date since the 31st December, 1837, will apply.

District Registry Rules.

the case, accompanied by a copy of the will, must be transmitted to the registrars of the principal registry, who will advise thereon.

22. Similar to Rule 17, N.-C. B.
23. Similar to Rule 18, N.-C. B.
24. Similar to Rule 19, N.-C. B.
25. Similar to Rule 20, N.-C. B.
26. Similar to Rule 21, N.-C. B.

Republication by Codicil.

27. A will made before the 1st January, 1838, is republished by a subsequent codicil thereto duly executed.

As to Letters of Administration.

Notice to other Next of Kin.

28. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

Limited Administrations.

29. Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge.

Amended rule of December 3, 1925.

30. Save as in the Administration of Estates Act, 1925, expressly provided, no person entitled to a general grant in respect of the estate of the deceased person will be permitted to take a limited grant, except under the direction of the judge.

Administration under Section 73.

31. Whenever the Court under section 73 appoints an administrator other than the person who, prior to the "Court of Probate Act, 1857," would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Grants to an Attorney.

32. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

District Registry Rules.

27. Similar to Rule 22, N.-C. B.

28. This rule commences with the words: "The will, codicil or testamentary paper should appear on the face of it to be a complete document." The words of Rule 23, N.-C. B. then follow.

29. Similar to Rule 24, N.-C. B., with the addition of the words: "or explained by affidavits. In such cases the testmentary paper and the evidence taken in support of it should be transmitted to the registrars of the principal registry."

30. Similar to Rule 25, N.-C. B.

31. Similar to Rule 26, N.-C. B.

32. Similar to Rule 27, N.-C. B.

Grants of Administration to Guardians.

33. Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.

34. In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or one of the registrars; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

35. Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar.

36. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

Administrator's Oath.

37. The oath to lead to a grant of administration or of administration with the will is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

Amended rule of December 3, 1925.

District Registry Rules.

As to Letters of Administration.

33. The duties of the district registrar in granting letters of administration are in many respects the same as in cases of probate. In both cases he must ascertain the time and place of the deceased's death, and the value of the property to be covered by the grant, and see that the applicant has been sworn as required by statute 55 Geo. 3, c. 184.

34. Similar to Rule 28, N.-C. B.

35. Similar to Rule 29, N.-C. B.

36. Similar to Rule 30, N.-C. B.

37. Similar to Rule 31, N.-C. B.

Administration Bonds.

38. Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix.

Amended rule of December 3, 1925, to have effect where the deceased died on or since January 1, 1926.

39. In all cases of limited or special administration, except where these rules otherwise expressly provide, or a registrar otherwise directs, two sureties are to be required to the bond, and where the deceased died on or after the 1st day of January, 1926, the bond shall be given in double the amount of the property to be placed in the possession of, or dealt with by, the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required; the bond shall be in such of the forms annexed to the rules as is appropriate to the case or such other form as in the special circumstances of the case the registrar may direct.

Where deceased died before January 1, 1926.

[**39.** *In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.*]

40. The administration bond is in all cases of limited or special administrations to be prepared in the registry.

41. The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

District Registry Rules.

38. Similar to Rule 32, N.-C. B.
39. Similar to Rule 33, N.-C. B.

Grants of Administration to Guardians.

40. In all cases of infants (*i.e.*, under the age of seven years) a guardian must be assigned by order of the Judge or of one of the registrars of the principal registry; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either de facto next of kin of the infants, or that their next of kin de facto has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

41. Similar to Rule 35, N.-C. B., with the insertion of the words "of the principal registry" after the word "registrar" in each case.

Justification of Sureties.

42. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify.

GENERAL RULES AND ORDERS FOR THE REGISTRARS OF THE PRINCIPAL REGISTRY.

Time of issuing Grant.

43. No probate or letters of administration with the will annexed shall issue until after the lapse of seven days from the death of the deceased unless under the direction of the judge, or by order of two of the registrars.

44. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.

45. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit.

Filling up Grants.

46. All probates or letters of administration issued from the principal registry are to be filled up there.

Oath of Executors and Administrators.

47. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry.

District Registry Rules.

42. Similar to Rule 36, N.-C. B.
43. Similar to Rule 37, N.-C. B.
44. Similar to Rule 38, N.-C. B.

Administration Bonds.

45. In ordinary cases two sureties are to be required, but when the property is bona fide under the value of fifty pounds one surety only may be taken to the administration bond.
46. Similar to Rule 39, N.-C. B.
47. Similar to Rule 40, N.-C. B.

Identity of Parties.

48. The registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Testamentary Papers to be Marked.

49. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator and by the person before whom he is sworn.

Renunciations.

Amended rule of December 3, 1925.

50. Except where otherwise provided in these rules no person who renounces administration (with or without the will) of the estate of a deceased person in one character is to be allowed to take representation to the same deceased in another character.

Affidavits.

51. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.

Amended rules 52 and 53 of March 21, 1882.

52. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the " above-named " deponents.

53. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without leave of the

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District Registry Rules.

48. Similar to Rule 41, N.-C. B.
49. Similar to Rule 42, N.-C. B.

Last Wills.

50. The district registrar is not, in any case in which a will apparently duly executed has been produced to him for probate or for administration with the will annexed, to grant probate of any former will, or administration with any former will annexed, or administration to the deceased, as having died intestate, without an order of the judge or of one of the registrars of the principal registry, showing that the last will is not entitled to probate. In the absence of such order the district registrar is to communicate with the registrars of the principal registry.

Time of Issuing Grant.

51. Similar to Rule 43, N.-C. B., with the substitution, at the end, of the words " one of the registrars of the principal registry " for the words " two of the registrars."

52. Similar to Rule 44, N.-C. B., with the same substitution as in Rule 51, D. R.

53. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the

Court or of one of the registrars, be filed or made use of in any matter depending in the Probate Court or registry, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

54. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

55. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.

56. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

57. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose

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District Registry Rules.

deceased, the reason of the delay is to be certified by the practitioner to the district registrar. Should the certificate be unsatisfactory, or the case be one of personal application, the district registrar is to require an affidavit, or to communicate with the registrars of the principal registry.

Filling up Grant.

54. Every grant of probate or of letters of administration issued from a district registry is to be filled up therein, and any former grant which has been revoked or has ceased is to be cleared off therein.

Notices of Applications.

55. Notices of applications for grants of probate or administration, with the will annexed, transmitted by the district registrar to the registrars of the principal registry, are to contain (in addition to the particulars specified in section 49 of the Court of Probate Act, 1857), an extract of the words of the will or codicil by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration.

56. Notices of application are to set forth the names and interests of all persons who, according to the practice of the Court, would have a prior right to the applicant, and to show how such prior right is cleared off. In case the persons or any of them have renounced, the date of his or her renunciation must be stated. If the applicant claims as the representative of another person, the date and particulars of the grant to him must appear.

57. Similar to Rule 47, N.-C. B.

as to the mode in which the said will or codicil was executed and attested.

58. The registrars are not to allow any affidavit to be filed (unless by leave of the judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the Commissioner, or other person before whom it was sworn.

Caveats.

59. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district registry; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.

60. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time.

Revoked as from January 1, 1926.

[**61.** *The registrars shall, immediately upon a caveat being entered, send notice thereof to the district registrar of any district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.*]

Amended rule of December 3, 1925.

62. No grant shall be sealed at any time if the registrar has knowledge of an effective caveat.

63. All caveats shall be warned from the principal registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it.

District Registry Rules.

Oath of Executors and Administrators.

58. The draft oaths to lead grants of special or limited probate or administration with or without the will annexed are to be transmitted by the district registrar to the registrars of the principal registry, in order to their being settled, and no special or limited grant is to issue until the draft oath to lead the same has been settled by a registrar of the principal registry.

59. Similar to Rule 48, N.-C. B.

60. Similar to Rule 49, N.-C. B.

61. Similar to Rule 50, N.-C. B.

Revocation and Alteration of Grants.

62. Grants of probate or letters of administration can only be revoked by order of the judge or of one of the registrars of the principal registry.

63. No grant of probate or letters of administration is to be altered by a district registrar, without an order of a registrar of the principal registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of application must be renewed, and the alteration ordered is not to be made by the district registrar until the usual certificate on such notice has been received from the principal registry.

64. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it.

65. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the registry.

66. Before any citation is signed by a registrar, a caveat shall be entered against any grant being made in respect of the estate of the deceased to which such citation relates.

Amended rule of December 3, 1925.

67. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service, and an affidavit of search for appearance and of non-appearance, must be filed.

Citations.

68. No citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the registry.

69. Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do.

70. Citations and other instruments which cannot be personally served, are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars, as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals as the judge or one of the registrars may direct.

District Registry Rules.

64. Similar to Rule 51, N.-C. B.
65. Similar to Rule 52, N.-C. B.

Affidavits.

66. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall be filed or made use of, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

67. Similar to Rule 54, N.-C. B.
68. Similar to Rule 55, N.-C. B.
69. Similar to Rule 56, N.-C. B.
70. Similar to Rule 57, N.-C. B.

Blind and Illiterate Testators.

71. The registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.

Alterations in Grants, etc.

Amended rule of of May 26, 1882.

72. When any alteration is made in a grant of probate or letters of administration which has issued from a district probate registry, or when any such grant is revoked and the volume of the printed calendar containing the entry of the grant has been forwarded to the district registrars, notice of such alteration or revocation is without delay to be forwarded by the registrars of the principal registry to the district probate registrar from whose registry the altered or revoked grant issued.

Irish Grants (a).

See also Rule 107.

73. The seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect to letters of administration, the provisions of statute 21 & 22 Vict. c. 95, s. 29, must also be complied with.

Grants for Property in the United Kingdom.

74. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the Inland Revenue Office, that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland, other than

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District Registry Rules

71. Similar to Rule 58, N.-C. B., with the substitution of the words "unless with the concurrence of the registrars of the principal registry" for the words "unless by leave of the judge."

Caveats.

72. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his solicitor, enter a caveat in the principal registry, or in a district registry (*b*).

73. Similar to Rule 60, N.-C. B.

74. The district registrar shall, immediately upon a caveat being entered, send a copy thereof to the registrars of the principal registry (*b*).

(*a*) But see *ante*, pp. 480—482, as to the present position with regard to re-sealing Irish grants. (*b*) Amended rules of December 3, 1925.

that excluded by 22 & 23 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. *In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed* (*b*). Upon all such grants a note or memorandum must also be written and signed by one of the registrars to the effect that the testator or intestate died domiciled in England.

Notices to Queen's Proctor.

75. In all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue (*c*), or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator General (or in case the deceased died domiciled within the Duchy of Lancaster, to the Solicitor for the Duchy in London), in order that he may determine whether he will interfere on the part of the Crown; and no grant is to be issued until the officer of the Crown has signified the course which he thinks proper to take.

76. In the case of a person dying intestate on or after the 1st January, 1926, leaving no known person entitled to a share of his estate, a citation must be issued against all persons having or pretending to have a right to a share of the estate, and the service thereof upon them shall be effected as required by Rule 70. Such citation must also be served upon his Majesty's Procurator-General or upon the Solicitor for the Duchy of Lancaster or the Solicitor for the Duchy of Cornwall, as the case may require.

Amended rule of December 3, 1925, to have effect where deceased died on or since January 1, 1926.

[**76.** *In the case of persons dying intestate without any known relation, a citation must be issued against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased, and the service thereof upon them shall be effected as required by Rule* 70. *Such citation must also be served upon the Queen's Proctor, or upon the Solicitor for the Duchy of Lancaster, as the case may require.*]

Where deceased died before January 1, 1926.

Transmission of Papers.

77. After motions have been made before the judge in Court, the registrars are, on the application of the parties (unless the

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District Registry Rules.

75. If for any reason the seal should not have been placed upon a grant within forty-eight hours of receipt of the registrar's certificate, a further certificate shall be obtained from the principal registry. No grant shall be sealed at any time if the registrar has knowledge of an effective caveat (*d*).

76. Caveats shall be warned from the principal registry only.

77. After a caveat has been entered, the district registrar is not to

(*b*) A separate affidavit is no longer required.

(*c*) In the case of bastards dying after 1926, the provisions of section 9, sub-section 2 of the Legitimacy Act, 1926, should be observed in connection with this rule.

(*d*) Amended rules of December 3, 1925.

judge shall otherwise direct), to transmit to a district registrar the original papers and documents, in order that the grant of probate or administration may be completed in a district registry.

78. Papers and other documents may be transmitted by the registrars of the principal registry to the district registrars through the post office. Such letters or packets are to be superscribed with the words, "On Her Majesty's Service," and may be registered if thought necessary.

Probate Copies of Wills.

Amended rule of December 29, 1865.

79. The registrars are to take care that the copies of wills and affidavits to be annexed to the probates or letters of administration are fairly and properly written, and are to reject those which are otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.

Office Copies.

80. Office copies of wills and other documents furnished in the principal registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the registrars of the principal registry, to be an examined copy.

81. The seal of the Court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy.

Attendances with Documents.

82. If a will or other document filed in the registry is required to be produced at any place within three miles of the principal

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District Registry Rules.

proceed with the grant of probate or administration to which it relates until it has expired or been subducted, or until he has received notice from the principal registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated.

78. The further rules in respect to caveats will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

Citations and Subpœnas.

79. Citations and subpœnas can be issued from the principal registry only, and the rules applicable to them will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

80. No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge or of one of the registrars of the principal registry authorising the same.

81. Similar to Rule 71, N.-C. B., with the addition of the words "when such information is not forthcoming, the district registrars are to communicate with the registrars of the principal registry."

Alterations in Grants, etc.

82. Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration

registry, application must be made for that purpose not later than the day previously to that named for its production.

83. If a will or other document filed in the registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place, and in every case such notice must be given (except by special leave of the judge or registrars) at least twenty-four hours before the clerk in whose charge the will or other document is to be placed will be required to set off.

Subpœnas to bring in Testamentary Papers.

84. Any person bringing in a will or testamentary paper, in obedience to a subpœna, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the registrar to whom the will or paper brought in is to be delivered, and the registrar will sign the minute recording the delivery thereof.

85. The minute is to be entered in the book of registrar's minutes in the usual manner; and the fees for the entry, and a further fee for filing each testamentary paper, will then be payable. If these fees should not be paid by the person bringing in the will or paper, the same are to be charged to the person who may first apply to the clerk of the papers to make use of the will or paper so brought in. In case the person bringing in a will or testamentary paper may desire to have a voucher for its delivery into the registry, he may take an office copy of the minute on paying the usual fee for the same.

District Registry Rules.

is made in a grant, or a renunciation is filed, notice of such re-swearing, alteration or renunciation is without delay to be forwarded by the district registrar to the registrars of the principal registry, but no fee shall be payable in respect of any such notice.

Lists of Grants.

83. The lists of grants of probate and administration required to be furnished by the district registrars under section 51 of the "Court of Probate Act, 1857," are to be furnished on the first and every other Thursday in the month, and are to contain the name of the registry in which each grant was made; and the Christian and surname of each testator and intestate.

84. Every such list of grants furnished by the district registrar is to be accompanied by a copy of the record of each grant mentioned in it. The record, besides stating that the necessary particulars of the grant to which it refers, is to contain the place and time of death of the testator or intestate; the names and description of each executor or administrator; the date of each grant; and the sum under which the value of the personal estate and effects is sworn, and in cases of administrations the names and descriptions of the sureties.

85. Within four days from the end of each month each district registrar is to forward to the principal registry a return, arranged alphabetically, of all grants of probate or letters of administration passed at his district registry during the preceding month.

86. Any person served with a subpœna to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.

Time allowed for appearing to a Warning, Citation, or Subpœna.

87. The time fixed by a warning or citation for entering an appearance, or by a subpœna to bring in a testamentary paper, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Taxing Bills of Costs.

88. Any bill of costs may be referred to the registrars of the principal registry for taxation, and no special order shall hereafter be required for the purpose.

89. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner, and the registrar shall decide in each case what may be a sufficient notice.

90. When an appointment has been made by a registrar to tax a bill, the registrar may proceed to tax the same after the expiration of a quarter of an hour, notwithstanding the absence of either party, or his agent, provided he be satisfied that the absent party has had due notice of the appointment for taxation.

District Registry Rules.

86. Similar to Rule 74, N.-C. B.

Grants for Property in the United Kingdom, etc.

87. Grants of probate and administration made in Ireland and confirmations granted in Scotland must be taken to the principal registry, and not to a district registry, to be sealed with the seal of the Court of Probate, in order to the same having force and effect in England.

88. Similar to Rule 75, N.-C. B., with the omission of the words "or of a person dying without known relation."

Where deceased died since 1925.

89. In the case of a person dying intestate on or after the 1st January, 1926, leaving no known person entitled to a share of his estate a citation must be issued against all persons having or pretending to have a right to a share of the estate.

Where deceased died before 1926.

[**89.** *In the case of persons dying intestate without any known relation, a citation must be issued "from the principal registry" against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased. See the "Rules, Orders, and Instructions for the Registars of the Principal Registry."*]

Transmission of Papers.

90. When motions are to be made before the judge in Court, with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the Court have been taken, will, on the application of the parties, be returned to the district registrar together with an office copy of the decree of the judge.

91. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

For carrying out the Provisions of the Colonial Probates Act, 1892 (*ante*, pp. 486, 487).

Additional rules of December 7, 1892.

92. Application to seal a grant of probate or letters of administration or copy thereof under the Colonial Probates Act, 1892, may be made in the Principal Probate Registry by the executor or administrator or the attorney [lawfully authorised for the purpose] of such executor or administrator, either in person or through a solicitor (*a*).

93. Such application must be accompanied by an oath of the executor, administrator, or attorney in the form in the Appendix or as nearly thereto as the circumstances of the case will allow (*a*).

94. The registrars are to be satisfied that notice of such application has been duly advertised (*a*).

95. On application to seal letters of administration the administrator or his attorney shall give bond (in the form set out in the Appendix) to cover the personal estate of the deceased within the jurisdiction of the Court. The same practice as to sureties and amount of penalty in bond is to be observed as on application for letters of administration (*a*).

96. Application by a creditor under section 2, sub-section 3, of the Colonial Probates Act is to be made by summons before

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District Registry Rules.

91. Original papers are also to be forwarded to the principal registry whenever an inspection of them is necessary, in order to enable the registrars to answer the questions submitted to them by the district registrar.

92. Original papers and documents may be transmitted by the district registrars to the registrars of the principal registry through the post office. Such letters or packets are to be superscribed with the words, "On Her Majesty's Service," and may be registered, if thought necessary.

93. Similar to Rule 79, N.-C. B.

Office Copies.

94. Office copies of wills, and other documents furnished in a district registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined, shall be certified under the hand of the district registrar to be an examined copy.

95. Similar to Rule 81, N.-C. B.

Attendances with Documents.

96. If a will or other document filed in a district registry is required to be produced at any place within three miles of that registry, applica-

(*a*) Additional rule of December 7, 1892.

one of the registrars, supported by an affidavit setting out particulars of the claim (*a*).

97. In every case, and especially when the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant, the registrars may require further evidence as to domicile (*a*).

98. If it should appear that the deceased was not at the time of death domiciled within the jurisdiction of the Court from which the grant issued, the seal is not to be affixed unless the grant is such as would have been made by the High Court of Justice in England (*a*).

99. The grant [or copy grant] to be sealed and the copy to be deposited in the registry must include copies of all testamentary papers admitted to probate (*a*).

100. When application to seal a probate or letters of administration is made after the lapse of three years from the death of the deceased the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory the registrars are to require such proof of the alleged cause of delay as they may think fit (*a*).

101. Special or limited or temporary grants are not to be sealed without an order of one of the registrars (*a*).

102. Notice of the sealing in England of a grant is to be sent to the Court from which the grant issued (*a*).

103. When intimation has been received of the re-sealing of an English grant, notice of the revocation of, or any alteration in such grant is to be sent to the Court by whose authority such grant was re-sealed (*a*).

District Registry Rules.

tion must be made for that purpose not later than the day previously to that named for its production.

97. If a will or other document filed in a district registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place.

Doubtful and Difficult Cases.

98. The district registrars are in every case of doubt or difficulty to communicate with the registrars of the principal registry.

Taxing Bills of Costs.

99. All bills of costs are to be referred to the registrars of the principal registry for taxation, and no special order shall be required for the purpose.

100. The rules in respect of taxing bills of costs will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

101. Similar to Rule 106, N.-C. B.

102. Similar to Rule 107, N.-C. B.

103. Similar to Rule 109, N.-C. B.

(*a*) Additional rule of December 7, 1892.

104. The affidavit for inland revenue pursuant to the Customs and Inland Revenue Acts, 1880 and 1881, shall be transmitted to the Commissioners of Inland Revenue as if the person who applied for sealing under the Colonial Probates Act, 1892, were a person applying for probate or letters of administration (*a*).

105. The affidavit for inland revenue and accounts and schedules forming part thereof shall be in such form as may be prescribed by the Commissioners of her Majesty's Treasury (*a*).

[NOTE.—The forms in the Appendix to these rules will be found under their proper headings in App. VII of this book, viz.: Oath, Form 196; Advertisement, Form 1; Bond, Form 63.]

Certificate under Customs and Inland Revenue Act, 1881, *s.* 30.

Additional rule of August 1, 1894.

106. The certificate required to be given by the proper officer of the Court under section 30 of the Customs and Inland Revenue Act, 1881, shall for the purposes of the Finance Act, 1894, and subject to any necessary variations and modifications, which the officer of the Court is hereby authorised at his discretion to make (*b*), be in the form following:—

> And it is hereby certified that an affidavit for inland revenue has been delivered, wherein it is shown that the gross value of the personal estate of the said deceased within the United Kingdom (exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially) amounts to £ , and that it appears by a receipt signed by an inland revenue officer on the said affidavit that £ for estate duty and interest thereon has been paid, the duty being charged at the rate of £ per cent.

Re-sealing English Grants in Ireland.

Additional rules of December 11, 1896.

107. In any case in which it is intended to apply for the re-sealing in Ireland of any grant of probate or letters of administration made in the Probate Division of the High Court of Justice in England, the executor or administrator may deposit in the Principal or District Probate Registry where the grant has been made a copy of such grant of probate or letters of administration, together with the original and any certificate or certificates that may be required, and the fees payable in Ireland in respect of such re-sealing, and the Registrar shall transmit by post the documents so deposited, together with such fees, to the Registrar of the Principal Probate Registry in Ireland, for the purpose of such grant being re-sealed under the provisions of 20 & 21 Vict. c. 79, s. 94 (*c*).

District Registry Rules.

104. Similar to Rule 111, N.-C. B.
105. Similar to Rule 112, N.-C. B.
106. Similar to Rule 113, N.-C. B.
107. Similar to Rule 114, N.-C. B.

(*a*) Additional rule of December 7, 1892.

(*b*) Variations are now made in the form of the certificate, *vide ante*, p. 440, note (*g*).

(*c*) Additional rule of December 11, 1890. Reference should be made to pages 480—482 as to the present position with regard to re-sealing Irish grants.

Re-sealing Irish Grants in England.

108. The Registrar of the Principal Probate Registry in England shall, upon receiving by post from a probate registry in Ireland any grant of probate or letters of administration made in the Probate and Matrimonial Division of the High Court of Justice in Ireland, together with a copy thereof, and any certificate or certificates that may be required, and the fees payable in England in respect of the re-sealing of an Irish grant, cause such grant to be re-sealed in conformity with the provisions of 20 & 21 Vict. c. 79, s. 95, and shall transmit the grant so re-sealed to the registrar of the probate registry in Ireland from whom it was received (*a*).

Land Transfer Act, 1897.

Additional rule of November 20, 1897.

109. All rules, orders and instructions and the existing practice of the Court with respect to non-contentious business shall so far as the circumstances of each case will allow be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897.

Taxation of Costs.

Additional rule of February 23, 1920.

110. The provisions of Order 65, Rule 10B, of the Rules of the Supreme Court made and dated the 4th day of February, 1920, shall be applied on taxation of costs in non-contentious business in the principal and in the district registries of the Court of Probate so long as such rule shall remain in force.

Trust Corporations.

Additional rules of December 3, 1925, to take effect on and after January 1, 1926.

111. Where application is made for probate or administration by a trust corporation other than the Public Trustee the officer appointed by the corporation for such purpose shall in every case lodge in the registry a sealed copy of the resolution appointing him, and shall depose, in the oath to lead the grant, that the corporation is a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, and is empowered by its constitution to accept the grant sought, and shall further depose in what manner the said corporation has been duly authorised to apply for the grant by the persons entitled thereto.

No surety shall be required from a trust corporation having its principal office within the jurisdiction, unless the registrar shall so direct (*b*).

Retraction of Renunciation by Executor.

112. Where an executor, who has renounced probate, applies for leave of the Court to withdraw his renunciation, he shall lodge with the papers on motion the probate or letters of administration

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District Registry Rules.

103. Similar to Rule 115, N.-C. B.
109. Similar to Rule 116, N.-C. B.
110. Similar to Rule 117, N.-C. B.
111. Similar to Rule 118, N.-C. B.
112. Similar to Rule 119, N.-C. B.

(*a*) Additional rule of December 11, 1890. Reference should be made to pages 480—482 as to the present position with regard to re-sealing Irish grants.
(*b*) Additional rules of December 3, 1925.

with will. When leave to withdraw a renunciation has been granted, a notation of the subsequent probate shall be made upon the original grant and the record thereof or, in the event of the original grant not being available, upon the record, and the grant when so noted shall be retained in the registry unless the Court shall otherwise direct (*b*).

Life Interests and Minorities.

113. In every oath to lead a grant of administration with or without the will annexed, the deponent shall state whether there is a life interest or a minority, and the registrar may call for such further evidence as he may require (*b*).

More than Four Executors.

114. Where there are more than four executors who have not renounced and are competent to take probate, the grant will bear a notation that power is reserved to the other executors to apply on vacancies occurring (*b*).

Substituted Administrator.

115. Applications under section 160 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, shall be by way of summons before the registrar supported by the affidavit of the applicant together with such further evidence, if any, as the registrar may direct. The original grant may be noted with the appointment of the substituted administrator, or administrators, or may be impounded, or revoked, as the circumstances of the case may require, or as the registrar shall direct. The original grantee, if he is not the applicant, shall be served with the summons unless the registrar shall otherwise require (*b*).

Limited Grants.

116. Where the deceased died on or after the 1st January, 1926, and application is made to take a separate grant of the real estate or any part thereof, or of the personal estate (not being trust estate), the oath shall state that the deceased died solvent. The renunciation, in respect of that part of the estate, of all persons first entitled to a general grant, must be filed, and so in like manner in respect of a grant of trust property only (*b*).

Personal Representative Abroad.

117. Where the deceased died on or after the 1st January, 1926, applications under section 164 of the Supreme Court of Judicature (Consolidation) Act, 1925, shall be made upon motion to the Court, and the Court may require notice to be given to persons having a prior right to a grant or to such other persons as it may think fit. A grant under this section may be limited as regards time or portion of the estate or otherwise as the Court may think fit (*b*).

District Registry Rules.

113. Similar to Rule 120, N.-C. B.
114. Similar to Rule 121, N.-C. B.
115. Similar to Rule 122, N.-C. B.
116. Similar to Rule 123, N.-C. B.

(*b*) Additional rules of December 3, 1925.

Settled Land.

118. In every oath to lead a grant of probate or administration (with or without will annexed) where the deceased died on or after the 1st January, 1926, the deponent shall swear to the best of his knowledge information and belief whether there is land vested in the deceased which was settled previously to his death and not by his will; and the trustees, at the date of death, of such settled land, if any, shall be cleared off before a general grant shall issue. A general executor or person entitled to a full grant may take a grant save and except settled land (*b*).

Priority of Right to Grant.

119. Where the deceased died on or after 1st January, 1926, leaving a will, the priority of right to a grant of probate or administration with will annexed shall be as follows:—

1. Executors.
2. Residuary legatees or devisees in trust.
3. Residuary legatees or devisees for life.
4. Ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy.
5. The legal personal representatives of persons indicated in 4.
6. Legatees or devisees, or creditors.
7. Contingent residuary legatees or devisees, or contingent legatees or devisees, or persons, having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate.
8. The Crown (*b*).

120. Where the deceased died on or after 1st January, 1926, wholly intestate the priority of right to a grant of administration shall be as follows:—

1. Husband or wife.
2. Children, or other issue of deceased taking per stirpes.
3. Father or mother.
4. Brothers and sisters of the whole blood, or the issue of deceased brothers and sisters of the whole blood, taking per stirpes.
5. Brothers and sisters of the half blood, or the issue of deceased brothers and sisters of the half blood, taking per stirpes.
6. Grandparents.
7. Uncles and aunts of the whole blood, or the issue of deceased uncles and aunts of the whole blood, taking per stirpes.
8. Uncles and aunts of the half blood, or the issue of deceased uncles and aunts of the half blood, taking per stirpes.
9. The Crown.
10. Creditors (*b*).

121. Upon the making of a grant, live interests will be preferred to dead interests; and, in the case of conflicting claims, the nearer interest will be preferred to the more remote, unless the registrar shall otherwise direct (*b*).

(*b*) Additional rules of December 3, 1925.

Joint Grant.

122. Where it is sought to join, with a person entitled to a grant, a person not equally or next entitled, all persons with a prior right must be cleared off by renunciation or by a registrar's order on summons for a joint grant (*b*).

Taxation of Costs.

123. Notwithstanding anything in the Order dated the 11th February, 1874, as to the costs to be allowed to proctors, solicitors and attorneys practising in non-contentious business (*bb*) the following items may be allowed on taxation of costs in non-contentious business as disbursements made to commissioners for oaths:— Additional rule of September 1, 1926.

	£	s.	d.
For each oath administered to each deponent by a commissioner for oaths	0	2	0
For each exhibit referred to in the affidavit and required to be marked	0	1	4
For each obligor to a bond the execution of which has been superintended and attested by a commissioner for oaths ...	0	2	0

RULES, ORDERS, AND INSTRUCTIONS

AS TO

PERSONAL APPLICATIONS

FOR GRANTS OF PROBATE OR LETTERS OF ADMINISTRATION.

1. Persons wishing to obtain grants of probate or letters of administration without the intervention of a proctor, solicitor, or attorney, must apply in person at the department for personal applications (*c*), and not by letter.

2. No such application will be received through an agent of any kind (whether paid or unpaid).

3. The applications of parties who are attended by a person acting or appearing to act as their adviser in the matter will not be entertained.

4. All fees are to be paid in advance in Probate Court stamps (*cc*).

5. Applications which have in the first instance been made through a proctor, solicitor, or attorney at the principal registry, or at a district registry, cannot be transferred to this department.

6. Applications for grants of probate or administration in cases which have already been before the Court (on motion or otherwise) will not be entertained at this department, but must be made through a proctor, solicitor, or attorney.

(*b*) Additional rules of December 3, 1925.
(*bb*) See App. VI.
(*c*) Or at a district probate registry.
(*cc*) Probate Court stamps are not now used. Fees are now taken in Judicature fee stamps.

7. Whenever it becomes necessary, in the course of proceeding with an application which has been entertained at this department, to obtain the directions of the Court, the application will not be proceeded with, but must be placed in the hands of a proctor, solicitor, or attorney.

8. The papers necessary to lead the grant applied for will be prepared in this department. An applicant is, however, at liberty to bring such papers, or any of them, filled up, but not sworn to, and the same, if correct, may be received (the usual fee for perusal being charged). All further papers which may be required will be drawn in this department. Testamentary papers once deposited in this department will not be given out unless under special circumstances, and by permission of one of the registrars.

9. When it is necessary to administer an oath or take an affirmation, the party shall be sworn or affirmed before some proper authority of the principal registry, or of a district registry, unless otherwise permitted by one of the registrars.

10. Every applicant for a first grant of probate or letters of administration must produce a certificate of the death or burial of the deceased, or give a reason to the satisfaction of one of the registrars for the non-production thereof.

11. Every applicant must be prepared with a reference to some person of position of character, to establish his or her identity.

12. The engrossments of wills and testamentary papers will be made in the registry.

13. Every applicant for a grant of probate or letters of administration shall give under his or her hand a schedule of the property to be affected by the grant . . . . (The necessary forms will be provided in the registry.)

14. Legal advice is not to be given to applicants, either with respect to the property to be included in the above-mentioned schedule, or upon any other matter connected with the application, and the clerks in this department are only to be held responsible for embodying in a proper form the instructions given to them, but they will, as far as practicable, assist applicants by giving them information and directions as to the course which they must pursue.

15. A receipt or acknowledgment of each application will be handed to the applicant, and the production of such receipt will be required of the person who attends to obtain the grant when completed.

16. No clerk or officer of this department is to become surety to any administration bond.

17. All administration bonds in cases of personal applications are to be executed in this department, or in a district registry; if executed in this department the bond must be attested by the chief clerk or senior clerk in attendance (*d*).

(*d*) Bonds, in cases of personal applications in a district registry, are to be executed in that registry or in some other probate registry, unless otherwise permitted by the district registrar.

PART II.—CONTENTIOUS BUSINESS.

RULES AND ORDERS

FOR HER MAJESTY'S COURT OF PROBATE,

Made under the Provisions of the Statutes 20 & 21 *Vict. c.* 77, *and* 21 & 22 *Vict. c.* 95,

IN RESPECT OF

CONTENTIOUS BUSINESS.

[N.B.—These rules are only in force so far as they have not been altered or annulled by the Rules of the Supreme Court (see *ante*, p. 540).]

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1. All rules and orders heretofore made and issued in respect of CONTENTIOUS business shall be repealed on and after the 1st day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

2. The following rules and orders in respect of contentious business shall take effect on and after the 1st day of September, 1862.

CONTENTIOUS BUSINESS.

3. All proceedings in the Court of Probate or in the registries thereof in respect of business not included in the Court of Probate Act, 1857, under the expression "Common Form Business," except the warning of caveats, shall be deemed to be contentious business.

Parties to Causes.

4. Executors or other parties who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore.

5. Next of kin and others who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore (*dd*).

6. Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore (*e*).

(*dd*) As to the question of costs, *vide ante*, pp. 629, 630.

(*e*) Intervention in a probate action by any person showing interest in the estate is allowed by Order XII, r. 23, the application being made by summons to the registrar.

Caveats.

7. Caveats may be entered in the principal registry of the Court of Probate or in a district registry thereof; if in the principal registry the person entering the caveat must insert the name of the deceased in the index to the caveat book.

8. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time.

9. Caveats shall be warned from the principal registry. The warning is to be served by leaving the same or a true copy thereof at the place mentioned in the caveat as the address of the person who entered it.

10. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

11. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and must be accompanied by an address within three miles of the General Post Office at which any notice requiring service may be left. The form of warning will be supplied in the registry.

12. Upon an appearance being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the Court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.

Citations.

13. Citations can only be extracted from the principal registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry.

14. When a party proposes to prove a will or codicil in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation in the Forms Nos. 1 and 2 (*gg*), or in some similar form.

15. Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates (*f*) and notice thereof shall be sent to the registrar of any district in which the deceased appears to have had a residence at the time of his death (*g*). Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule is not to apply to citations to exhibit an inventory, and to render an

(*f*) In the case of a citation to see proceedings, the caveat entered upon the issue of the writ will suffice.

(*g*) Notice is not now sent from the principal registry to a district registry.

(*gg*) The forms referred to are those appearing in an appendix to the Rules and orders. The numbers given are not those of the forms printed in this book.

account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties (*h*).

16. Citations to see proceedings may be extracted from the registry, on the application of any party to the cause.

17. Every citation shall be written or printed on parchment (*i*), and the party extracting the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a form of which is given, marked No. 5 (*ii*), to the registry, and there deposit the præcipe, and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office.

18. Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, but if personal service cannot be effected the direction of the judge or registrars as to the mode of service must be obtained (*k*). Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do.

19. Citations may be served upon parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the registrars, as an advertisement, in such of the morning and evening London newspapers, and if necessary in such local newspapers, and at such intervals as the judge or a registrar may direct: Provided that in any case the judge or a registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.

20. Before a party can proceed after the service of a citation an appearance must have been entered by or on behalf of the party cited, or an affidavit of personal service, and of non-appearance must, together with the citation, have been filed in the registry, or if personal service has not been duly effected, the order of the judge, or of one of the registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained. In case the citation has been advertised, the newspapers containing the advertisement, together with the citation and an affidavit of non-appearance, must be filed in the registry.

21. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

22. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause.

Suits in Forma Pauperis (*l*).

23. Any person desirous of prosecuting a suit in forma pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

(*h*) These citations are no longer used. (*i*) Paper is now allowed.

(*ii*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

(*k*) In practice the direction is given by a registrar.

(*l*) These rules are now superseded by the Rules of the Supreme Court (Poor Persons), 1925. See Order XVI, rr. 22—31G.

24. No person shall be admitted to prosecute a suit in forma pauperis without the order of the judge; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor, or attorney that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth £25 after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

25. Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show the cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.

Appearances.

26. All appearances are to be entered in the principal registry (*m*) in a book provided for the purpose, and kept by the clerk of the papers. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased.

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post Office.

Service of Pleadings, etc.

28. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

Default.

29. In case the party cited does not appear within the time limited in the citation, the cause shall proceed in default; nevertheless the party cited may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the judge or of one of the registrars.

Affidavits as to Scripts.

30. In testamentary causes the plaintiff and defendant, within eight days (*n*) of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession. A form, No. 10, is given (*nn*).

31. Every script which has at any time been made by or under the direction of a testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the

(*m*) But see *ante*, p. 566, as to appearances now entered at the Central Office, Royal Courts of Justice.

(*n*) The time in which the affidavits of scripts are to be filed is now fixed in the order for directions. The affidavit of scripts should be filed before a "short cause" is entered for hearing.

(*nn*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry.

32. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

The Declaration (o).

33. In ordinary cases it belongs to the plaintiff to deliver the declaration, and to the defendant to deliver the plea; but the party propounding the alleged last will and testament of the deceased shall, in all cases, even if defendant in the suit, deliver the declaration, and the party opposing the same deliver the plea.

34. The declaration is to be delivered to the opposite party, and a copy thereof filed in the registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts.

35. In case of proving a will in solemn form of law, the party whose duty it is shall declare in the Form No. 6 (*oo*), or as near thereto as the circumstances of the case admit.

36. In case of proceedings in default, the plaintiff shall file his declaration in the registry within eight days from the last day allowed in the citation for the appearance of the defendant.

Interest of Party Opposing Will.

37. In a testamentary cause after delivery of the declaration the interest of the party to whom it has been delivered cannot be disputed by the party declaring, except by leave of the judge (*p*).

The Plea (q).

38. A party desirous of pleading must deliver his plea to the other party within eight days after the service of the declaration, and file a copy thereof in the registry on one and the same day, otherwise he will not be permitted to plead, except with the permission of the judge, or of the registrars of the principal registry in the absence of the judge (*r*). A form of plea is given, No. 8 (*oo*).

Further Pleadings.

39. Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication,

(*o*) Declarations are no longer in use. The practice as regards pleadings is governed by the order on the summons for directions.

(*oo*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

(*p*) See also Order XX, r. 9, as to the necessity of denial of the defendant's interest.

(*q*) The term "plea" is not now used. See note under "declaration."

(*r*) Pleadings are not filed in the registry until the case is entered for trial.

rejoinder, surrejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings (*s*).

General Rules as to Pleadings.

Amended rule of December 29, 1865.

40. If one party propounds a will or testamentary script in his declaration, and the adverse parties, or either of them, desire to propound another will or testamentary script, the adverse parties must, with their pleas, deliver to the opposite party and file in the registry a declaration propounding such other will or testamentary script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the rules and orders of this Court in respect to the original declaration delivered and filed in the cause (*t*).

Amended rule of December 29, 1865.

40A. The party or parties pleading to a declaration propounding a will or testamentary script shall be allowed to plead only the pleas hereunder set forth, unless by leave of the judge, to be obtained on summons.

(1) That the paper writing bearing date, etc., and alleged by the plaintiff [*or* defendant] to be the last will and testament [*or* codicil to the last will and testament] of A B, late of, etc., deceased, was not duly executed according to the provisions of the statute 1 Vict. c. 26, in manner and form as alleged.

(2) That A B, the deceased in this cause, at the time his alleged will [*or* codicil] bears date, to wit, on the, etc., was not of sound mind, memory, and understanding.

(3) That the execution of the said alleged will [*or* codicil] was obtained by the undue influence of C D and others acting with him.

(4) That the execution of the said alleged will [*or* codicil] was obtained by the fraud of C D and others acting with him.

(5) That the deceased at the time of the execution of the said alleged will [*or* codicil] did not know and approve of the contents thereof.

Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) deliver to the adverse parties and file in the registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith (*u*).

41. In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be

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(*s*) The pleadings referred to in this rule are no longer used. A reply and subsequent pleading in a probate action can only be delivered by leave.

(*t*) For the present practice as to counterclaim, *vide ante*, pp. 596—604.

(*u*) See also Order XIX, r. 25A and *ante*, pp. 577—579.

subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court (*v*).

42. Either party desiring to alter or amend a pleading must apply to the Court upon motion (*w*); but if the alteration or amendment required be merely verbal or in the nature of a clerical error it may be made by order upon summons.

43. When a pleading has been ordered to be altered or amended, the time for filing the next pleading shall commence from the time of the order having been complied with.

44. If a party in any cause fail to deliver, or file a copy of the declaration, plea, or other pleading, within the time specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea, or other pleading ought to have been delivered shall not be bound to receive it, and the copy of such declaration, plea, or other pleading shall not be filed, unless by direction of the judge, or by order of the registrars of the principal registry, obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the judge or registrars shall otherwise direct.

45. When in any cause a conditional order is made, the party entitled to proceed in default must, before he can take the next step, obtain an order of the registrars, or, if required, an order of the judge upon summons, or on motion in Court.

The Issue (*x*).

46. Within fourteen days after the delivery of the last pleading in the cause, the party who brought in the declaration is to deliver to the other parties in the cause the issue in the Form No. 11 (*xx*), or in a form as near thereto as the circumstances of the case will admit, but the issue is not to be filed.

The Mode of Trial (*x*).

47. The party who delivers the issue shall therewith give notice to the other parties to the cause, that, after the expiration of eight days, he intends on a day to be specified in the notice to apply to the Court to try the questions at issue before itself, either with or without a jury, or to direct an issue to be tried before a judge of assize, as the case may be; and if he do not give such notice with the issue, or within sixteen days from the day on which the issue was delivered, the other party may give a similar notice to him. A form of notice, No. 12 (*xx*), is subjoined.

48. A copy of every such notice shall be filed in the registry with the case for motion as to mode of trial.

49. In each case the judge shall, after hearing the parties upon motion in Court, direct in what mode the cause shall be tried or heard.

The Record (*x*).

50. After the direction of the judge has been obtained as to the mode in which the cause is to be tried or heard, the party

(*v*) Order XXI, r. 18, now regulates the practice.

(*w*) A motion is not now necessary; *vide ante*, pp. 588, 589.

(*x*) See chapter on Summons for Directions.

(*xx*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

who delivered the declaration shall, within eight days, deposit the record of the cause in the registry. The record is to conclude with a statement of the mode in which the judge has directed the cause to be tried or heard, as in the Form No. 13 (*y*).

51. In default of the appearance of defendants, being parties cited, a record as in Form No. 14 (*y*), or as near thereto as can be, shall be deposited in the registry.

Trial by Jury.

52. If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by one of the registrars of the principal registry. A form is given, No. 15 (*y*), and a copy of such questions so settled is to be served on all the other parties to the cause (*z*).

53. After the questions have been so settled, any party in the cause shall be at liberty to apply to the judge on summons to alter or amend the same, and his decision shall be final and binding on the parties.

Setting Down the Cause for Trial or Hearing (*a*).

54. The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the Court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the registry; and the cause, unless the judge shall otherwise direct, shall come on in its turn.

55. No cause is to be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit, previously filed in the registry.

Demurrer (*b*).

56. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the judge without a jury.

The Hearing.

57. The hearing of the cause shall be conducted in Court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of common law.

58. After the conclusion of the trial or hearing, the registrar shall enter on the record the finding of the jury, or the decision

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(*y*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

(*z*) Questions are not now usually settled by the registrars.

(*a*) The practice as to setting down a probate action is now regulated by the Rules of the Supreme Court.

(*b*) No demurrer is now allowed. *Vide ante*, p. 590.

of the judge, in a form corresponding as near as may be with those given, Nos. 25 and 26 (*bb*), and shall sign the same.

New Trial (*c*).

59. An application for a new trial of an issue tried before a jury may be made to the Court by motion within fourteen days from the day on which the issue was tried if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days.

60. An application for a re-hearing of a cause heard before the judge without a jury, and in which evidence has been given *viva voce*, may be made by motion within fourteen days from the day on which the same was heard, if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days.

Interest Causes.

61. In interest causes, as heretofore, each party shall be at liberty to deny (*d*) the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively.

62. In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.

63. Forms of the declaration and plea in an interest cause are given, No. 7 and No. 9 (*bb*). (These forms are not now used.)

Proceedings by Petition (*e*).

64. Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition.

65. The party desiring to proceed by petition is to give notice thereof in writing to all the other parties in the cause, and such notice is to set forth the question intended to be raised for the decision of the Court, and a copy of such notice is to be filed in the registry.

66. In proceedings by petition the plaintiff shall, within eight days after he has given notice, deliver his petition to the defendant, and file a copy thereof in the registry upon one and the same day.

67. The defendant shall, within eight days after the delivery of the petition, deliver his answer to the plaintiff, and file a copy thereof in the registry upon one and the same day; and the same course shall be pursued with respect to the reply, rejoinder, etc., until the petition is concluded.

(*bb*) The forms referred to are those appearing in an appendix to the Rules and Orders. The numbers given are not those of forms printed in this book.

(*c*) *Vide ante*, pp. 617—618.

(*d*) In probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest: Order XX, r. 9.

(*e*) There are now no proceedings in probate matters by petition.

68. When the defendant raises the question to be heard by petition, and gives notice thereof to the plaintiff, the plaintiff shall, within eight days from the receipt of such notice, file a petition; otherwise the defendant shall be at liberty to do so.

69. Both plaintiff and defendant shall, within eight days from the day upon which the petition is concluded, file in the registry such affidavits and other proofs as may be necessary in support of their several averments therein. A form of petition is given, No. 28.

70. After the time for filing the affidavits and other proofs has expired, the petitioner is to set down the petition for hearing in the same manner as a cause.

Subpœnas.

71. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses (*f*). The party, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and deposit the præcipe.

Admission of Documents.

72. Any party in a cause may call upon the other party or parties, by notice in writing in the form given, No. 20 (*ff*), to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or hearing the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed as costs in the cause except in cases where the omission to give the notice was, in the opinion of the registrar, a saving of expense

Production of Wills, etc.

73. Applications for an order for the production of papers or writings purporting to be testamentary, may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpœna for the production of the same may be obtained by a registrar's order, founded on an affidavit, Forms of subpœnas applicable to these cases are given, Nos. 21 and 22 (*ff*), and forms of præcipe, Nos. 23 and 24 (*ff*).

Guardians to Minors.

74. A minor may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business, and without having such guardian assigned to him; but guardians are to be assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one

(*f*) Each subpœna is now limited to three persons, and may be printed on paper.

(*ff*) The forms referred to are those appearing in an appendix to the Rules and Orders. The numbers given are not those of forms printed in this book.

of the registrars; founded on an affidavit to the effect required for such assignment in non-contentious business.

Pencil Writing on Will, etc.

75. When any pencil writing appears on a will, script, or other document filed in the registry, a facsimile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.

Inventories.

76. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar (*g*).

Notices.

77. All notices required by these rules, or by the practice of the Court, are to be in writing.

Real Estate.

78. Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorising him to cite the heir or heirs-at-law, or other person or persons having or pretending interest in such real estate, to see proceedings; and the judge or registrar on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorising the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid: Provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires (*h*).

Receiver of Real Estate.

79. A receiver of real estate pending suit is to give bond in the form given, No. 29 (*hh*), or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge (*i*).

Affidavits.

80. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every person making an affidavit is to be inserted therein.

81. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

82. No affidavit will be admitted in any matter depending in the Court of Probate any material part of which is written on an

(*g*) The provisions of this rule are now usually not observed.

(*h*) But for the present practice see *ante*, p. 515.

(*hh*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

(*i*) Where it is desired to have a penalty other than that in accord with the ordinary practice, the penalty will, as a rule, be fixed by a registrar.

erasure, or in the jurat of which there is any interlineation or erasure.

83. When an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that such party made his or her mark thereto, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other person before whom the affidavit was made.

84. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before the partner or clerk of his proctor, solicitor, or attorney.

85. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

86. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court, unless by leave of the judge.

Appeals (*k*).

87. Application for leave to appeal against any interlocutory decree or order of the Court of Probate must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favour such order or decree has been made, and filed in the registry. A form of notice is given, No. 29 (*kk*).

88. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any notice of appeal, or of application for leave to appeal, unless the judge shall otherwise order; and the judge may order the execution of his decree or order to be suspended, upon such terms as he sees fit.

Time Fixed by these Rules.

89. The judge shall in every case in which a time is fixed by these rules for the performance of any act, have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit (*l*).

90. To prevent the time fixed for the performance of any act from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in chambers, or in Court to hear motions.

(*k*) See chapter on Appeals, *ante*, pp. 613—621.

(*kk*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

(*l*) Extension of time is now dealt with by the registrar under the summons for directions.

91. The time fixed in these rules for bringing in pleadings and for other proceedings shall in all cases be exclusive of Sundays, Christmas Day and Good Friday.

Taxing Bills of Costs (m).

92. All bills of costs in contentious business are referred to the registrars of the principal registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of a judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill.

93. The party who has obtained an appointment to tax his bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed.

94. When an appointment has been made by a registrar of the principal registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

95. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

Accounts of Administrators and Receivers Pending Suit.

96. Every administrator pendente lite and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination.

Paying Money Out of Court (mm).

97. Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and to set forth the day on which the money applied for was paid into the registry—the minute entered on receiving the same—the date and particulars of the order for payment to the applicant—and if the same be in payment of costs, the date of filing the bill for taxation and of the registrar's certificate. During the summer vacation

(*m*) *Vide ante*, p. 634.
(*mm*) The Rules of the High Court now apply.

money can only be paid out on certain days, to be fixed by the registrars, notice whereof will be given in the registry (*n*).

Summonses (*o*).

98. A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding.

99. A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar.

100. The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m. (*p*).

101. On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the judge's chambers.

102. Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book.

103. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

104. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

105. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The clerk of the papers before giving out the order is to see that the proper stamp has been affixed to it, and is to cancel such stamp.

106. If a summons is brought to the clerk of the papers (*q*) with a consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the judge;

(*n*) This rule is now obsolete. See R. S. C., Order XXII.

(*o*) See rules 133—136, *post*; and the chapter on summonses, ***ante***, pp. 522—525.

(*p*) This rule has not been superseded by Order LIV, r. 4E : *Hopkinson* v. *Carter*, [1909] P. 118.

(*q*) The summons is taken, in practice, to the registrar or the Judge, as the case may be.

provided that the order sought is, in the opinion of the registrars, one which, under the circumstances, would be made by the judge.

Writs of Attachment and other Writs.

107. Applications for writs of attachment, and also for writs of *fieri facias* and of sequestration, must be made to the judge by motion in Court (*r*).

Rules 107 to 109 are additional rules of December 29, 1865.

108. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the judge to sign such writs.

109. Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge (*s*).

Service of Notices, etc. (*t*).

110. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules and orders of the Court are required to be given or delivered to the opposite parties in a cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required, at the address furnished by such parties respectively.

Rules 110 to 132 are additional rules, to take effect after March 2, 1874.

111. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the registrars in his absence.

112. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct.

113. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the Commissioner or other person before whom the affidavit is sworn.

Change of Proctor, Solicitor, or Attorney.

114. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the judge, or to the registrars in his absence (*u*).

(*r*) Motions are now only required in the case of a writ of attachment.
(*s*) The application is now made in vacation to the vacation Judge.
(*t*) For practice see chapter on motions, *ante*, pp. 530—538.
(*u*) A notice of change is now filed, no summons being necessary.

115. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

Order for the immediate Examination of a Witness.

116. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to one of the registrars in his absence, by summons, or if on behalf of a plaintiff proceeding in default of appearance of the parties cited or warned in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the judge, as he may think fit (*x*).

117. Such witness shall be examined *viva voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the judge or by the registrar to whom the application for the order is made.

118. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the judge or the registrar to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses (*y*).

119. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a plaintiff proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge, as he may think fit.

120. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by one of the registrars, or for want of agreement to be nominated by the registrar to whom the application is made.

121. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the judge. Form of a commission and requisition is given in the Appendix, No. 31 (*yy*).

(*x*) The order is now made by a registrar on summons.

(*y*) *Vide ante*, pp. 583—586, for the present practice.

(*yy*) The form referred to is that appearing in an appendix to the Rules and Orders. The number given is not that of a form printed in this book.

122. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the judge.

123. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

Cases for Motion.

124. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

125. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

126. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge.

127. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto.

As to Costs.

128. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule nisi should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation (*z*).

Review of Taxation.

129. Application for a review of taxation is to be made to the judge on summons.

Recovery of Costs.

130. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the

(*z*) The provision as to time is not now enforced.

amount within seven days, unless a summons be taken out for a review of the taxation, in which case the order for payment shall be suspended until the summons is disposed of.

131. This order shall be served on the proctor, solicitor, or attorney of the party liable or if it is desired to enforce the order by committal on the party himself (*a*), and if the costs be not paid within the seven days a writ of *fieri facias* or writ of sequestration or a writ of elegit shall be issued as of course in the registry, upon an affidavit of service of the order, and non-payment.

As to Subpœnas.

132. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness.

As to Summonses.

Rules 133 to 136 are additional and amended rules of March 1, 1875.

133. All summonses heretofore heard by the registrars at the principal registry in the absence of the judge shall hereafter be heard before one or more of the registrars at the principal registry during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence.

134. All rules and orders in respect to summonses now heard before the judge in chambers at Westminster (*b*) shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry.

135. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the judge.

136. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the judge on summons to rescind or vary the same.

(*a*) There is now no committal for non-payment of costs.
(*b*) Now at the Royal Courts of Justice.

APPENDIX IV.

INSTRUCTIONS AND MEMORANDA.

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MEMORANDA

FOR THE USE OF THE DISTRICT REGISTRARS.

AS TO FILLING IN OATH AND GRANT.

1. As a general rule the district registrars are to adopt the signature of a testator as his name, although it differ from the name as written in the heading of the will.

2. In case of a variance between the name of the testator in the heading of the will and the name as signed at the foot or end of it, and in case the former is the more correct, the testator should be described by the name he signs, the word " otherwise " followed by the name given him in the will being added.

3. If the testator's name is wrongly spelt in the will, and he signs his will by his initials or by a mark, he should be described in the probate by his correct name, the word " otherwise " followed by the name written in the will being added.

4. If the testator is described in the will as " the elder," but does not so subscribe himself, such description is not to be inserted in the probate.

5. If the testator is described in the will as " the younger," but does not so subscribe himself, he should, notwithstanding, be described in the probate as " the younger," or " heretofore the younger," as the case may be.

6. The testator's last place of residence, as stated in the will or codicil, should form part of his description in the oath and in

the grant, and any previous or subsequent residence may be added, provided that not more than three places of residence be inserted in the grant (*a*).

7. When there is but one executor or executrix named in the will, he or she should be described in the probate as " the sole executor " or " the sole executrix."

8. When there are more executors than one, if they are all females, they are to be described as " the executrixes." If they are all males, or partly males and partly females, they are to be described as " the executors." The expressions " joint executors " and " executor and executrix " should not be used.

9. If the name of an executor or executrix is misspelt in the will, the words " in the will written " should be added to his or her correct name, and if the two names be identical in sound, no proof of identity is required.

10. If an executor be wrongly described in the will as " the elder," or " the younger," or by a wrong Christian name, an affidavit is requisite in proof of the identity of the person intended to be named in the will with the executor applying for the grant, or to whom power to apply is to be reserved in the grant.

11. Whenever it appears from the contents of the will that an executor or executrix is related to the testator, as father, mother, grandfather, grandmother, son, daughter, grandson, grand-daughter, brother, sister, uncle, aunt, great-uncle, great-aunt, nephew, niece, great-nephew, great-niece, or as the son or daughter or connection of any relative or of any other person, he or she is to be so described in the probate.

12. Administrators are to be described as follows (*b*):—

A husband as " the lawful husband."

A wife as " the lawful widow and relict."

A father as " the [*natural and*] lawful father."

A mother as " the [*natural and*] lawful mother " and " next of kin."

A child as " the [*natural and*] lawful son " [or daughter] and " one of the next of kin " or " only next of kin."

A brother as " the [*natural and*] lawful brother."

A sister as " the [*natural and*] lawful sister."

If there be no parents living, the brother or sister are further to be described as " one of the next of kin," or the " only next of kin."

A nephew as " the lawful nephew " and " one of the " [or " only "] " next of kin."

A niece as " the lawful niece " and " one of the " [or " only "] " next of kin."

If a brother or sister should be living, and the nephew or niece being the child of the intestate's

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(*a*) The last place of abode of the deceased (where a former address is also inserted) should appear first in the grant.

(*b*) The descriptions here given do not, except in the case of husband and wife, apply where the deceased died since 1925. The term " natural " is no longer used.

brother or sister who died in his lifetime takes the letters of administration, he or she is to be described as " one of the parties entitled in distribution."

Grandparents, grandchildren, cousins, etc., are to be described as " lawful."

LAND TRANSFER ACT, 1897.

INSTRUCTIONS TO THE OFFICERS OF THE PRINCIPAL AND DISTRICT PROBATE REGISTRIES.

[N.B.—*In cases of death after* 1925 *these and the following instructions no longer apply in certain respects.*]

1. This Act comes into operation on the 1st January, 1898. Speaking generally, in cases of persons dying on or after the 1st January, 1898, a grant will be made sufficient in terms to cover real and personal estate.

2. It is considered that the term " estate " will be sufficient to express both real and personal estate, and in place of the words " the personal estate of," the following words will be inserted in the grant, oath, Act, and bond:—

" All the estate which by law devolves to and vests in the personal representative of."

When the estate is mentioned more than once in a document, it will be sufficient on subsequent occasions to use the words " the said estate."

3. In the Act the footnotes will read as follows:—

" Gross value of estate, £ .

" Net value of personal estate, £ ."

4. There will be no addition to or alteration of the *ad valorem* fee on the grant, which will be charged as now upon the net personal estate only.

5. In the case of a grant made to an heir-at-law, the necessary evidence that the applicant's claim is well founded will usually appear in the oath, but need not be set out in the grant.

6. Grants to be made under section 1, sub-section 3 will be general in terms, and will not be limited to real estate.

8. As the grant will cover both real and personal estate, the bond will be conditioned for the due administration of both kinds of property, which will be described as in the grant, and the consequent additional penalty shall be double the gross annual value of the real estate of the deceased, which will appear in the account annexed to the Inland Revenue Affidavit (*d*).

(*d*) In cases of death after 1925 the penalty on real estate is double the capital value thereof.

LAND TRANSFER ACT, 1897.

ADDITIONAL INSTRUCTIONS TO THE OFFICERS OF THE PRINCIPAL AND DISTRICT PROBATE REGISTRIES.

1. If the deceased did not die possessed of any real estate, the Act does not apply. If it be necessary to clear off a prior right that would exist if there were real estate, it should be done by a statement in the oath (which should also be inserted in the grant) that "the deceased did not die possessed of real estate."

2. A residuary legatee and a residuary devisee are equally entitled to a grant.

3. Where there is a residuary devisee in trust he should be cleared off before a grant can be made to a residuary legatee, and where there is a residuary legatee in trust he should be cleared off before a grant can be made to a residuary devisee.

4. The next of kin and heir-at-law are equally entitled to a grant (*e*).

5. If there be no executor or residuary legatee, a grant should not be made to a next of kin without clearing off the residuary devisee, and if there be no executor or residuary devisee, a grant should not be made to the heir-at-law without clearing off the residuary legatee.

6. A grant should not be made to the representative of a deceased residuary legatee without clearing off the residuary devisee.

7. The prior right of the husband or widow of an intestate to a grant is not affected by the Act.

8. Although the next of kin and heir-at-law are equally entitled to a grant, yet, in the case of the renunciation of the husband of an intestate, the heir-at-law should be cleared off before a grant is made to the next of kin who has no interest in the estate.

9. But on the renunciation of the widow of an intestate, it is not necessary to clear off the heir-at-law before making a grant to the next of kin.

10. On the renunciation of the husband of an intestate a grant should not be made to the husband's receiver in bankruptcy without clearing off the heir-at-law.

11. A grant should not be made to a person who (though not one of the next of kin) is entitled in distribution to the personal estate, without clearing off the heir-at-law as well as the next of kin of the intestate.

12. A grant should not be made to the representative of a next of kin of an intestate without clearing off the heir-at-law.

13. Guardians of minors and infants are not entitled to a grant without clearing off all persons of age equally entitled with such minors and infants whether as interested in real or personal estate.

14. A grant will not be made to a person for the use of a lunatic without clearing off all other persons equally entitled

(*e*) But see instruction No. 8.

with the lunatic whether as having an interest in real or personal estate.

15. A person acting under a power of attorney has the same equality and priority as the donor of the power would have if applying personally.

16. When a grant is made to an heir-at-law, his relationship to the deceased should not appear in the grant.

17. The value of any real estate in Scotland or Ireland accounted for in the Inland Revenue affidavit should not be included in the oath or certificate on the grant.

18. Bonds are liable to duty (5s.) unless the gross value of the real and personal estate to be dealt with by the administrator does not exceed £100.

19. Where the gross value of the personal estate and the annual value of the real estate together do not exceed £50, one surety to the bond is sufficient, although the total gross values of the real and personal estate exceed that sum (*f*).

20. The foregoing instructions are to be considered provisional. Should any case arise in which a departure from them might seem to be expedient, such case should be referred to the registrars of the principal registry.

PRESIDENT'S NON-CONTENTIOUS PROBATE DIRECTIONS, DECEMBER 3, 1925.

DIRECTIONS given by the President, to the Officers of the Probate Division, for regulating the Practice on and after the 1st January, 1926, under the Administration of Justice Act, 1925, the Administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925 (*ff*).

Jurisdiction of district probate registrars. Sections 151 (1), 158 and sched. 5.

1. On such day, not before the 1st day of January, 1926, as may be prescribed by the President, the provisions of section 151, sub-section 1 of the Judicature (Consolidation) Act come into effect, abolishing the territorial limits of district probate registries (*g*). On and after such date, all country notices must be searched as heretofore, and, in addition, search must be made of the Country Notices Book; such search need not be extended back further than the appointed day.

Notice of caveats entered on or after the prescribed date need not be sent to district registries, nor the fee charged.

Trust corporations. Section 161 (2).

2. On and after the 1st January, 1926, no grant of administration or of administration with will annexed can be made to a syndic or nominee of a *trust* corporation; a foreign trust corporation can, however, appoint an attorney, and an English trust corporation can apply as attorney.

(*f*) In cases of death after 1925 the real estate is calculated at twice the capital value thereof.

(*ff*) Unless the contrary is indicated, the sections referred to in connection with these directions are those of the Supreme Court of Judicature (Consolidation) Act, 1925.

(*g*) Territorial limitation was abolished by order as from January 1, 1926.

Probate limited to settled land. Section 162. Administration of Estates Act, 1925, s. 22.

3. On application by trustees of settled land deemed to be as such executors in that respect, provided that the will in question shall have been proved and shall be sufficiently identified in such application, no engrossment of the will need be annexed to the grant to such trustees, nor need the executors be sworn to the will. If the will has not been proved, it must be marked and engrossed.

On application, otherwise than by trustees of settled land, for a grant of the whole estate, the names of the trustees of the settlement must be stated in the oath.

Special administrators. Section 162 (substitute for s. 73, Court of Probate Act, 1857).

4. In cases of death on or after 1st January, 1926, application under section 162 will be made by motion to the Court except when the gross estate does not exceed £500, in which case application may be made *ex parte* to a registrar of the principal registry, who may make an order or refer the matter to the Court on motion.

The provisions of rule 31 shall apply, *mutatis mutandis*; a declaration shall be filed and the sureties justify.

Life interest. Administration of Estates Act, 1925, s. 48 (2).

5. When it is alleged by an applicant for a grant to a single grantee that a life interest has been cleared off by redemption, the registrar must be satisfied before making such grant that the whole life interest of the person in question, whether at present ascertainable or not, has been redeemed.

Failing this the grant must be made to two persons, whatever the value of the estate.

Administration *pendente lite*. Section 163.

6. When an order on motion for the appointment of an administrator *pendente lite* of the estate is drawn in respect of a person who died on or after 1st January, 1926, it will provide for an administration of the real and personal estate, unless the judge shall otherwise direct.

Two grantees. Section 160.

7. Where a grant must be made to two persons it is immaterial that they represent the interest of a single individual, whether as guardians, attorneys, or otherwise.

A grant to a trust corporation, made by reason of a minority or life interest, will be limited "until further representation be granted."

Administration to four grantees. Section 160 (1).

8. Grants of administration with or without will may be made to any number of persons not exceeding four.

Minor executors. Section 165.

9. Except in cases where there are beneficiaries who are minors or infants, or where life interests are created by the will, the fact that an executor is an infant does not of itself necessitate a grant to two persons. The grant will, in either case, be *durante minore ætate*.

Minority or life interest. Colonial Probates Act, 1892.

10. In applications under the Colonial Probates Act, 1892, unless it is shown by the grant or by affidavit that the deceased died domiciled in the colony, the provisions of section 160 of the Judicature Act, 1925, must be observed if there is (a) a minority, or (b) a life interest under English law.

Election and assignment of guardians.

11. The existing practice as to the election, appointment, or assignment of guardians shall continue. Where, for the purpose of a grant, a second guardian is required, the minor may elect any other of his kin, or the guardian duly constituted may

nominate as his co-administrator some other person whose fitness he shall show by a filed statement, unless in either case a registrar of the principal registry shall otherwise direct. The same principles shall apply to the assignment of guardians. A trust corporation nominated by the guardian duly elected or assigned may join in the application for a grant; such nomination must be signed by the guardian in the presence of a witness; it will be filed with the papers to lead the grant.

Lunatics. Law of Property Act, 1925, s. 171. Death on or after January 1, 1926.

12. Under the Administration of Estates Act, 1925, s. 51, sub-s. 2, where a person, being on 1st January, 1926, a lunatic and of full age, dies intestate without having recovered his testamentary capacity, his real estate (other than chattels real) devolves on his heir-at-law, as if he had died before 1926; his personal estate, subject to any settlement by the Court under the Law of Property Act, 1925, s. 171, devolves in accordance with the provisions of the Administration of Estates Act, 1925, s. 46.

In making a grant in respect of the estate of such a person, the rights and interests of the heir-at-law shall be regarded equally with those of the person or persons entitled under the Administration of Estates Act, 1925, s. 46.

Bond. Non-Contentious Rule 39.

13. In calculating the amount of the bond in respect of real estate, double the capital value must be taken. Direction dated February, 1898, as to the gross annual value is cancelled.

Sureties. Section 167.

14. The principal probate registrar has directed that where the gross estate is under £50 one surety may be accepted unless a registrar shall otherwise direct.

A husband is no longer to be excused, as such, from furnishing two sureties, where the death occurred on or after 1st January, 1926.

[*See also* Rules 39 and 114 N. C. B.]

Irish re-sealings. Certificate of bond. Section 169 (1).

15. No bond or certificate of security need be given when application is made to re-seal a grant made in Northern Ireland in respect of a person dying on or after the 1st April, 1923.

16. The description in oath and grant (*h*) shall be—

A husband	"the lawful husband."
A wife	"the lawful widow and relict."
Issue of marriage	"the lawful son (or daughter), and only person entitled to the estate,"
	or
	"the lawful son (or daughter), and one of the persons entitled to share in the estate,"
	or
	"the lawful grandson (or granddaughter), and only person entitled to the estate,"
	or
	"the lawful grandson (or grand-

Title to grant.

(*h*) A legitimated person is described in the same manner as an ordinary applicant: *vide ante*, p. 454; an illegitimate person is described as the "natural son, daughter or mother."

daughter), and one of the persons entitled to share in the estate."

A father / *or* / A mother — "the lawful father (or mother), and only person entitled to the estate,"

or

"the lawful father (or mother), and one of the persons entitled to share in the estate."

A brother / *or* / A sister — "the lawful brother (or sister) of the whole blood, and only person entitled to the estate,"

or

"the lawful brother (or sister) of the whole blood, and one of the persons entitled to share in the estate."

If there be no brother or sister of the whole blood, nor any issue of such brother or sister, then the half blood is described as "the lawful brother (or sister) of the half blood, and, *etc.*"

Issue of a brother or sister — "the lawful nephew or great nephew (or niece) of the whole blood, and only person entitled to the estate,"

or

"the lawful nephew or great nephew (or niece) of the whole blood, and one of the persons entitled to share in the estate."

If there be no brother or sister of the whole blood, nor any issue of such brother or sister, then the half blood is described as "the lawful nephew or great nephew (or niece) of the half blood, and, *etc.*"

A grandparent — "the lawful grandfather (or grandmother), and only person entitled to the estate,"

or

"the lawful grandfather (or grandmother), and one of the persons entitled to share in the estate."

An uncle / *or* / An aunt — "the lawful uncle (or aunt) of the whole blood, and only person entitled to the estate,"

or

"the lawful uncle (or aunt) of the whole blood, and one of the persons entitled to share in the estate."

If there be no uncle or aunt (being brother or sister of a parent of the whole blood) nor any issue of such uncle or aunt, then such person shall be described as "the lawful

uncle (or aunt) of the half blood, and, *etc.*"

Issue of an uncle or aunt

" the lawful cousin german of the whole blood, and only person entitled to the estate,"

or

" the lawful cousin german of the whole blood, and one of the persons entitled to share in the estate."

If there be no uncle or aunt (being brother or sister of a parent of the whole blood) nor any issue of such uncle or aunt, then such person shall be described as " the lawful cousin german of the half blood, and, *etc.*"

Presumption of death.

17. Applications for leave to swear to the death of a person presumed to be deceased may be made to a registrar of the principal registry if the gross estate does not exceed £250.

Notation of domicil.

18. On and after the 1st January, 1926, a district probate registrar may, upon the usual affidavit evidence, make orders for the notation of grants as to domicil.

19. Attention is called to the following amendments of, and additions to, the Non-Contentious Probate Rules:—Principal Registry Rules Nos. 30, 37, 39, 50, 62, 66, 76, and 111 to 122; and District Registry Rules, Nos. 36, 43, 46, 61, 72, 74, 75, 76, 89, and 104 to 115; and to the rescission of Rule 61 P. R. and, under Rule 75 (A.) D. R., to the repeal of section 49 of the Court of Probate Act, 1857, so far as the immediate forwarding of notices is concerned. Directions dated August 2, 1859, and April, 1908, on this subject are cancelled.

Life interest.

20. Attention is also drawn to the following:—

(1) A residuary legatee or devisee for life, or a legatee or devisee for life, can no longer take a grant alone.

(2) Notwithstanding the provisions of section 47 of the Administration of Estates Act, 1925, no reference need be made, where a grant is made on behalf of a minor, to the fact that he has not attained an absolutely vested interest.

21. The following sections should be noted:

Marriage. Law of Property Act, 1925, s. 177 (1).

A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.

Survivorship. Law of Property Act, 1925, s. 184.

In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of

seniority, and accordingly the younger shall be deemed to have survived the elder.

Decisions of the Senior Registrar, Dated December 19, 1925.

Rule 111, P. R.; 104, D. R.

The definition of a trust corporation will be found in Rule 30 of the Public Trustee Rules. (The rule referred to has been revised and will be found *ante*, p. 206 (note).)

It must be sworn in what manner a corporation has been authorised, but the authority or nomination need not be produced.

A trust corporation may no longer apply by a syndic. Corporations other than trust corporations may, however, do so, but must swear that they are not trust corporations.

Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (2).

Application to add a representative under sub-section 2 may be made by any person interested.

In the administration or administration (will) oath a mere statement that there are, or are not, minority or life interests is sufficient.

Rule 118, and President's Directions, 1925.

No particulars of the trust need be given.

The right of trustees of settled land to a grant of probate limited to such land is confined to the trustees at the date of the death.

Rule 121.

In applying for a grant all members of any one class are equally entitled, unless there are conflicting claims, in which case a brother (for example) would usually be preferred to a nephew.

Rule 122.

Where the sole person first entitled to a grant which must be made to two persons, is also the next-of-kin of a minor who is next entitled, such person may, if he is the statutory guardian, or has been duly elected, nominate a co-administrator. In the case of an infant, an order will, of course, be required, unless there is a statutory or testamentary guardian.

Supreme Court of Judicature (Consolidation) Act, 1925, s. 162. President's Directions, 1925.

This replaces section 73 [Court of Probate Act, 1857] as regards cases in which the death occurred after the 1st January, 1926, but as regards these no provision is made for cases in which there is a will.

The allegation of redemption of a life interest must be proved by affidavit. An acknowledgment, by the person having the life interest, of the redemption, must be lodged.

Executors—

Grants may be made to a single attorney (or guardian) of an *executor* notwithstanding that there is a minority or life interest.

Such grants do not break the chain of executorship, even though probate be not subsequently granted.

Fees on real estate.

The present practice will continue. No fee will be taken.

DEPOSITORY FOR WILLS OF LIVING PERSONS.

[Amended Regulations dated the 15th May, 1914.]

In pursuance of the provisions of *the Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77, *s.* 91 (*i*)), the Principal Probate Registry of the High Court of Justice, Somerset House, Strand, London, is the depository now provided for the wills of living persons, and testators are at liberty to deposit their wills and codicils therein, under the following regulations:—

1. The will or codicil to be deposited must be brought into the Record Keeper's Department and acknowledged as that of the testator before one of the registrars, either by the testator himself, or by some person specially authorised by him to deposit the same on his behalf.

2. The will or codicil so deposited will not *under any circumstances* be delivered out of the registry nor revoked by destruction.

3. In case the testator himself deposits his will or codicil, he will be required to sign his name, or acknowledge his signature, in the presence of the registrar, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, *or* codicil to the last will and testament, *or* last will and testament and codicil thereto, bearing date respectively [*here state the dates of all the papers enclosed*], of A B, of, etc., whereof C D, of, etc., and E F, of, etc., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justice by me for safe custody, there to remain deposited until after my decease." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.*

4. In case the testator authorises some other person to deposit his will or codicil for him he will be required to subscribe his name, in presence of a witness, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, *or* codicil to the last will and testament, *or* last will and testament and codicil thereto, of me, A B, of, etc., whereof C D, of, etc., and E F, of, etc., are appointed executors, and I authorise G H to deposit the same for safe custody in the Principal Probate Registry of the High Court of Justice, there to remain deposited until after my decease. (Signed) A B. Witness, K L." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.*

The packet containing the will or codicil must be accompanied by an affidavit of the witness to the effect that the signature of the testator to the above endorsement, deposed by the witness, is in the proper handwriting of such testator, and was by him

(*i*) The section referred to in the text is now repealed. The depository for wills of living persons is now provided for by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 172.

signed in the witness's presence on the day mentioned in the endorsement, and that the signature " K L " is in the proper handwriting of the deponent. An affidavit will also be required from the person authorised to deposit the packet, to the effect that the packet which is produced for the purpose of being deposited for safe custody in the Principal Probate Registry of the High Court of Justice, and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight, and condition as when received by the deponent from the hands of A B [the testator] on a day to be mentioned as that on which he received it.

The last-mentioned affidavit is to be sworn before the registrar to whom the packet containing the will or codicil is delivered.

5. In case the testator is a lunatic, his will or codicil may be deposited for or on behalf of the Masters in Lunacy.

The Master in Lunacy, or the person depositing the will or codicil on his behalf, will be required to sign his name, or acknowledge his signature in the presence of the registrar, to an endorsement on the envelope in which the will or codicil is enclosed to the following effect:—

" This sealed packet contains the last will and testament, *or* codicil to the last will and testament, *or* last will and testament and codicil thereto, bearing date respectively [*here state the dates of all the papers enclosed*] of A B, now a lunatic, of, etc., whereof C D, of, etc., and E F, of, etc., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justice by the Masters in Lunacy for safe custody, there to remain deposited until after the decease of the testator." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of the testator's signature thereto.*

6. A minute setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and the declaration of the testator, or his agent, that he deposited the same in the registry for safe custody, and also acknowledging the receipt of the packet, will be drawn up in duplicate and will be signed by the registrar. One copy of this minute will be delivered to the testator, or his agent, and the other retained in the registry.

7. The following fees will be payable in Judicature fee stamps:—

	£	s.	d.
For depositing the will and receipt for same	0	10	0
For drawing and entering minute of the registrar	0	2	6
For filing each affidavit	0	2	0

8. Testators are at liberty to transmit their wills and codicils to the Principal Probate Registry, to be deposited there for safe custody, through the registrar of a district probate registry, who will send the same by the general post in a registered letter.

The affidavit of the person authorised by the testator to deposit his will or codicil will, in that case, be sworn before the district registrar to whom the packet containing it is delivered.

On production to the district registrar of the sealed packet containing the will or codicils to be deposited, and the affidavits (if any), he will draw up a certificate in duplicate under his hand, setting forth when and by whom the same were produced to, and left with him. He will deliver one of these certificates to the testator, or his agent, and retain the other in his district registry, and he will transmit an office copy of the certificate, with the sealed packet and affidavits, and a form of receipt, to the Principal Probate Registry. The receipt will be returned to him under the hand of one of the registrars of the Principal Registry.

The following fees will be payable to the district registrar in addition to the fees before mentioned:—

	£	s.	d.
For his certificate	0	2	6
For filing same	0	2	6
For office copy of the same to transmit to the Principal Registry	0	2	6
For receipt	0	1	0

All fees are to be retained in the district registry.

9. On the death of a testator who has deposited a will or codicil during his lifetime, the certificate of death, and, when possible, the registrar's minute or certificate on the deposit must be produced. The executors will be required to attend and acknowledge before one of the registrars that they are the executors named in the will. They will be sworn to the will (which is not delivered up) before a commissioner at the registry.

The following fees will be payable:—

	£	s.	d.
For filing minute on opening will	0	2	6
For search, if registrar's minute be not produced	0	1	0

10. All forms and envelopes required for deposit of wills are to be had on application at the Record Keeper's Department of the Principal Probate Registry.

INSTRUCTIONS WITH REGARD TO APPLICATIONS BY THE PUBLIC TRUSTEE (*k*).

[Dated March 27, 1908.]

1. For grants of letters of administration.

(a) When the Public Trustee applies for letters of administration, notice should be given by him to the widower, widow, heir-at-law, next of kin, and persons entitled in distribution (*l*) or their representatives, as the case may be, or such of them

(*k*) Under section 175, sub-section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Public Trustee is entitled to apply for a grant as a trust corporation.

(*l*) Or the persons entitled to share in the estate under the Administration of Estates Act, 1925.

as can, without delay, be communicated with, intimating that the application for the grant is being made by the Public Trustee, and that unless application for a grant be made, or a caveat be entered, within eight days from the date of the posting of the notices, he will proceed with his application without further notice; but if a person to whom notice is sent is not in the United Kingdom the period of eight days should be increased by the addition of time sufficient for a reply by return of post in ordinary course of postage from the place to which the notice is sent.

(b) If any application for a grant in preference to the Public Trustee be made, the question of preference may be dealt with by one of the registrars of the Principal Probate Registry, or on an application to the Court.

(c) If a caveat be entered, the usual practice is to be followed.

(d) If it is suggested that there is a will, the Public Trustee must first cite the executors and the persons interested thereunder to propound the same.

2. When the Public Trustee applies for letters of administration with the will annexed, he must clear off executors in the usual way, and notice should be given, as above mentioned, to the residuary legatees and devisees, or their representatives, as the case may be, or, if there are no residuary legatees and devisees, to the person or persons entitled to the undisposed-of residue, or their representatives.

3. In the wording of the grant, the Public Trustee should be described as "the Public Trustee."

4. If the Public Trustee take a grant as executor, he must be considered thereby to continue the chain of executorship.

The Public Trustee is not required to give a bond (*m*).

Under the Public Trustee Rules, 1912, the Public Trustee is authorised to act as attorney for any person where the execution of any trust is involved. A grant made to the Public Trustee, as attorney, is made for the use and benefit of the constituent of the power of attorney, omitting the words "and until he shall apply," etc.

The Public Trustee may take a limited grant although entitled to a general grant (*o*).

An undertaking by the Public Trustee to administer an estate under section 3 of the Public Trustee Act, 1906, may be filed, without fee, at the Notation Department. A notation, setting out the undertaking will be made on the record of the grant, and where such notation appears no duplicate grant will issue without special direction of one of the registrars.

(*m*) Public Trustee Act, 1906, s. 11, sub-s. 4.
(*o*) President's Direction, July 20, 1915.

RE-SEALING ENGLISH GRANTS IN IRELAND UNDER RULE 108 N.-C.B.

[Except in Northern Ireland in Cases of Death on or since November 22, 1921.]

Applications to transmit an English grant to Ireland to be re-sealed may be made either by the executor or administrator, or by his solicitor.

The applicant must personally deposit at the Personal Application Department (Room 34)—

(1) The original grant;

(2) A copy of the grant fairly written with the number of folios (a folio contains 90 words) clearly marked outside the copy;

(3) A *certificate* from the Inland Revenue Office that *estate duty* has been paid according to the value of the property in England and *Ireland*.

[Note.—This certificate is obtained either on a personal request or by letter addressed to the Secretary, Estate Duty Department, Somerset House.]

(4) A *certificate* (in cases of grants of administration with or without will) that sufficient *bond* has been given to cover the personal estate in Ireland.

[Note.—Application for this certificate must be made at the Notation Department (Room 70), Principal Registry, accompanied by an affidavit made by the administrator. A form of the affidavit (Appendix VII, Form 26) can be obtained of the Messenger, Contentious Department (Room 43). The applicant must also look up the bond in the Public Hall. The fees in respect of this certificate are:—Filing affidavit, 2s.; certificate, 2s. 6d.; looking up bond, 1s.]

Upon presenting the documents at the Personal Application Department, the applicant must deposit postal orders for the amount of the fees payable in Ireland. Particulars of these fees will be furnished to the applicant by this department on the documents being left (see Appendix V, Part I.)

RE-SEALING ENGLISH GRANTS IN NORTHERN IRELAND UNDER RULE 108.

[Death on or since November 22, 1921.]

The procedure generally is the same as that described in respect of cases of death prior to November 22, 1921, but the applicant will be required to deposit:—

(1) The grant;
(2) A copy of the grant (see above);
(3) Inland Revenue affidavit, in duplicate, showing the duty paid in Northern Ireland;
(4) Bond in respect of the Northern Ireland property;
(5) An affidavit of justification of sureties will in most cases be required.

Particulars of the fees payable in Northern Ireland will be found in Appendix V, Part I.

APPENDIX V.

FEES.

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PART I.—FEES IN NON-CONTENTIOUS BUSINESS.

FEES

TO BE TAKEN IN THE

PRINCIPAL REGISTRY OF THE COURT OF PROBATE

IN

NON-CONTENTIOUS BUSINESS.

Note.—*This table, which is that of March 2, 1874, as altered and amended by subsequent orders, may be taken to apply to the district probate registries, except where the contrary is indicated. In certain cases references to the wording of the district registry fees are inserted in italics.*

PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

Including double or cessate probates or letters of administration with will annexed, de bonis non or cessate, upon which

stamp duty (*a*) is payable in respect of the value of the personal estate of the testator.

If the personal estate is sworn to be under the value of—	£	s.	d.
£5	0	1	0
20	0	1	0
100	0	1	0
200	0	3	0
300	0	7	6
450	0	12	0
600	0	16	6
800	1	2	6
1,000	1	13	0
1,500	2	5	0
2,000	3	0	0
3,000	3	15	0
4,000	4	10	0
5,000	4	15	0
6,000	5	0	0
7,000	5	5	0
8,000	5	10	0
9,000	5	15	0
10,000	6	0	0
12,000	6	5	0
14,000	6	10	0
16,000	6	17	6
18,000	7	5	0
20,000	7	12	6
25,000	8	2	6

If the personal estate is sworn to be under the value of—	£	s.	d.
£30,000	8	15	0
35,000	9	7	6
40,000	10	6	3
45,000	11	5	0
50,000	12	3	9
60,000	13	2	6
70,000	15	0	0
80,000	16	17	6
90,000	18	15	0
100,000	20	12	6
120,000	21	11	3
140,000	23	8	9
160,000	25	6	3
180,000	27	3	9
200,000	29	1	3
250,000	30	18	9
300,000	35	12	6
350,000	40	6	3
400,000	41	17	6
500,000	43	8	9
For every additional £100,000 or any fractional part of £100,000 a further and additional fee of	3	2	6

[NOTE.—These fees are calculated upon the NET amount of the PERSONAL estate upon which stamp duty is paid.]

Double or Cessate Probate, etc.

	£	s.	d.
For every double or cessate probate, or letters of administration with the will annexed, de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under £450 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards	0	12	6
For every duplicate and triplicate probate, or letters of administration with the will annexed, when the personal estate is under £450 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards	0	12	6

Exemplifications.

	£	s.	d.
For every exemplification of a probate, or letters of administration with the will annexed, in addition to the fees for engrossing and collating the will and other documents registered with the same	1	1	0

Registering and collating or engrossing and collating Wills.

	£	s.	d.
For registering and collating or engrossing and collating wills and other documents, if three folios of ninety words each, or under, including parchment	0	4	6
If above three folios of ninety words each, per folio	0	1	6
In cases of grants for Queen's pay or prize money, the effects being under £100, without reference to the length of the will	0	4	6
If there are pencil marks in a will or codicil, or if a will or codicil or any part thereof is to be or has been registered facsimile, in			

(*a*) Now "estate duty," or, in cases of death prior to August 2, 1894, "probate duty." This substitution should be made in each case in which reference to "stamp duty" appears in this table.

	£	s.	d.
addition to any other fee for registering and collating or for engrossing and collating the same :—			
If the part or parts to be registered or engrossed facsimile are two folios of ninety words in length, or under	0	1	0
If exceeding two folios, for every additional folio or part of a folio of ninety words	0	0	6

Codicils to Wills already Proved.

For every probate of a codicil or codicils, or letters of administration with a codicil or codicils annexed, being a codicil or codicils to a will already proved, the same fees respectively as on a duplicate probate or duplicate letters of administration with will annexed.

Letters of Administration.

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of an intestate.

If the personal estate is sworn to be under the value of—	£	s.	d.
£5	0	1	0
20	0	1	0
50	0	1	0
100	0	1	0
200	0	4	6
300	0	12	0
450	0	16	6
600	1	2	6
800	1	13	0
1,000	2	5	0
1,500	3	7	6
2,000	4	10	0
3,000	4	13	9
4,000	4	17	6
5,000	5	5	0
6,000	5	12	6
7,000	6	0	0
8,000	6	7	6
9,000	6	15	0
10,000	7	2	6
12,000	7	10	0
14,000	7	17	6
16,000	8	8	9
18,000	9	0	0
20,000	9	11	3
25,000	10	6	3

If the personal estate is sworn to be under the value of—	£	s.	d.
£30,000	11	5	0
35,000	12	3	9
40,000	13	11	3
45,000	15	0	0
50,000	16	7	6
60,000	17	16	3
70,000	20	12	6
80,000	23	8	9
90,000	26	5	0
100,000	29	1	3
120,000	30	9	6
140,000	33	5	9
160,000	36	2	0
180,000	38	18	3
200,000	41	14	6
250,000	44	10	9
300,000	46	17	6
350,000	49	4	6
400,000	51	11	3
500,000	53	18	3
For every additional £100,000 or any fractional part of £100,000 a further and additional fee of	4	13	6

[Note.—These fees are calculated upon the net amount of the personal estate upon which stamp duty is paid.]

Duplicate and Triplicate Letters of Administration, etc.

	£	s.	d.
For every duplicate and triplicate letters of administration when the personal estate is under £300 or any sum less than £300, the same fee as on a first grant of letters of administration under the same sum.			
For every duplicate and triplicate letters of administration when the personal estate is of the value of £300 and upwards	0	12	6

Exemplifications.

	£	s.	d.
For every exemplification of letters of administration	1	1	0

Administrations de bonis non or cessate.

For every grant of letters of administration de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is

	£	s.	d.
under £300 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £300 and upwards	0	12	6

Additional Security.

For noting on the grant of letters of administration with or without will annexed, and on the Act, that additional security has been given	0	5	0
For every certificate for the Inland Revenue Office, that additional security has been given	0	1	0

Articles to pay Pro Rata.

For articles entered into by administrators to pay creditors pro rata, per folio of seventy-two words each	0	2	0
For the bond for the performance of the articles, or for payment of creditors pro rata, per folio of seventy-two words	0	2	0

Searches and Inspection of Wills, etc.

For every search for will or grant of letters of administration or any document filed in the Principal Registry [or *in a district registry*], including the looking up and inspecting an original will before the same is registered, or a registered copy of a will or an Administration Act	0	1	0
For every third will or Administration Act looked up in addition to the above	0	1	0
For looking up and inspecting an original will after the same is registered, in addition to the fee for the search	0	1	0
For looking up and producing any document filed in the registry other than an original will or Administration Act	0	1	0
For a search for a will or grant of letters of administration, and for reading the will when the party applying is unable or unwilling to search for or read the same :—			
For the search for each year or part of a year	0	0	6
For reading the will :—			
If twenty folios of ninety words each or under	0	1	0
For every additional twenty folios or part of twenty folios of ninety words each	0	1	0

Searches for former Grants.

For every search by an officer of the Principal Registry [or *by an officer of a district registry*] in order to ascertain whether any probate or grant of letters of administration has already issued, or any application has been made for a grant of probate or administration, as under :—			
For every full year or part of a year which has elapsed since the deceased's death	0	0	6
In case it be requisite to extend the search to one or more [or *to one or more other*] district registries, a similar additional fee for the search in each of such district registries.			

Special and Limited Grants.

For every special or limited grant of probate or letters of administration with or without will annexed, in addition to the ordinary fees, as under :—			
If the personal estate is under the value of £20, 1s. per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.			
If the personal estate is of the value of £20 and upwards, 2s. per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.			
Whenever the personal estate to be placed in possession of, or dealt with by, the executor or administrator, by means of a special or limited grant of probate or letters of administration, exceeds in value the sum of £20, the fee of 2s. per folio of seventy-two words shall be payable on the bond, on the Act, and on the grant, although the personal estate be sworn under £20.			

Sealing Irish and Scotch Grants (b).

	£ s. d.	
For affixing the seal of the Court to any grant of probate or letters of administration, with or without will annexed, or to any exemplification of probate or letters of administration, with or without will annexed, under seal of the Court of Probate in Ireland, in order to its becoming in force for property in England, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the probate or other instrument to which the seal of the Court is to be affixed. Except as under :—		Amended by an order of December 12, 1892.
When the property in England amounts to or exceeds £300 in value, and is shown to have been included in the property in respect of which a fee was paid in Ireland (*c*)	0 12 6	
For the registrar's fiat on an Irish grant	0 5 0	
For affixing the seal of the Court to any confirmation of an executor issued by authority of a Commissary Court in Scotland	1 1 0	

Sealing Colonial Grants (b).

The fees hereunder written are fixed and appointed to be taken in the Principal Probate Registry in respect of applications under the Colonial Probates Act, 1892, in addition to any fees payable under the existing Table of Fees in non-contentious business. Order of December 12, 1892.

	£ s. d.
For affixing the seal of the Court to any grant of probate or letters of administration, with or without will annexed, or copy thereof, in order to its becoming in force for property in England, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the probate or other instrument to which the seal of the Court is to be affixed.	
For the registrar's fiat	0 5 0
If the application to seal under the above-mentioned Act be made through the Personal Application Department, the additional fees payable when a grant is extracted through that department, inclusive of the *ad valorem* fee for probate or letters of administration under seal, are to be taken.	

Notation of Domicile.

For noting on a probate or on letters of administration, with or without will annexed, that the testator or intestate died domiciled in England	0 5 0

Office Copies and Extracts.

For every office copy or extract of a will, or of a probate, or Administration Act, or of any document filed or deposited in the Principal [or *a district*] Registry, if five folios of ninety words or under	0 2 6
If exceeding five folios of ninety words, for every additional folio or part of a folio	0 0 6
If the will or other document is 200 years old and five folios of ninety words or under	0 5 0
If exceeding five folios of ninety words, for every additional folio or part of a folio	0 0 9
If the office copy of a will or any part of a will or other document is required to be made facsimile, and such will or part of a will or other document is two folios of ninety words in length or under, in addition to the fee for the copy	0 1 0

(*b*) These sections apply only to the principal registry.

(*c*) It should be observed that in the case of Northern Ireland grants, where death has occurred on or since November 22, 1921, this fee will only apply if it is clearly shown to the satisfaction of the registrar that the English property was included in the Northern Ireland grant. If this is not satisfactorily shown an *ad valorem* fee on the property in England will be payable : Direction of the President, May 23, 1922. For fees payable in Ireland on re-sealing English grants, see *post*, pp. 913—916.

	£	s.	d.
If exceeding two folios of ninety words, for every additional folio or part of a folio	0	0	6
For copies of wills and other documents in foreign languages made by persons specially employed for that purpose, the charges of the persons so employed will be taken in addition to any other fees which may be payable in respect of such copies.			
If a copy is required to be printed (in addition to a manuscript copy for the printer, at 6d. per folio of ninety words, and collating) :—			
For twenty folios of ninety words or under	0	10	0
For every additional folio or part of a folio	0	1	0
For office copy of a will, minute, order, decree, or any document under seal of the Court for which no other fee is payable :—			
For the seal, in addition to the fee for the copy and collating ...	0	5	0
For copies of plans, drawings, and armorial bearings, etc., such fee as shall be determined by the registrar [or *the district registrar*] in each particular case.			
For notifying a charitable institution of a bequest in its favour and forwarding extract (*d*)	0	10	6

Order of July 23, 1926. (See also Order of December 20, 1926.)

Collating Documents.

For collating copy of a probate and will, or copy of letters of administration with or without the will annexed, or any other instrument to be filed or deposited in the registry, or for collating any copy or instrument with an original document already filed or deposited in the registry, including the registrar's [or *district registrar's*] certificate in verification thereof :—			
If ten folios of ninety words each, or under	0	2	6
If above ten folios of ninety words each, per folio	0	0	3

[NOTE.—The fee for re-collating, or for collating "copy to assist," or for fiat, etc., is 3d. per folio for each necessary examination; the minimum fee of 2s. 6d. referred to in the Rules as to Fees not being considered applicable to this class of work (Circular, March 21, 1898).]

If there is any pencil writing copied, or the copy or any part thereof is facsimile, in addition to the above fees :—			
If such pencil writing or facsimile copy is two folios of ninety words in length or under	0	0	6
For every additional folio or part of a folio	0	0	3

Attendances.

For attendance with any book or original document in any of the Courts of law or equity in London or Westminster, or elsewhere within three miles of the Principal Registry [or *a district registry*]	1	1	0
For the second and each subsequent attendance in the same term or sittings after term	0	10	6
For attendance with books or original documents in any of the Courts of law or equity in London or Westminster, or elsewhere within three miles of the Principal Registry [or *a district registry*] when more than one book or document are required, for each book or document besides the first	0	5	0
For the second and each subsequent attendance in the same term or sittings after term, for each book or document besides the first	0	2	6
For each day's attendance with any book or original document in any of the Courts of law or equity, or elsewhere beyond the distance of three miles from the Principal Registry [or *district registry*] exclusive of travelling expenses	1	1	0
For each day's attendance with books or original documents in any of the Courts of law or equity, or elsewhere beyond the distance of three miles from the Principal Registry [or *district registry*] exclusive of travelling expenses, when more than one book or document are required, for each book or documents besides the first	0	5	0
The travelling expenses to be advanced and paid to the messenger attending with books, or original documents, shall include all			

(*d*) Principal registry fee only.

other necessary expenses which are to be or may have been incurred by such messenger.

Registrar's Order (f).

	£	s.	d.
For every registrar's order for revocation of a grant	0	5	0
For every other registrar's order	0	2	6

Filing.

For filing every *affidavit* or other document in the Principal Registry [or *district registry*] except the oaths for executors, administrators, or administrators with the will, the first administration bond and the testamentary papers in respect of which probate or administration with will annexed is granted	0	2	6
For filing every exhibit	*0*	*1*	*0*
For filing in the Principal Registry any notice required to be sent there by a district registrar	0	0	6
For filing in a district registry any notice required to be sent there by a registrar of the Principal Registry	0	0	6

[NOTE.—The fee for filing an affidavit is altered to 2s., and no fee is charged for filing an exhibit; the fee for filing a declaration remains at 2s. 6d.]

Caveats.

For the entry of every caveat	0	1	0
For each notice of such caveat to the district registrars (g)	*0*	*1*	*0*
For every warning to a caveat	0	2	6
For every service of a warning to caveat sent by a registrar through the public post	0	2	6
For subducting a caveat	0	1	0
For notice to any district registrar to whom notice of a caveat has been sent of its having been subducted or warned (g)	*0*	*1*	*0*

Receipts for Papers.

For every receipt for documents left in the Principal Registry [or *district registry*] in order to obtain a grant of probate or letters of administration with or without will annexed, or any second or subsequent grant	0	1	0
For every receipt for a document or documents delivered out of the Principal [or *district*] Registry	0	1	0

Deposit of Wills.

For depositing every will of a person deceased in the Principal Registry for safe custody	0	10	0
For depositing every will of a living person for safe custody, including the deposit receipt	0	10	0

Taxing Costs (h).

For taxing every bill of costs, inclusive of the registrar's certificate :—			
If five folios of seventy-two words, or under	0	5	0
If exceeding that length, for every additional folio	0	1	0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed :—			
If the bill of costs is five folios of seventy-two words, or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0

(*f*) These fees are not applicable to a district registry, where the fee for the district registrar's minute is 2s. 6d.

(*g*) Notice is not now sent from the principal registry to a district registry. The fee for the notice to the principal registry of entry or subduction of a caveat in a district registry is 1s. for each such notice. The fees as to warning and service thereof are principal registry fees only.

(*h*) This section applies only to the principal registry.

Bonds.

	£	s.	d.
Amended by an order of July 23, 1926. For superintending and attesting the execution of a bond by each obligor	0	2	0

Oaths.

Amended by an order of July 23, 1926. For every oath administered by an officer of the principal registry [or *by a district registrar*] to each deponent	0	2	0
And in addition thereto for each exhibit referred to in the affidavit and required to be marked	0	1	4

Settling Advertisements (*h*).

For settling the abstract of citation for advertisement or other advertisement	0	2	6

Alterations in Grants.

For making alterations in grants of probate or letters of administration in pursuance of the order of one of the registrars (*i*)	0	2	6

Notations.

For noting alterations in and revocations of grants on the record of the same	0	2	6
For noting second and subsequent grants on the record of the first grant	0	2	6
For noting renunciations, or any other necessary matter on the record of a grant	0	2	6

Certificates.

For every certificate under the hand of one or more of the registrars of the Principal Registry [or *of a district registrar*] for which no other fee is payable	0	2	6

Fiats.

For the fiat of a registrar as to the form in which any will or codicil is to be registered	0	5	0
For noting on a testamentary paper that probate thereof is refused	0	5	0

Notices.

For every notice required to be sent to a district registrar for which no other fee is payable, except notices required by rule 72 (*k*)	0	1	0

Perusing and Settling Oaths, etc. (*l*).

For perusing and settling oaths to lead special or limited grants of probate or letters of administration, with or without will, or other instruments :—			
If five folios of seventy-two words, or under	0	2	6
If above five folios, for each additional folio	0	0	3
For perusing deeds and other documents when necessary, per folio of seventy-two words	0	0	3

(*h*) This section applies only to the principal registry.

(*i*) *I.e.*, an order of one of the registrars of the principal registry.

(*k*) The corresponding district registry fee is as follows :—"For every notice required to be sent to the principal registry, for which no other fee is payable, except notices required by rule 82 . . . 1s."

(*l*) Only the last fee in this Section is included in the district registry fees.

Commissioner (m).

	£	s.	d.
For each appointment of a commissioner to administer oaths in the Court of Probate, other than clerks and officers of the Court authorised to administer oaths in the principal or in a district registry only	1	0	0
For registering the appointment of a commissioner appointed to administer oaths in the Court of Chancery	0	5	0

IN ADDITION TO THE ORDINARY FEES

TO BE TAKEN IN THE

PRINCIPAL REGISTRY OF THE COURT OF PROBATE IN NON-CONTENTIOUS BUSINESS,

The following Fees are to be taken in

THE DEPARTMENT FOR PERSONAL APPLICATIONS.

Note.—*This table, which is that of* 1874, *as altered and amended by subsequent orders, may be taken to apply to the district registries, unless the contrary is indicated.*

On Probates or Letters of Administration with Will annexed,

Or double or cessate probate or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty (*n*) is payable in respect of the personal estate of the testator.

Effects sworn under	Preparing Oath of Executors.	Preparing Affidavit for the Inland Revenue Office.	Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 5 0	0 2 0	0 2 0
300	0 5 0	0 5 0	0 5 0	0 2 0
450	0 5 0	0 5 0	0 8 0	0 2 0
600	0 5 0	0 5 0	0 11 0	0 2 0
800	0 5 0	0 5 0	0 15 0	0 2 0
1,000	0 5 0	0 5 0	1 2 0	0 2 0
1,500	0 5 0	0 5 0	1 10 0	0 5 0
2,000	0 5 0	0 5 0	2 0 0	0 5 0
3,000	0 5 0	0 5 0	2 10 0	0 5 0
4,000	0 5 0	0 5 0	3 0 0	0 5 0
5,000	0 5 0	0 5 0	3 2 6	0 7 6
6,000	0 5 0	0 5 0	3 5 0	0 7 6
7,000	0 5 0	0 5 0	3 7 6	0 7 6
8,000	0 5 0	0 5 0	3 10 0	0 7 6
9,000	0 5 0	0 5 0	3 12 6	0 7 6
10,000	0 5 0	0 5 0	3 15 0	0 7 6
12,000	0 5 0	0 5 0	3 17 6	0 7 6
14,000	0 5 0	0 5 0	4 0 0	0 7 6
16,000	0 5 0	0 5 0	4 3 9	0 7 6

(*m*) Not included in district registry fees.

(*n*) Now "estate duty, or, in cases in which death occurred prior to August 2, 1894, "probate duty." This substitution should be made in each case in which reference to "stamp duty" appears in this table.

Effects sworn under	Preparing Oath of Executors.	Preparing Affidavit for the Inland Revenue Office.	Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
18,000	0 5 0	0 5 0	4 7 6	0 7 6
20,000	0 5 0	0 5 0	4 11 3	0 7 6
25,000	0 5 0	0 5 0	4 16 3	0 7 6
30,000	0 5 0	0 5 0	5 2 6	0 7 6
35,000	0 5 0	0 5 0	5 8 9	0 7 6
40,000	0 5 0	0 5 0	5 18 3	0 7 6
45,000	0 5 0	0 5 0	6 7 6	0 7 6
50,000	0 5 0	0 5 0	6 17 0	0 7 6
60,000	0 5 0	0 5 0	7 6 3	0 7 6
70,000	0 5 0	0 5 0	8 5 0	0 7 6
80,000	0 5 0	0 5 0	9 3 9	1 1 0
90,000	0 5 0	0 5 0	10 2 6	1 1 0
100,000	0 5 0	0 5 0	11 1 3	1 1 0
120,000	0 5 0	0 5 0	11 10 9	1 1 0
140,000	0 5 0	0 5 0	12 9 6	1 1 0
160,000	0 5 0	0 5 0	13 8 3	1 1 0
180,000	0 5 0	0 5 0	14 7 0	1 1 0
200,000	0 5 0	0 5 0	15 5 9	1 1 0
250,000	0 5 0	0 5 0	16 4 6	1 1 0
300,000	0 5 0	0 5 0	18 11 3	1 1 0
350,000	0 5 0	0 5 0	20 18 3	1 1 0
400,000	0 5 0	0 5 0	21 13 9	1 1 0
500,000	0 5 0	0 5 0	22 9 6	1 1 0

For every additional £100,000, or any fractional part of £100,000 under which the effects are sworn, in addition to the above fees, £1 11s. 3d.

In addition to the above, for all second and subsequent grants the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

	£ s. d.
For engrossing and collating the will, if three folios of ninety words or under, including parchment	0 4 6
If exceeding three folios, per folio	0 1 6

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered facsimile, in addition to any other fee for engrossing and collating the same :—

	£ s. d.
If the pencil marks in the will or codicil, or the part or parts thereof to be registered facsimile, are two folios of ninety words in length or under	0 1 0
If exceeding two folios, for every additional folio or part of the folio of ninety words	0 0 6

Fees on Letters of Administration with Will annexed.

In addition to the above fees,

For preparing the bond—if the effects are—

	£ s. d.
Under £20	0 1 6
£20 and under £100	0 3 6
£100 and upwards	0 5 0

On Letters of Administration granted to a Widow of an Intestate, or to One or More of his Children, or to One or More of the Children of an Intestate Widow,

On personal application at the Principal [or *district*] Registry, other than letters of administration granted in pursuance of the provisions of the Act of 36 & 37 Vict. c. 52, as extended by the Act of 38 & 39 Vict. c. 27.

In lieu of all fees heretofore authorised to be taken when the personal (*o*) estate is sworn :—

Amended table of fees to be taken on and after July 26, 1875.

[For fees to be taken in pursuance of 36 & 37 Vict. c. 52, see *post*, p. 912.]

	£	s.	d.
Not to exceed in value £20	0	5	0
Not to exceed in value £30	0	6	0
Not to exceed in value £40	0	7	0
Not to exceed in value £50	0	8	0
Not to exceed in value £60	0	9	0
Not to exceed in value £70	0	10	0
Not to exceed in value £80	0	11	0
Not to exceed in value £90	0	12	0
Not to exceed in value £100	0	13	0

The above include the fees payable for taking instructions for, and drawing, and copying an instrument of renunciation to be executed by the widow of an intestate if required, and all other fees payable in respect of such grants.

On other Grants of Letters of Administration,

Including letters of administration de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn not to exceed	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 4 0	0 2 6	0 1 0	—
20	0 4 0	0 2 6	0 1 0	0 1 0
50	0 7 6	0 3 0	0 1 0	0 2 0
100	0 8 6	0 5 0	0 1 0	0 2 0
Effects sworn under				
200	0 10 0	0 5 0	0 3 0	0 2 0
300	0 10 0	0 5 0	0 8 0	0 2 0
450	0 10 0	0 5 0	0 11 0	0 2 0
600	0 10 0	0 5 0	0 15 0	0 2 0
800	0 10 0	0 5 0	1 2 0	0 2 0
1,000	0 10 0	0 5 0	1 10 0	0 5 0
1,500	0 10 0	0 5 0	2 5 0	0 5 0
2,000	0 10 0	0 5 0	3 0 0	0 5 0
3,000	0 10 0	0 5 0	3 1 9	0 7 6
4,000	0 10 0	0 5 0	3 3 9	0 7 6
5,000	0 10 0	0 5 0	3 7 6	0 7 6
6,000	0 10 0	0 5 0	3 11 3	0 7 6
7,000	0 10 0	0 5 0	3 15 0	0 7 6
8,000	0 10 0	0 5 0	3 18 9	0 7 6
9,000	0 10 0	0 5 0	4 2 6	0 7 6
10,000	0 10 0	0 5 0	4 6 3	0 7 6
12,000	0 10 0	0 5 0	4 10 0	0 7 6
14,000	0 10 0	0 5 0	4 13 9	0 7 6
16,000	0 10 0	0 5 0	4 19 6	0 7 6
18,000	0 10 0	0 5 0	5 5 0	0 7 6
20,000	0 10 0	0 5 0	5 10 9	0 7 6

(*o*) It is considered that the fact that the deceased, whose personal estate is under £100, died possessed of real estate sufficient to bring the whole estate over £100, does not affect the right of the applicant to pay *fees* under this table; though the duty must be paid in the ordinary way. The above does not apply to similar cases in which application is made under section 16 of the Finance Act, 1894, when the 15s. fee must be paid.

Effects sworn not to exceed	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
25,000	0 10 0	0 5 0	5 18 3	0 7 6
30,000	0 10 0	0 5 0	6 7 6	0 7 6
35,000	0 10 0	0 5 0	6 17 0	0 7 6
40,000	0 10 0	0 5 0	7 10 9	0 7 6
45,000	0 10 0	0 5 0	8 5 0	0 7 6
50,000	0 10 0	0 5 0	8 18 9	0 7 6
60,000	0 10 0	0 5 0	9 13 3	0 7 6
70,000	0 10 0	0 5 0	11 1 3	0 7 6
80,000	0 10 0	0 5 0	12 9 6	1 1 0
90,000	0 10 0	0 5 0	13 17 6	1 1 0
100,000	0 10 0	0 5 0	15 5 9	1 1 0
120,000	0 10 0	0 5 0	15 19 9	1 1 0
140,000	0 10 0	0 5 0	17 8 0	1 1 0
160,000	0 10 0	0 5 0	18 16 3	1 1 0
180,000	0 10 0	0 5 0	20 4 0	1 1 0
200,000	0 10 0	0 5 0	21 12 6	1 1 0
250,000	0 10 0	0 5 0	23 0 3	1 1 0
300,000	0 10 0	0 5 0	24 3 9	1 1 0
350,000	0 10 0	0 5 0	25 7 3	1 1 0
400,000	0 10 0	0 5 0	26 10 6	1 1 0
500,000	0 10 0	0 5 0	27 14 0	1 1 0
600,000	0 10 0	0 5 0	30 10 0	1 1 0
700,000	0 10 0	0 5 0	32 7 9	1 1 0
800,000	0 10 0	0 5 0	34 13 9	1 1 0
900,000	0 10 0	0 5 0	37 1 6	1 1 0
1,000,000	0 10 0	0 5 0	39 8 6	1 1 0

For every additional £100,000, or any fractional part of £100,000, under which the effects are sworn, in addition to the above fees, £2 7s.

In addition to the above, for all second and subsequent grants, the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

On Double or Cessate Probates on which no Stamp Duty is Payable.

If the Effects are sworn under	Looking up and taking an Account of each former Grant.	Oath of the Executor.	Affidavit for Inland Revenue Office.	Double or Cessate Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 6 6	0 5 0	0 3 0	0 2 0
300	0 5 0	0 6 6	0 5 0	0 7 6	0 2 0
450	0 5 0	0 6 6	0 5 0	0 12 0	0 2 0
600	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
800	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,000	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,500	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
2,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
3,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
4,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
5,000	0 5 0	0 6 6	0 5 0	0 12 6	0 7 6
Above 5,000	The fees to be taken are the same as above, except the fee for clerks, which, if the effects are of the value of £70,000 or upwards, is £1 1s.				

On Exemplification of Probate or Letters of Administration with or without Will annexed.

	£	s.	d.
Looking up the grant of probate and original will, or grant of administration	0	5	0
Exemplification under seal, in addition to the £3 stamp	0	15	0
Clerks	0	2	6

On Duplicate and Triplicate Probates or Letters of Administration (with or without Will annexed), etc.

	£	s.	d.
Looking up the will	0	5	0
Duplicate or triplicate probate or letters of administration, with or without the will annexed, or probate of codicil to will already proved, or letters of administration (with same annexed), if the personal estate is sworn under £450, or any smaller sum, the same fees as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Clerks	0	2	6

On Letters of Administration with or without Will annexed, de bonis non or cessate, on which no Stamp Duty is payable.

If the Effects are sworn under	Looking up and taking an Account of each former Grant.	Oath of the Administrator and Bond.	Affidavit for Inland Revenue Office.	De Bonis or Cessate Administration under Seal and Duty-paid Stamp.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 4 0	0 2 6	0 1 0	0 1 0
50	0 3 6	0 6 0	0 3 0	0 1 6	0 2 0
100	0 5 0	0 7 6	0 5 0	0 3 0	0 2 0
200	0 5 0	0 10 0	0 5 0	0 4 6	0 2 0
300	0 5 0	0 10 0	0 5 0	0 12 0	0 2 0
450	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0
600	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0

If the effects are £600 and upwards, the same fees as above, except the fee for clerks, which is 5s.

Instructions, Drawing, Copying, etc.

	£	s.	d.
Instructions for every oath, affidavit, instrument, or document, other than the oaths and affidavits and instruments of renunciation included in the foregoing fees	0	5	0
Drawing same, at per folio of 72 words	0	1	0
Copies of any documents prepared in the Department for Personal Applications, not included in the foregoing fees, at per folio of 72 words	0	0	6
Instructions for special or limited probates, or letters of administration (*with or without will annexed*)	0	5	0
Attendances on settling oaths for special or limited grants	0	10	0

All other fees to be taken the same as for ordinary grants.

Perusing, etc.

Perusing and settling oaths, affidavits, and other instruments and documents not drawn in the Department for Personal Applications [or *in the district registry*], if 6 folios of 72 words or under	0	1	6
If exceeding six folios, at per folio of 72 words	0	0	3
Perusing and abstracting deeds, or other instruments when necessary, at per folio of 72 words [*this item is not included in the district registry table of fees*]	0	0	3

Oaths, etc.

Administering oaths, or taking affirmations, other than those included in the foregoing fees, each deponent	0	2	0
For marking each exhibit	0	1	4

Amended by an order of July 23, 1926.

Bonds.

Amended by an order of July 23, 1926.

	£	s.	d.
Attesting execution of bond (other than the bond of a widow or children of an intestate included in former fees) each obligor	0	2	0
On giving additional security in addition to the above fees and the fees for preparing new bond :—			
For looking up original or any former bond	0	5	0

Inland Revenue Affidavit.

Additional fee by an order of July 23, 1926.

	£	s.	d.
For assessing and paying estate duty and obtaining duty-paid stamp on every Inland Revenue affidavit, except in a fixed duty case	0	2	0

TABLE OF FEES

To be taken in

THE PRINCIPAL REGISTRY AND DISTRICT REGISTRIES OF THE COURT OF PROBATE, AND BY THE REGISTRARS OF COUNTY COURTS,

In pursuance of

THE INTESTATES' WIDOWS AND CHILDREN ACT, 1873 (36 & 37 Vict. c. 52).

Letters of administration of the personal estate of an intestate granted to his widow or one or more of his children, under the authority of the Act 36 & 37 Vict. c. 52, when the whole of such personal estate is sworn :—

	£	s.	d.
Not to exceed in value £20.....	0	5	0
Not to exceed in value £30.....	0	6	0
Not to exceed in value £40.....	0	7	0
Not to exceed in value £50.....	0	8	0
Not to exceed in value £60.....	0	9	0
Not to exceed in value £70.....	0	10	0
Not to exceed in value £80.....	0	11	0
Not to exceed in value £90.....	0	12	0
Not to exceed in value £100	0	13	0

The moiety of the above fees to be paid to or retained by the acting county court registrar, and the remaining moiety to be deposited in or remitted to the principal or district registries of the Court in the form of fee stamps.

(Signed) James Hannen.

Dated this 8th day of August, 1873.
Approved by the Commissioners of
Her Majesty's Treasury,
August 13, 1873.

Fees Payable in respect of Probates and Letters of Administration under Section 33 of the Customs and Inland Revenue Act, 1881, amended by Section 16 of the Finance Act, 1894.

Under section 33 of the Customs and Inland Revenue Act, 1881 (as amended by section 16 of the Finance Act, 1894),

an inclusive fee of fifteen shillings

to cover all Court fees and expenses with reference to the grant of probate or administration is payable :

44 Vict. c. 12, s. 33.

(1) Where the deceased died on or after June 1, 1881, and before August 2, 1894, and the whole personal estate and effects of the deceased (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of

the United Kingdom, without any deduction for debts or funeral expenses), does not exceed the value of **£300.**

(2) Where the deceased died since August 1, 1894, and the gross value of the property real and personal in respect of which estate duty is payable on the death of the deceased (exclusive of property settled otherwise than by the will of the deceased) does not exceed **£500.** 57 & 58 Vict. c. 30, s. 16.

*** As to the duty payable in such cases, see App. II, clause 67.

[NOTE.—In these cases it is considered that solicitors are *not* entitled to have the engrossments made in the registry free of charge. The fee includes the charge for all orders made by registrars in chambers, *e.g.*, appointing guardian or presuming death; *vide ante*, p. 445.]

SUMMARY OF FEES IN RESPECT OF RE-SEALING IN ENGLAND IRISH PROBATES AND LETTERS OF ADMINISTRATION WITH AND WITHOUT WILL ANNEXED (*p*).

	s.	d.
SEALING grant.		
Where property in England amounts to or exceeds £300 in value, and is shown to have been included in the property in respect of which a fee was paid in Ireland (*q*)	12	6
In other cases, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England affected by the grant.		
SEARCH.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
RECEIPT for grant	1	0
REGISTRAR'S fiat	5	0
FILING copy grant and will (if any)	2	6
COLLATING copy with original grant—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3
INLAND REVENUE certificate (*r*)	2	6
CERTIFICATE of bond (*s*)	2	6

FEES IN RESPECT OF RE-SEALING IN IRELAND ENGLISH PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED (*t*).

GRANT.	s.	d.
Effects in Ireland sworn under £20	1	0
,, ,, ,, ,, £100	10	0
,, ,, ,, at or over £100	12	6

(*p*) Irish Free State grants issued on or since April 1, 1923, cannot be resealed in England. Where application is made to reseal the grant under section 16 of the Finance Act, 1894, a fee of 2s. 6d. only is payable, with the exception that the fee is increased to 15s. in the case of Northern Ireland grants, where the deceased died on or since November 22, 1921, and before April 1, 1923, and fixed duty is paid in England. Where death has occurred since April 1, 1926, the re-sealing fee upon a grant, made in Northern Ireland under the section referred to, is 2s. 6d.

(*q*) The inclusion of the English property must, in the case of Northern Ireland grants, where death occurred after November 21, 1921, be shown to the satisfaction of the registrar. If this is not done, an *ad valorem* fee on the estate in England will be payable.

(*r*) Not required in the case of Northern Ireland grants where death occurred after November 21, 1921.

(*s*) This is not required in the case of a Northern Ireland grant where death occurred on or since April 1, 1923.

(*t*) This table is only applicable to Northern Ireland where death occurred before November 22, 1921, and to the Irish Free State where the English grant was made prior to April 1, 1923. Grants made in England under section 16 of the Finance Act, 1894, may, by sub-section 4 of this section, be re-sealed for a total fee of 2s. 6d.

	s.	d.
SEARCH.		
For every full year or part of a year (except the current one) which has elapsed since the deceased's death	0	6
FILING notice of application	2	6
RECEIPT for grant	1	0
REGISTRAR'S fiat	5	0
FILING copy will and grant	2	6
COMPARING copy with original grant—		
If 10 folios of 90 words each or under	2	6
If above 10 folios of 90 words each, per folio	0	3
STAMP OFFICE certificate	2	6
CERTIFICATE of bond (if any)	2	6

FEES IN RESPECT OF RE-SEALING IN IRELAND ENGLISH LETTERS OF ADMINISTRATION (*t*).

	s.	d.
GRANT.		
Effects in Ireland sworn under £20	1	0
,, ,, ,, ,, £50	5	0
,, ,, ,, ,, £100	10	0
,, ,, ,, at or over £100	12	6
SEARCH.		
For every full year or part of a year (except the current one) which has elapsed since the deceased's death	0	6
FILING notice of application	2	6
RECEIPT for grant	1	0
REGISTRAR'S fiat	5	0
FILING copy grant	2	6
COMPARING copy with original grant—		
If 10 folios of 90 words each or under	2	6
If above 10 folios of 90 words each, per folio	0	3
STAMP OFFICE certificate	2	6
CERTIFICATE of bond	2	6

FEES PAYABLE IN NORTHERN IRELAND IN RESPECT OF RE-SEALING ENGLISH GRANTS, WHERE DEATH OCCURRED ON OR SINCE NOVEMBER 22, 1921.

[N.B.—The fee payable is 15s. if the gross assets in Northern Ireland do not exceed £500 (whatever the fees payable in England, and a B—1 N. form of Inland Revenue affidavit is used. Since a grant made in England, in respect of a person dying on or since November 22, 1921, will not, as a general rule, extend to property in Northern Ireland, it seems that, upon an application to re-seal such grant in Northern Ireland, the circumstances will not fall within the terms of section 16, sub-section 4 of the Finance Act, 1894, which authorises a total re-sealing fee of 2s. 6d. in the case of grants made under that section.]

FEES PAYABLE IN PROBATE OR LETTERS OF ADMINISTRATION WITH WILL CASES.

	s.	d.
FILING notice of application	2	6
RECEIPT	2	6
COLLATING (under 10 folios)	2	6
Over 10 folios, at 3d. per folio.		
SEARCH.		
For every year or part of year from time of death at 6d. per year.		
REGISTRAR'S fiat	5	0
SEALING FEE.		
Where the property in Northern Ireland amounts to or exceeds £100 in value, and is shown to have been included in the property in respect of which a fee was paid in England	12	6

(*t*) This table is only applicable to Northern Ireland where death occurred before November 22, 1921, and to the Irish Free State where the English grant was made before April 1, 1923. Grants made in England under section 16 of the Finance Act, 1894, may be, by sub-section 4 of this section, re-sealed for a total fee of 2s. 6d.

Where no fee upon such property is shown to have been paid in England, and the personal estate in Northern Ireland is sworn to be under the net value of—

£	£ s. d.
5	0 1 0
20	0 1 6
100	0 12 6
200	1 5 0
300	1 17 6
450	2 2 6
600	2 10 0
800	2 15 0
1,000	3 2 6
1,500	4 2 6
2,000	4 10 0
3,000	5 12 6
4,000	6 15 0
5,000	7 2 6
6,000	7 10 0
7,000	7 17 6
8,000	8 5 0
9,000	8 12 6
10,000	9 0 0
12,000	9 7 6
14,000	9 15 0
16,000	10 5 0
18,000	10 17 6
20,000	11 10 0
25,000	12 5 0
30,000	13 2 6
35,000	14 2 6
40,000	15 10 0
45,000	16 17 6
50,000	18 5 0
60,000	19 15 0
70,000	22 10 0
80,000	25 7 6
90,000	28 2 6
100,000	31 0 0
120,000	37 15 0
140,000	41 0 0
160,000	44 7 6
180,000	47 7 6
200,000	50 7 6
250,000	53 5 0
300,000	62 10 0
350,000	70 10 0
400,000	73 10 0
500,000	76 0 0
For every additional £100,000, or any fractional part of £100,000, a further and additional fee of	7 15 0

	s. d.
Filing copy grant	2 6
Filing Inland Revenue affidavit	2 6
Filing copy Inland Revenue affidavit	2 6
Filing bond (if any)	2 6
Filing justification (if any)	2 6

Fees payable in Administration Cases.

	s. d.
Filing notice of application	2 6
Receipt	2 6
Collating copy grant (under 10 folios)	2 6

Over 10 folios, at 3d. per folio.

SEARCH.

For every year or part of year from time of death at 6d. per year.

REGISTRAR'S fiat 5 0

SEALING FEE.

Where the property in Northern Ireland amounts to or exceeds £100 in value, and is shown to have been included in the property in respect of which a fee was paid in England 12 6

Where no fee upon such property is shown to have been paid in England, and the personal estate in Northern Ireland is sworn to be under the net value of—

£	£ s. d.
5	0 1 0
20	0 1 6
50	0 6 0
100	0 12 6
200	1 5 0
300	1 17 6
450	2 2 6
600	2 10 0
800	2 15 0
1,000	3 2 6
1,500	5 2 6
2,000	6 15 0
3,000	7 0 0
4,000	7 5 0
5,000	7 17 6
6,000	8 10 0
7,000	9 0 0
8,000	9 10 0
9,000	10 2 6
10,000	10 15 0
12,000	11 5 0
14,000	11 17 6
16,000	12 15 0
18,000	13 10 0
20,000	14 7 6
25,000	15 10 0
30,000	16 17 6
35,000	18 5 0
40,000	20 7 6
45,000	22 10 0
50,000	24 12 6
60,000	26 15 0
70,000	31 0 0
80,000	35 2 6
90,000	39 7 6
100,000	43 12 6
120,000	53 7 6
140,000	58 5 0
160,000	63 2 6
180,000	68 2 6
200,000	73 0 0
250,000	77 17 6
300,000	82 0 0
350,000	86 2 6
400,000	90 5 0
500,000	94 7 6
For every additional £100,000, or any fractional part of £100,000, a further and additional fee of	8 5 0

	s. d.
FILING copy grant	2 6
FILING Inland Revenue affidavit	2 6
FILING copy Inland Revenue affidavit	2 6
FILING bond	2 6
FILING justification	2 6

Summary of Fees in Respect of Re-sealing Scotch Confirmations in England (*u*).

	s.	d.
Sealing confirmation	21	0
Search.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
Receipt for confirmation	1	0
Filing copy confirmation	2	6
Collating copy with original confirmation—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3

Summary of Fees in Respect of Re-sealing Colonial Grants in England.

	s.	d.
Sealing grant.		
Such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the grant.*		
Search.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
Receipt for grant	1	0
Registrar's fiat and certificate	7	6
Filing copy grant	2	6
Collating copy with original grant—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3
Power of Attorney (if any)	2	6
Certificate of Delay (if required)	2	6

* If the application is made through the Personal Application Department, the additional fees payable when a grant is extracted through that department, inclusive of the *ad valorem* fee for probate and letters of administration under seal, are to be taken.

PART II.—FEES IN CONTENTIOUS BUSINESS.

Note.—*The fees taken in Contentious Business are regulated by the Supreme Court Fees Order*, 1924. *The following table is an alphabetical re-arrangement of some of the more important items in this order.*

Supreme Court Fees Order, 1924: Item No.		£	s.	d.
	Account of Administrator.			
101.	Filing	0	2	6
75.	For every £100 received or fraction of £100	0	2	0
	Advertisement.			
80.	Settling, or approving	0	10	0
	Affidavits.			
144.	Swearing (each person)	0	2	0
144.	Marking each exhibit	0	1	4
101.	Filing each affidavit	0	2	6
	Affidavit of Scripts. See "Scripts."			

(*u*) Where the application is to re-seal, a Scotch confirmation issued under section 16 of the Finance Act, 1894, no fees are payable. Where the application is made pursuant to section 168, sub-section 3 of the Supreme Court of Judicature (Consolidation) Act, 1925, through the Scotch commissary or sheriff clerk the fee payable is 2s. 6d.

Supreme Court Fees Order, 1924: Item No.		£	s.	d.
	Appeals.			
	(A) Court of Appeal.			
97.	On filing notice of appeal—			
	(a) If the appeal is entered in the interlocutory list ...	2	0	0
	(b) ,, ,, ,, ,, ,, ,, any other list	5	0	0
98.	On filing notice of cross appeal—			
	(a) If the appeal is entered in the interlocutory list ...	1	0	0
	(b) ,, ,, ,, ,, ,, ,, any other list	2	0	0
99.	On entering or sealing the order made on the hearing of the appeal [*taken when appeal entered*]—			
	(a) If in the interlocutory list	1	0	0
	(b) ,, ,, any other list	2	0	0
100.	On entering or sealing any other order made by the Court of Appeal or of a Judge thereof (including orders for leave to appeal and for security of costs)	1	0	0
	(B) From County Court to Divisional Court.			
74.	Filing notice and setting down	2	0	0
29.	On entering or sealing the order [*taken when appeal entered*]	2	0	0
	Appearances.			
10.	Entering appearance (for each person)	0	2	6
11.	Amending appearance	0	2	6
	Appointment before Registrar.			
79.	Except for hearing of summons or motion for every hour or part of an hour	0	10	0
	Associate's Certificate.			
29.	After trial at assizes, to be paid to the Associate	2	0	0
101.	Filing certificate	0	2	6
	Attendances.			
143.	On application for any officer to attend as a witness, or to produce documents, for each day or part thereof he is absent from his office, in addition to reasonable expenses incurred by such officer	2	0	0
	Bond.			
145.	Vacating bond	0	10	0
146.	Assignment of bond (in addition to the 5s. duty stamp) ...	0	5	0
101.	Filing bond	0	2	6
62.	Settling bond	0	10	0
62.	Settling undertaking in lieu of bond	0	5	0
	Certificates.			
	Associate's certificate, see above.			
104.	Certificate of appearance, or of pleading, etc., filed, or the negative	0	2	6
	Citations.			
101.	Filing affidavit to lead	0	2	6
101.	Filing citation (also filing draft citation)	0	2	6
73.	Settling and sealing citation	0	10	0
	Commissions.			
16.	Sealing or issuing	1	0	0
	Copies.			
	In this case the Supreme Court Fees do *not* apply to probate practice. The fees for making copies are those charged in non-contentious business (see Appendix V, Part I). The folio in contentious business is 72 words.			

Costs. See "Taxation of Costs."

Decrees. See "Orders."

Supreme Court Fees Order, 1924: Item No.		£	s.	d.
	Depositions.			
101.	Filing	0	2	6
81.	Minute	0	5	0
	Filing.			
101.	All documents unless otherwise provided (*e.g.*, scripts) ...	0	2	6
	Scripts. See "Scripts."			
	Hearing.			
28.	Entering an action for trial	2	0	0
29.	Fee for drawing up decree [*taken when action is set down*]	2	0	0
29.	And if the trial or hearing lasted more than five hours, for each complete hour	0	10	0
24.	On entering or setting down action as a short cause	1	0	0
29.	Fee for decree [*taken when action is set down*]	2	0	0
	Judgments. See "Orders."			
	Minute.			
21.	Sealing note or memorandum of an order where no order is drawn up	0	5	0
	Motions.			
13 and 31.	Fee for order (including filing of case on motion)	1	10	0
101.	Filing affidavits, each	0	2	6
	[These fees are taken when the motion is set down.]			
	Notice under Summons for Directions. See "Summons for Directions."			
	Oaths. See "Affidavits."			
	Orders.			
	On drawing up and entering judgments, decrees, and orders :—			
	If made in Court at trial. See "Hearing."			
31.	If made in Court other than at trial or for security	1	0	0
30.	For security	0	10	0
32.	Final order in chambers	0	10	0
19.	Interlocutory order in chambers	0	5	0
	On application to Court of Appeal. See "Appeal."			
	Requisition.			
16.	Sealing or issuing	1	0	0
	Scripts.			
101.	Filing affidavit of scripts	0	2	6
72.	On depositing script	0	5	0
72.	For each additional script	0	1	0
	Sealing.			
82.	Any document, unless otherwise provided	0	5	0
	Search.			
102.	On search for an appearance or an affidavit and inspecting same	0	1	0
103.	On any other search, including inspection, for each hour or part of an hour occupied	0	2	6
	Setting down. See "Hearing."			

Supreme Court Fees Order, 1924: Item No.		£	s.	d.
	Subpœna.			
	Subpœna to bring in will under section 23 of the Court of Probate Act, 1858:			
71.	Sealing	0	10	0
19.	Order	0	5	0
101.	Affidavit (filing)	0	2	6
35.	Subpœna (for each witness not exceeding three)	0	2	6
	Summonses.			
12 and 19.	Summons for directions (including order)	0	10	0
12 and 19.	Subsequent directions by notice (including order)	0	10	0
12 and 21.	For extension of time and memorandum	0	10	0
12 and 20.	Summons for discontinuance (including order)	0	15	0
12 and 20.	Any other summons involving final order in chambers (including order)	0	15	0
12 and 19.	Any interlocutory summons (including order)	0	10	0
	Swearing. See "Affidavits."			
	Taxation of Costs.			
101.	Filing bill of costs	0	2	6
19.	Order (if any)	0	5	0
148.	Allocatur or certificate where no order drawn	0	5	0
	On taxing bill of costs:			
120.	Where the amount allowed does not exceed £4	0	2	0
120.	Where the amount exceeds £4, for every £2 allowed, or fraction thereof	0	1	0
	[NOTE.—A deposit of 3s. for each £10 of the will as untaxed is taken.]			
	Writs.			
1.	Sealing writ of summons on commencement of an action	1	10	0
4.	Sealing concurrent or renewed writ of summons	0	5	0
5.	Sealing amended writ of summons	0	5	0
36.	Sealing a writ of execution	0	10	0

APPENDIX VI.

COSTS.

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COSTS IN NON-CONTENTIOUS BUSINESS.

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COSTS IN NON-CONTENTIOUS BUSINESS.

COSTS

To be allowed

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in

THE PRINCIPAL REGISTRY

Of the Court of Probate, in

NON-CONTENTIOUS BUSINESS (*a*).

[**Note.**—*This table, which is that of February* 5, 1874, *is similar to the table of the same date applicable to the district registries, except where the contrary is indicated.*]

IN RESPECT OF PROBATES,

Including double or cessate probates or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the testator.

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
5	2 6	2 6	4 6	0 1 0	1 0	—
20	2 6	2 6	4 6	0 1 0	3 4	0 1 0
100	5 0	5 0	4 6	0 1 0	6 8	0 2 0
200	6 8	6 8	4 6	0 3 0	6 8	0 2 0
300	10 0	10 0	4 6	0 7 6	6 8	0 2 0

(*a*) See Rule 110 N.-C.B. (Appendix III, Part I).

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
450	10 0	10 0	4 6	0 12 0	6 8	0 2 0
600	10 0	10 0	4 6	0 16 6	6 8	0 2 0
800	10 0	10 0	4 6	1 2 6	6 8	0 2 0
1,000	10 0	10 0	4 6	1 13 0	6 8	0 2 0
1,500	10 0	10 0	4 6	2 5 0	6 8	0 5 0
2,000	10 0	10 0	4 6	3 0 0	6 8	0 5 0
3,000	10 0	10 0	4 6	3 15 0	13 4	0 5 0
4,000	10 0	10 0	4 6	4 10 0	13 4	0 5 0
5,000	10 0	10 0	4 6	4 15 0	13 4	0 7 6
6,000	10 0	10 0	4 6	5 0 0	13 4	0 7 6
7,000	10 0	10 0	4 6	5 5 0	13 4	0 7 6
8,000	10 0	10 0	4 6	5 10 0	13 4	0 7 6
9,000	10 0	10 0	4 6	5 15 0	13 4	0 7 6
10,000	10 0	10 0	4 6	6 0 0	13 4	0 7 6
12,000	10 0	10 0	4 6	6 5 0	13 4	0 7 6
14,000	10 0	10 0	4 6	6 10 0	13 4	0 7 6
16,000	10 0	10 0	4 6	6 17 6	13 4	0 7 6
18,000	10 0	10 0	4 6	7 5 0	13 4	0 7 6
20,000	10 0	10 0	4 6	7 12 6	13 4	0 7 6
25,000	10 0	10 0	4 6	8 2 6	13 4	0 7 6
30,000	10 0	10 0	4 6	8 15 0	13 4	0 7 6
35,000	10 0	10 0	4 6	9 7 6	13 4	0 7 6
40,000	10 0	10 0	4 6	10 6 3	13 4	0 7 6
45,000	10 0	10 0	4 6	11 5 0	13 4	0 7 6
50,000	10 0	10 0	4 6	12 3 9	13 4	0 7 6
60,000	10 0	10 0	4 6	13 2 6	13 4	0 7 6
70,000	10 0	10 0	4 6	15 0 0	13 4	0 7 6
80,000	10 0	10 0	4 6	16 17 6	13 4	1 1 0
90,000	10 0	10 0	4 6	18 15 0	13 4	1 1 0
100,000	10 0	10 0	4 6	20 12 6	13 4	1 1 0
120,000	10 0	10 0	4 6	21 11 3	13 4	1 1 0
140,000	10 0	10 0	4 6	23 8 9	13 4	1 1 0
160,000	10 0	10 0	4 6	25 6 3	13 4	1 1 0
180,000	10 0	10 0	4 6	27 3 9	13 4	1 1 0
200,000	10 0	10 0	4 6	29 1 3	13 4	1 1 0
250,000	10 0	10 0	4 6	30 18 9	13 4	1 1 0
300,000	10 0	10 0	4 6	35 12 6	13 4	1 1 0
350,000	10 0	10 0	4 6	40 6 3	13 4	1 1 0
400,000	10 0	10 0	4 6	41 17 6	13 4	1 1 0
500,000	10 0	10 0	4 6	43 8 9	13 4	1 1 0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate dealt with by the grant.]

	£ s. d.
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for probate under seal of	3 2 6
In addition to the above, for all second or subsequent grants of probate or letters of administration with will annexed, the same fees for looking up the will and bespeaking engrossment as on similar grants upon which no stamp duty is payable.	
For engrossing and collating the will, if more than three folios of 90 words each, per folio, including parchment	0 1 6
When there are two or more executors, and they are not sworn at	

	£	s.	d.
the same time, for each attendance after the first on their being sworn to oath and affidavit :—			
If the effects are sworn under £20	0	2	6
If the effects are sworn under £100	0	5	0
If the effects are sworn above £100	0	6	8

In respect of Letters of Administration with Will annexed.

In addition to the above fees, for preparing and attendance on the execution of the bond if the effects are :—

	£	s.	d.
Under £20	0	2	6
£20 and under £100	0	6	8
£100 and upwards	0	10	0

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac-simile, in addition to any other fee for engrossing and collating the same :—

	£	s.	d.
If the pencil marks in the will or codicil, or the part or parts thereof to be registered facsimile, are two folios of 90 words in length or under	0	1	0
If exceeding two folios, for every additional folio or part of a folio of 90 words	0	0	6

In respect of Letters of Administration,

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Letters of Administration under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
5	2 6	2 6	0 1 0	1 0	—
20	3 4	2 6	0 1 0	3 4	0 1 0
50	5 0	5 0	0 1 6	4 8	0 2 0
100	6 8	6 8	0 3 0	6 8	0 2 0
200	10 0	6 8	0 4 6	6 8	0 2 0
300	13 4	10 0	0 12 0	6 8	0 2 0
450	13 4	10 0	0 16 6	6 8	0 2 0
600	13 4	10 0	1 2 6	6 8	0 2 0
800	13 4	10 0	1 13 0	6 8	0 2 0
1,000	13 4	10 0	2 5 0	6 8	0 5 0
1,500	13 4	10 0	3 7 6	6 8	0 5 0
2,000	13 4	10 0	4 10 0	13 4	0 5 0
3,000	13 4	10 0	4 13 9	13 4	0 7 6
4,000	13 4	10 0	4 17 6	13 4	0 7 6
5,000	13 4	10 0	5 5 0	13 4	0 7 6
6,000	13 4	10 0	5 12 6	13 4	0 7 6
7,000	13 4	10 0	6 0 0	13 4	0 7 6
8,000	13 4	10 0	6 7 6	13 4	0 7 6
9,000	13 4	10 0	6 15 0	13 4	0 7 6
10,000	13 4	10 0	7 2 6	13 4	0 7 6
12,000	13 4	10 0	7 10 0	13 4	0 7 6
14,000	13 4	10 0	7 17 6	13 4	0 7 6

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Letters of Administration under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
16,000	13 4	10 0	8 8 9	13 4	0 7 6
18,000	13 4	10 0	9 0 0	13 4	0 7 6
20,000	13 4	10 0	9 11 3	13 4	0 7 6
25,000	13 4	10 0	10 6 3	13 4	0 7 6
30,000	13 4	10 0	11 5 0	13 4	0 7 6
35,000	13 4	10 0	12 3 9	13 4	0 7 6
40,000	13 4	10 0	13 11 3	13 4	0 7 6
45,000	13 4	10 0	15 0 0	13 4	0 7 6
50,000	13 4	10 0	16 7 6	13 4	0 7 6
60,000	13 4	10 0	17 16 3	13 4	0 7 6
70,000	13 4	10 0	20 12 6	13 4	0 7 6
80,000	13 4	10 0	23 8 9	13 4	1 1 0
90,000	13 4	10 0	26 5 0	13 4	1 1 0
100,000	13 4	10 0	29 1 3	13 4	1 1 0
120,000	13 4	10 0	30 9 6	13 4	1 1 0
140,000	13 4	10 0	33 5 9	13 4	1 1 0
160,000	13 4	10 0	36 2 0	13 4	1 1 0
180,000	13 4	10 0	38 18 3	13 4	1 1 0
200,000	13 4	10 0	41 14 6	13 4	1 1 0
250,000	13 4	10 0	44 10 9	13 4	1 1 0
300,000	13 4	10 0	46 17 6	13 4	1 1 0
350,000	13 4	10 0	49 4 6	13 4	1 1 0
400,000	13 4	10 0	51 11 3	13 4	1 1 0
500,000	13 4	10 0	53 18 3	13 4	1 1 0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate to be dealt with by the grant.]

	£ s. d.
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for letters of administration under seal of	4 13 6
When there are two or more administrators, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit, and on execution of the bond :—	
If the effects are under £20	0 3 4
If the effects are under £100	0 5 0
If the effects are above £100	0 10 0
In addition to the above fees, for preparing bond if the effects are :—	
Under £20	0 1 8
£20 and under £50	0 3 4
£50 and under £100	0 5 0
£100 and upwards	0 6 8

In respect of Double or Cessate Probates, upon which no Stamp Duty is Payable.

If the effects are sworn under	Attendance in the Registry, and looking up the Will and bespeaking the Engrossment.	Oath of the Executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and Attendance on the Executor being sworn.	Drawing and copying Statement in support of application for the duty-paid Stamp.	Attending the Commissioners of Stamps and procuring the duty-paid Stamp.	Double or Cessate Probate under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
5	3 4	2 6	2 6	—	—	1 0	1 0	—
20	3 4	2 6	2 6	—	—	1 0	3 4	1 0
100	6 8	5 0	5 0	6 8	13 4	1 0	6 8	2 0
200	6 8	6 8	6 8	6 8	13 4	3 0	6 8	2 0
300	6 8	10 0	10 0	6 8	13 4	7 6	6 8	2 0
450	6 8	10 0	10 0	6 8	13 4	12 0	6 8	2 0
600	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
800	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,500	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
2,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
3,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
4,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
5,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	7 6
Above 5,000	The fees to be taken are the same as above, except the clerk's fee, which, if the effects are of the value of £70,000 or upwards, is £1 1s.							

The above fee for drawing and copying the statement in support of application for the duty-paid stamp is to be taken when the statement is five folios of 72 words or under. If the statement exceeds five folios, for each additional folio of 72 words ... ... £ s. d. 0 1 4

When there are two or more executors to be sworn, and they are not sworn at the same time, for each attendance after the first on their being sworn, the same fee as on a first grant under the same sum.

Exemplification of Probate or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the registry, looking up the grant of probate and original will or grant of administration, and bespeaking exemplification	0	6	8
Exemplification under seal and stamp	1	1	0
Extracting	0	6	8
Clerks	0	2	6

In respect of Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the registry, looking up the will, and bespeaking duplicate or triplicate of a grant and engrossment	0	6	8
Drawing and copying statement in support of application to the Inland Revenue Office for the duty-paid stamp :— The same fee as on a double or cessate probate.			
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0	13	4
Duplicate or triplicate probate or letters of administration with or without will annexed. If the personal estate is under £450 or any smaller sum, the same fee as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Extracting	0	6	8
Clerks	0	2	6

In respect of Letters of Administration with or without Will annexed de bonis non or cessate, upon which no Stamp Duty is payable.

If the Effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid Stamp.	Attending at the Inland Revenue Office and procuring the duty-paid Stamp.	De Bonis or Cessate Administration with or without Will under Seal and duty-paid Stamp.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
5	6 8	5 0	2 6	—	—	1 0	1 0	—
20	6 8	5 0	2 6	—	—	1 0	3 4	1 0
50	6 8	6 8	5 0	—	—	1 6	4 8	2 0
100	6 8	10 0	6 8	5 0	6 8	3 0	6 8	2 0
200	6 8	13 4	6 8	6 8	13 4	4 6	6 8	2 0
300	6 8	16 8	10 0	6 8	13 4	12 0	6 8	2 0
450	6 8	16 8	10 0	6 8	13 4	12 6	6 8	2 0
Above 450	The fees to be taken are the same as above, except the extracting fee, which, if the effects are £1,500 and upwards is 13s. 4d., and the clerk's fee, which, if the effects are £600 and upwards, is 5s.							

	£	s.	d.
If there has been more than one previous grant, for each grant looked up after the first, a further fee of	0	5	0
The above fee for drawing and copying the statement in support of application to the Inland Revenue Office for the duty-paid stamp is to be taken if the statement is five folios of 72 words or under. If it exceeds five folios, for each additional folio	0	1	4

In addition to the above, for preparing the bond, and for each attendance after the first on the administrators being sworn, and on the execution of the bond, when there are two or more administrators and they are not sworn at the same time, the same fees as on ordinary grants of letters of administration.

IN RESPECT OF PROBATES, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Affidavit for Inland Revenue Office and attendance on the executor being sworn thereto :—			
The same fee as on ordinary probates.			
Drawing special oath of executor, per folio of 72 words	0	1	0
Fair copy of the oath for the registrar, per folio of 72 words	0	0	4
Attending the registrar thereon	0	13	4
Engrossing same, per folio of 72 words	0	0	4
Each attendance on the executors being sworn	0	6	8
Engrossing and collating the will Special or limited probate under seal Extracting Clerks	The same fees as on ordinary probates.		

IN RESPECT OF LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Perusing and abstracting deeds or other instruments, when necessary, at per folio of 72 words	0	0	4
Proxy of nomination	0	13	4
Affidavit for Inland Revenue Office and attendance on the administrators being sworn thereto :—			
The same fees as on ordinary grants of letters of administration.			
Drawing special oath of the administrators, per folio of 72 words	0	1	0
Fair copy of the oath for the registrar to peruse, per folio of 72 words	0	0	4
Attending the registrar thereon	0	13	4
Engrossing the same, per folio of 72 words	0	0	4
Each attendance on the administrators being sworn, and on execution of the bond	0	6	8
Engrossing and collating the will Letters of administration, under seal and stamp Extracting Clerks	The same fees as on ordinary grants of letters of administration, with or without will annexed.		

OFFICE COPIES OF, OR EXTRACTS FROM, RECORDS, WILLS, AND OTHER DOCUMENTS.

	£	s.	d.
For attendance in the registry and searching for a record, will, or other document, or for a grant of probate, or letters of administration, with or without will annexed, for five years, or any period less than five years, *including* the ordering of a copy	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a record, will, or other document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of 90 words	0	0	4
For collating an office copy or extract of a record, will, or other document, with the original, or a registered copy thereof, including extracting fee, per folio of 90 words	0	0	2
For collating an office copy of the Act on granting probate or administration with the original entry thereof, including extracting fee	0	1	0

CAVEATS.

	£	s.	d.
For attendance in the registry and entering or subducting a caveat	0	6	8
For attendance in the registry and giving instructions for warning caveators to enter an appearance (*b*)	0	6	8
For service of warning to a caveat, and copy	0	5	0

(*b*) This item only applies to the principal registry.

AFFIDAVITS OTHER THAN THE AFFIDAVITS AND OATHS INCLUDED IN THE FEES OF PROBATE AND LETTERS OF ADMINISTRATION; AND DECLARATION OF PERSONAL ESTATE AND EFFECTS.

	£	s.	d.
For taking instructions for every affidavit or declaration of personal estate and effects	0	6	8
For drawing and fair copy of the same, per folio of 72 words	0	1	4
For every attendance on the deponents or declarants being sworn or affirmed to such affidavit or declaration	0	6	8

INSTRUMENTS OF RENUNCIATION AND CONSENT, LETTERS OF ATTORNEY, AND OTHER DOCUMENTS.

	£	s.	d.
For taking instructions for every instrument of renunciation or consent, letters of attorney, or other document	0	6	8
For drawing and fair copy thereof, per folio of 72 words	0	1	4

FOR COMMISSIONERS OF THE COURT (*c*).

	£	s.	d.
For each oath administered to each deponent by a commissioner, surrogate, or other person authorised to administer oaths in the Court of Probate	0	1	6
For marking each exhibit	0	1	0
For each occasion of superintending and attesting the execution of a bond	0	1	6

TAXING BILL OF COSTS (*d*).

	£	s.	d.
For attendance on taxation of bill of costs If long, such further fee as the registrar may think proper.	0	6	8

Proctors, solicitors, and attornies are not entitled to any costs in addition to those allowed by the foregoing table in respect of the non-contentious business comprised therein; but in case of their transacting any business not therein provided for, they will be allowed as follows :—

	£	s.	d.
For instructions for any original instrument prepared by them	0	6	8
For perusing every document which it is necessary to peruse as instructions, per folio of 72 words	0	0	4
For drawing and fair copy of any original instrument, per folio of 72 words	0	1	4
For every plain copy of a document, per folio of 72 words	0	0	4
If the same, or any part thereof, is to be copied fac-simile, for the part or parts to be so copied, per folio of 72 words, in addition to the above	0	0	2
For every necessary attendance on counsel, or on any practitioner or party other than their own client	0	6	8

(*c*) By Rule 123, N.-C.B. (see Appendix III, Part I), the following items may be allowed :—

	£	s.	d.
For each oath administered to each deponent by a commissioner for oaths	0	2	0
For each exhibit referred to in the affidavit and required to be marked	0	1	4
For each obligor to a bond, the execution of which has been superintended and attested by a commissioner for oaths	0	2	0

(*d*) Only applicable to the principal registry.

APPENDIX VII.

FORMS

IN USE IN CONTENTIOUS AND NON-CONTENTIOUS BUSINESS.

[**Note.**—*Taken as a whole, the following Forms are drawn to suit cases in which the deceased person died on or after January* 1, 1926. *They can also be used in cases where the death occurred before that date, but, if so, references to the heir-at-law and next-of-kin, etc., should be substituted on the lines indicated in the text of this book.*]

N.B.—The following forms are specimens only, and must be altered to suit individual cases.

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ADVERTISEMENT.

FORM NO. 1.

Advertisement of Application to re-seal Colonial Grant (*a*).

In the High Court of Justice, Probate, Divorce and Admiralty Division (Probate).

Advertisement of application to re-seal Colonial grant.

A. B., deceased.

Notice is hereby given, that after the expiration of eight days application will be made in the Principal Probate Registry of the High Court of Justice for the sealing of the probate of the will [*or* letters of administration of the estate] of A. B., late of , deceased, granted by the Court at on the day of , 1926.

Solicitors for .

[NOTE.—*To be advertised once in the "Times" newspaper unless otherwise directed by one of the Registrars. See Rule 94 N.-C. B.*]

ADVERTISEMENT, ABSTRACT OF CITATION FOR. *See* "CITATION, ABSTRACT OF, FOR ADVERTISEMENT."

AFFIDAVITS TO LEAD GRANTS. *See* "OATHS."

AFFIDAVITS.

FORM NO. 2.

Affidavit of due Execution of Will [or Codicil] by an Attesting Witness (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. The Principal [*or* District] Probate Registry.

Affidavit of due execution of will [or codicil] by an attesting witness.

In the Estate of A. B., deceased.

I, C. D., of , in the county of , baker, make oath and say that I am one of the subscribing witnesses to the last will and testament of A. B., of , deceased, the said will being hereunto annexed, bearing date the and that the said deceased executed the said will on the day of the date thereof by signing his name at the foot or end thereof, as the same now appears thereon, in the presence of me and of E. F., the other subscribing witness thereto, both of us being present at the same time, and we thereupon (to wit, after the deceased had so signed) attested and subscribed the said will in the presence of the said deceased

Sworn, etc.,

(Signed) C. D.

FORM NO. 3.

Affidavit of Execution where a Will is signed in the Attestation or Testimonium Clause (*a*).

[*Heading as in Form No.* 2.]

Affidavit of execution where a will is signed in the attestation or testimonium clause.

In the Estate of A. B., deceased.

I, C. D., of , surgeon, make oath and say that I am one of the subscribing witnesses to the last will and testament of A. B., of , deceased, the said will being now hereunto annexed, bearing date the , and that the said deceased executed the said will on the day of the date thereof by signing his name in the attestation [*or* testimonium] clause thereof, as the same now appears thereon, meaning and intending the same for his final signature to his will, in the presence of me and

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said deceased.

Sworn, etc. (Signed) C. D.

FORM No. 4.

Affidavit as to a Testator's Knowledge of the Contents of his Will (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that I am one of the subscribing witnesses to the last will and testament of the said A. B., of , deceased, the said will being now hereunto annexed, bearing date the .

Affidavit as to a testator's knowledge of the contents of his will.

1. And I further make oath and say, that the said testator duly executed his said will on the day of the date thereof by signing his name [*or* making his mark] at the foot or end thereof, as the same now appears thereon, in the presence of me the said C. D. and of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

2. And I further make oath, that previously to the execution of the said will by the said testator, the same was read over to him by me [*or* by E. F. in my presence, *or* by himself in my presence], and he the said deceased at such time seemed thoroughly to understand the same [*or* had full knowledge of the contents thereof].

Sworn, etc. (Signed) C. D.

FORM No. 5.

Affidavit verifying Alterations in a Will (made by Subscribed Witness) (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , farmer, make oath and say, that I am one of the attesting witnesses to the last will and testament of the said A. B., of , deceased, the said will being now hereunto annexed and bearing the date the , and having particularly observed the words interlined between the and lines of the sheet of the said will, make oath and say as follows :—

Affidavit verifying alterations in a will (made by a subscribed witness).

That the said testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me the said C. D. and of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

And I further make oath and say, that the said recited interlineation was written and made in the said will previously to the execution thereof.

Sworn, etc.

(Signed) C. D.

FORM No. 6.

Affidavit verifying Alteration in Will (by Writer of the Will) (*a*).

[*Heading as in Form No.* 2.]

In the Estate of X. Y., deceased.

I, W. V., of , labourer, make oath and say that I was the writer of the last will and testament of X. Y., of , deceased, bearing date , the said will being now hereunto annexed, and referring to the said will and the interlineations appearing thereon between the and the lines, and between the and the lines thereof respectively, and the erasures appearing in the and the lines thereof, I make oath and say, that the said interlineations and erasures were made by me in the said will previously to the execution of the said will as they now appear.

Affidavit verifying alteration in will (by writer of the will).

Sworn, etc. (Signed) W. V.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 7.

Affidavit of Death of Attesting Witnesses (*a*).

[*Heading as in Form No.* 2.]

Affidavit of death of attesting witnesses.

In the Estate of A. B., deceased.

We, C. D., of , baker, E. F., of , butcher, and G. H., of , confectioner, having severally inspected the last will and testament of the said A. B., of , deceased, hereunto annexed and dated , and having also observed the names I. J. and K. L., subscribed to the said will as witnesses attesting the due execution thereof, severally make oath and say as follows :—

I, the said C. D., for myself, say that I am the lawful father of the said deceased and the sole executor named in the said will, and that I have made inquiries and have caused inquiries to be made respecting the execution of the said will, and by means of such inquiries I have ascertained that no person or persons, save and except the said testator and the said I. J. and K. L., was or were present at the execution of the said will.

And I, the said E. F., for myself say, that I knew and was well acquainted with the said A. B., who died on the , at , for many years before and down to the time of his death, and that during such period I have frequently seen him write and subscribe his name to writing, and I have thereby become well acquainted with his manner and character of handwriting, and I say that I verily believe the name A. B. subscribed to the said will as aforesaid to be the true and proper handwriting of the said A. B., deceased.

And I, the said E. F., further say that I am the brother of the said I. J., whose name appears subscribed to the said will as one of the attesting witnesses thereto, and that the said I. J. died on the , and that I frequently saw him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say that I verily believe that the names I. J. now appearing subscribed to the said will, are of the true and proper handwriting of the said I. J.

And I, the said G. H., for myself say, that I knew and was well acquainted with the said K. L., whose name appears subscribed to the said will as one of the attesting witnesses thereto, and that the said K. L. died on the day of , 19 .

And I, the said G. H., further say that, during the period of my acquaintance with the said K. L., I frequently saw him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say that I verily believe that the names K. L. appearing subscribed to the said will are of the true and proper handwriting of the said K. L.

Sworn, etc.

(Signed) C. D.
E. F.
G. H.

FORM NO. 8.

Affidavit as to Absence of Attesting Witnesses (*a*).

[*Heading as in Form No.* 2.]

Affidavit as to absence of attesting witnesses.

In the Estate of A. B., deceased.

We, C. D., of , baker, and E. F., of , butcher, jointly and severally make oath and say as follows :—

We have carefully inspected the last will and testament of A. B., of , spinster, deceased, the said will being now hereunto annexed, and bearing date the and subscribed A. B., and have also observed the names G. H. and I. J. subscribed to the said will as witnesses attesting the due execution thereof.

And I, the said E. F., for myself say, that I knew and was well acquainted with the said testatrix, who died on the , at ; for many years before and down to the time of her death, and that during such period I have frequently seen her write and subscribe her name to writings, and I have thereby become well acquainted with her manner and character of handwriting, and I say that I verily believe the names A. B. subscribed to the said

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

will as aforesaid to be of the true and proper handwriting of the said A. B., deceased.

And I, the said C. D., for myself say, that I am the sole executor named in the said will, and that I have made inquiries and have caused inquiries to be made respecting the execution of the said will, and I have ascertained that no person was present at the execution of the said will, save and except the said testatrix and the said G. H. and I. J.

And I, the said E. F., for myself say, that I am the uncle of the said I. J., and that the said I. J. in the month of , 19 , left this country for some place unknown to this deponent, and has not since been heard of.

And I, the said E. F., further say, that I have frequently seen the said I. J. write and subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say, that I verily believe that the names I. J. now appearing subscribed to the said will, are of the true and proper handwriting of the said I. J.

[*Account for the other attesting witness in a similar way.*]

Sworn, etc.

(Signed) C. D.
E. F.

FORM No. 9.

Affidavit of Search (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

Affidavit of search.

I, C. D., of , grocer, make oath and say that I am the sole executor named in the paper writing hereunto annexed, purporting to be and contain the last will and testament of A. B., of , deceased, who died on the , at , the said will beginning thus, " ," ending thus, " In witness whereof I have hereunto set my hand, this day of in the year of our Lord 19 " [*or as the case may be*], and being thus subscribed, " A. B." And referring particularly to the fact that the blank spaces originally left in the said will for the insertion of the day and month of the date thereof have never been supplied [*or* that the said will is without date, *or as the case may be*], I further make oath, that I have made inquiry of E. F., the solicitor of the said deceased, and that I have also made diligent and careful search in all places where he the said deceased usually kept his papers of moment and concern, and in his depositories, in order to ascertain whether he had or had not left any other will, but that I have been unable to discover any such will. And I lastly make oath, that I verily believe the said deceased died without having left any will, codicil, or testamentary paper whatever, other than the said will hereinbefore referred to by me.

Sworn, etc. (Signed) C. D.

FORM No. 10.

Affidavit of Handwriting (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

Affidavit of handwriting.

I, C. D., of , widow, make oath and say that I knew and was well acquainted with A. B., late of , deceased, who died on the , at , for many years before and down to the time of his death, and that during such period I have frequently seen him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed purporting to be and contain the last will and testament of the said deceased, bearing date , beginning thus, " ," ending thus, " ," and being subscribed thus, " ," I further make oath that I verily believe the whole of the said will, together with the names subscribed thereto as aforesaid, to be of the true and proper handwriting and subscription of the said , deceased.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 11.

Affidavit of Plight and Condition of Finding (*a*).

[*Heading as in Form No.* 2.]

Affidavit of plight and condition of finding.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that I am sole executor named in the paper writing now hereunto annexed purporting to be and contain the last will and testament of A. B., late of , deceased, who died on the , the said will bearing date the , beginning thus, " ," ending thus, " ," and being subscribed thus, " ," and having viewed and perused the said will and particularly observed that (1) lastly make oath that the same is now in all respects in the same state, plight, and condition as when found [*or as the case may be*] by me as aforesaid.

Sworn, etc. (Signed) C. D.

[1] Here recite the finding of the will, and the various obliterations, interlineations, erasures, and alterations (if any), and the general plight and condition of the will or any other matters requiring to be accounted for, and clearly trace the will from the possession of the deceased in his lifetime up to the time of making this affidavit.

FORM No. 12.

Affidavit for Alias (*a*).

[*Heading as in Form No.* 2.]

Affidavit for alias.

In the Estate of A. B., otherwise C. D., deceased.

I, E. F., of , shoemaker, make oath and say as follows :—

1. That A. B., of , deceased, died on the , at ; having made and duly executed his last will and testament bearing date the , and thereof appointed me, this deponent, sole executor.

2. That the said deceased in his said will is described as and subscribed his name thereto in execution thereof as A. B., and was generally known by that name.

3. That the deceased became the owner of certain securities, namely :— , which were purchased by him in the name of C. D., and the certificates of the holding of such securities in such name are produced herewith, and that the person referred to in the said certificates as C. D. is the said deceased.

4. That the said deceased purchased certain freehold property at , in the year , and such property was conveyed to him in the name of C. D., and the person described as C. D. in the conveyance of the said property dated , produced herewith, is the said deceased.

5. In the circumstances it is necessary that the grant of probate of the will of the said deceased should issue in the names of A. B., otherwise C. D.

Sworn, etc.

(Signed) E. F.

FORM No. 13.

Affidavit as to Identity of Executor named in Will (*a*).

[*Heading as in Form No.* 2.]

Affidavit as to identity of executor named in will.

In the Estate of A. B., deceased.

I, C. D., of , tobacconist, make oath and say as follows :—

1. That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament bearing date the , whereof he appointed me, this deponent, sole executor.

2. That the said deceased described me in his said will as his nephew, whereas, in fact, I am not the nephew of the said deceased but the nephew of E. B., the lawful wife of the said deceased.

3. That the said deceased in his lifetime always spoke of and referred to

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

me as his nephew, and that he, during his lifetime, informed me that he had appointed me the executor of his will.

4. That I am well acquainted with the family and relatives of the said deceased, and that the said deceased has not and never had a nephew of the name of C. D.

5. That I am the only person of the name of C. D., residing at , as described in the said will, and was the only person of that name residing there at the date of the said will.

Sworn, etc. (Signed) C. D.

FORM NO 14.

Affidavit as to Domicil (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , surgeon, make oath and say as follows :— Affidavit as to domicil.

That I knew and was well acquainted with A. B., of , deceased, who died on the , at .

That the said A. B., was at the time of his death domiciled in .

That [*give grounds for above statement*].

Sworn, etc. (Signed) C. D.

FORM NO. 15.

Affidavit as to Foreign Law (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased. Affidavit as to foreign law.

I, C. D., of , an advocate of , make oath and say as follows :—

I am conversant with the laws and constitutions of , [*state how*]. I have referred to the last will and testament of A. B., of , deceased, bearing date the , and now hereunto annexed, and I say that the said will is made in conformity with and is valid by the aforesaid laws and constitutions.

Sworn, etc. (Signed) C. D.

FORM NO. 16.

Affidavit as to British Status of Testator (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say as follows :— Affidavit as to British status of testator.

That I am sole executor named in the last will and testament of A. B., of , deceased, the said will being now hereunto annexed bearing date the day of , 19 .

That the said will was made at .

That the said deceased was a British subject and born of English parents at , and that his domicil of origin was English.

Sworn, etc. (Signed) C. D.

FORM NO. 17.

Affidavit as to Validity of Scotch Copy Will which has not been Confirmed (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased. Affidavit as to validity of Scotch copy will which has not been confirmed.

I, C. D., of , Writer to the Signet in Scotland [*or* Advocate of the Scottish Bar] make oath and say as follows :—

1. That I have full knowledge of the laws and constitutions of Scotland, and have perused the copy of the will of A. B., of , deceased, now hereunto annexed, which will is on record in the books of the for the county of .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

2. That the said will is duly made in accordance with and conforms to, and is valid by the said laws and constitutions of Scotland.

3. That the said official copy hereunto annexed is by the said laws and constitutions equivalent in all respects to the original, and that such copy would be received in all courts in Scotland as making faith in judgment equally with the original, and that confirmation by the Commissary Court of Scotland is granted on the production of such official copy.

Sworn, etc. (Signed) C. D.

FORM No. 18.

Affidavit in Proof of Lunacy (*a*).

[*Heading as in Form No.* 2.]

Affidavit in proof of lunacy.

In the Estate of A. B., deceased.

I, C. D., of , physician, make oath and say as follows:—

That for the space of years now last past I have attended in my professional capacity G. B. (who is as I am informed and believe the lawful father of A. B., of , deceased), the said G. B. being a patient at the asylum or house for the reception of lunatics at , aforesaid, and that the said G. B. has been for many years, and now is, a lunatic and totally incapable of managing himself or his affairs, or of doing any act whatever requiring thought, judgment or reflection, and is not likely soon to recover the use of his mental faculties.

Sworn, etc.

(Signed) C. D.

FORM No. 19.

Affidavit as to Delay in Applying for a Grant (*a*).

[*Heading as in Form No.* 2.]

Affidavit as to delay in applying for a grant.

In the Estate of A. B., deceased.

I, C. D., of , baker, the party applying for letters of administration of the estate of A. B., late of , deceased, who died on the , make oath and say that the only estate and effects which the said deceased died possessed of consisted of a sum of £ , bequeathed to him by the will of E. F., deceased, proved in the month of , 19 , in this Division, subject to the life interest of G. H., who died in the month of last, and that I am now applying for the said letters of administration for the purpose only of enabling me to give a legal discharge for the said sum.

Sworn, etc.

(Signed) C. D.

(*See also Form No.* 69.)

FORM No. 20.

Affidavit Proving Heirship-at-Law (*a*).

[*Heading as in Form No.* 2.]

Affidavit proving heirship-at-law.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that A. B., of , died on the , without leaving any parent or other ancestor and without having ever had any issue, and that the said A. B. was married once only, namely, to E. F., who predeceased the said A. B.

That I am the heir-at-law of the said A. B., being the lawful and eldest born child of G. H. and I. J., the lawful father and mother of the said A. B.

That the said A. B. died possessed of certain real estate which he purchased in the year [*or state in what other way the deceased became possessed of the real estate*] (*b*).

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) This form is applicable only to cases of death before 1926, or to cases in which the deceased was a lunatic on January 1, 1926, and did not subsequently recover testamentary capacity.

AFFIDAVITS—*continued.*

FORM No. 21.

Affidavit Proving Heirship by Custom of Gavelkind (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , in the county of Kent, farmer, make oath and say that A. B., of , died on the , intestate, a bachelor, without parent or other ancestor. Affidavit proving heirship by custom of gavelkind.

That the said A. B. died possessed of certain freehold property situate at , in the county of Kent, which he purchased on or about the day of , 19 .

That I am the lawful brother and one of the heirs of the said A. B., by the custom of gavelkind, being the lawful and eldest born son of G. H. and I. J., the lawful father and mother of the said A. B.

And I do further make oath and say that on the , notice of this application was given to K. L., who with myself is the only heir of the said A B., by the said custom of gavelkind (*b*).

Sworn, etc. (Signed) C. D.

FORM No. 22.

Affidavit of Justification of Sureties (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

We, C. D., of , banker, and E. F., of , merchant, jointly and severally make oath and say that we are the proposed sureties on behalf of G. H., the intended administrator of the estate of the said A. B., of , deceased, in the penal sum of pounds, for his faithful administration of the said estate of the said deceased; and I, the said C. D., for myself, further make oath that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of pounds, and I, the said E. F., for myself, further make oath that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of pounds. Affidavit of justification of sureties.

Sworn, etc. (Signed) C. D.
E. F.

FORM No. 23.

Affidavit of Justification—Guarantee Society (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , in the City of London, to the Insurance Company, make oath and say as follows (*c*) :— Affidavit of justification—guarantee society.

1. I am now and have been for years and upwards of the Insurance Company, which carries on business at aforesaid.

2. The said Company was established under its present name by virtue of the Company Act, , having previously carried on business under the name of .

3. The subscribed capital of the said Company is £ held in shares of £ each (of which shillings have been paid on each of such shares) by and standing in the names of a responsible body of proprietors so that there is an uncalled capital of £ , which, together with the whole of the invested assets of the said Company (amounting to the sum of £ and upwards), are now available for the settlement of claims and demands on the insurance office in respect of its guarantees.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) This form is applicable only to cases of death before 1926, or to cases in which the deceased was a lunatic on January 1, 1926, and did not subsequently recover testamentary capacity.

(*c*) Certain companies have filed general affidavits, by leave of the Senior Registrar, whereby the filing of an affidavit in each individual case is rendered unnecessary.

AFFIDAVITS—*continued.*

The funds of the Insurance Company are invested as follows :—

(*Set out list and amounts of securities.*)

And I further say that all claims and demands properly arising out of the business of the said Company have been regularly paid and satisfied. The present outstanding unsettled claims of every kind against the said office do not exceed the sum of £ .

The balance sheet of the said Company for the year ending 31st December, 19 , is now produced and shown to me marked " A," and the statements therein contained are true as of the date of the said balance sheet.

4. By section of the Company Act, it is provided *inter alia* that :—

" The objects of the Company and its fundamental laws shall from the commencement of this Act be those defined and set forth in the First Schedule to this Act."

By the First Schedule of the same Act :—

Clause :—

" The objects of the Company are to carry on all or any one or more of the following businesses in all or any one or more of their respective branches, namely (*inter alia*) :—

" Insurance against contingencies of all descriptions or by way of guarantee or security."

By article of the regulations of the Insurance Company (which regulations were duly approved at a general meeting of the Insurance Company specially summoned for that purpose and adopted by the directors in accordance with section of the said Act) it is provided as follows (*inter alia*) :—

" Policies if signed by one director shall be well and sufficiently signed; and all other documents the execution or signature of which is not otherwise expressly provided for shall be well and sufficiently executed or signed if executed or signed by the secretary acting under the authority of a general or special resolution of a meeting of directors."

By a resolution duly passed at an extraordinary meeting of the directors of the Insurance Company held on the it was resolved as follows :—

" That the secretary be authorised to execute or sign all documents the execution or signature of which is not otherwise expressly provided for by the regulations or by resolution of the directors."

The said resolution has not been rescinded.

5. Save as hereinbefore is mentioned there is no provision contained in the said Act of Parliament or regulations as to the due execution of the bonds or guarantees issued by the Insurance Company. The Insurance Company has no common seal, and all bonds or guarantees which are signed by the secretary are binding on the Insurance Company.

6. The bond now produced and shown to me marked " B " was duly executed in my presence by , who is the secretary of the Insurance Company, and the signature " " to the said bond is of the proper handwriting of the said and the signature " " set and subscribed to the attestation of the said bond is of my proper handwriting.

7. No petition or other proceeding is pending in any court for the purpose of winding up the said Insurance Company.

Sworn, etc. (Signed) C. D.

FORM No. 24.

Affidavit of Increase of Estate—Further Security (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

Affidavit of increase of estate—further security.

I, C. D., of , baker, make oath and say that on the , letters of administration of the estate of A. B., of , deceased, were granted to me by the High Court of Justice at the Principal Probate Registry thereof, that the gross value of the said estate in Great Britain was then sworn to amount to £ , but that I have since discovered that the value of the said estate exceeds that amount, and that the true gross value thereof is £ .

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 25.

Affidavit—Increase of Estate—Further Security—Before Application for Grant *de bonis non* (*a*).

[*Heading as in Form No.* 2.]

In the Estate of A. B., deceased.

I, C. D., of , chemist, make oath and say that in the month of , 19 , letters of administration of the estate of A. B., deceased, were granted to E. F. as the lawful widow and relict of the said deceased by the authority of this division at the registry thereof, and that the said estate was then sworn to be of the gross value of £ and no more. Affidavit—Increase of estate—further security—before application for grant *de bonis non.*

And I further make oath and say that the said E. F. for some time intermeddled in the said estate, but has since died, to wit, on the day of , 19 , leaving part thereof unadministered.

And I further make oath and say that it has since been discovered that the said estate exceeds the said sum of £ , being of the value of £ and no more.

That I am [*here insert the character in which the grant* de bonis non *will be taken*] of the said A. B., deceased, and am about to apply for administration of the said estate left unadministered as aforesaid to be granted to me.

Sworn, etc.

(Signed) C. D.

FORM No. 26.

Affidavit to lead Certificate that Estate in Ireland is covered by Bond given (*b*).

[*Heading as in Form No.* 2.]

I, C. D., of , farmer, make oath and say as follows :—

That A. B. of , deceased, died on the , and that on the , letters of administration [*with the will annexed*] of the estate of the said deceased were granted to me by the High Court of Justice at the Principal Probate Registry thereof. Affidavit to lead certificate that estate in Ireland is covered by bond given.

That the gross value of the estate in the United Kingdom in respect of which the grant was made was then sworn to be £ .

That no additional estate has since come to my knowledge.

That part of the said estate amounting to £ (further particulars of which are set forth in the Schedule hereto annexed) is in Ireland.

Sworn, etc.

(Signed) C. D.

SCHEDULE.

[*To be signed by the Deponent.*]

FORM No. 27.

Affidavit of Service of Citation (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between C. D. and E. F., plaintiffs,
and
H. G., defendant.

I, I. J., of , clerk to of , solicitor, make oath and say that I did on the duly serve the above-named H. G. with a true copy of a citation issued out of this Division in the above-named action [*or* matter], and now hereunto annexed and marked "A," by delivering to and leaving the same with him at , and at the same time, at his desire and request, I showed him the original thereof. Affidavit of service of citation.

Sworn, etc. (Signed) I. J.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) This form is a specimen only, and must be altered to suit individual cases. For information as to the circumstances in which this certificate is required, *vide ante*, pp. 483, 484.

AFFIDAVITS—*continued.*

FORM No. 28.

Affidavit of Service of Warning, and of Search and Non-appearance (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate).
In the Estate of A. B., deceased.

Affidavit of service of warning, and of search and non-appearance.

I, C. D., of , clerk to of , solicitor, make oath and say that on the , I duly served Messrs. of , with a true copy of the warning now hereunto annexed and marked "A," by delivering to and leaving the same with a clerk of the said Messrs. at their office aforesaid, and that I did on the duly and carefully search the book kept in the Principal Probate Registry of this Division for entering appearance from the said day of to the present day inclusive, to ascertain whether or not any appearance to the said warning had been entered, and I say, that no appearance to the said warning has been entered either by or on behalf of any person or persons whomsoever.

Sworn, etc.

(Signed) C. D.

FORM No. 29.

Affidavit of Search and Non-appearance to Citation to Accept or Refuse Grant (*a*).

[*Heading as in Form No.* 28.]

In the Estate of L. D., deceased.

Affidavit of search and non-appearance to citation to accept or refuse grant.

I, L. P., of , clerk to F. E., of , solicitor, make oath and say as follows:—

On the day of , 19 , the said F. E. extracted a citation on behalf of I. J., citing T. S. to accept or refuse probate of the will dated the [*or* letters of administration of the estate] of L. D., deceased.

On the I duly and carefully searched the book kept in the Principal Probate Registry of this Division for the entry of appearances to citations from the said day of , to the present day [*give date*], to ascertain whether or not any appearance to the said citation had been entered either by or on behalf of the above-named T. S., and I say that no appearance to the said citation has been entered either by or on behalf of the above-named T. S.

Sworn, etc. (Signed) L. P.

FORM No. 30.

Affidavit of Service of Summons and of Non-appearance [O. 54, r. 5; O. 67, r. 9.] (*a*).

[*Heading as in Form No.* 27.]

Affidavit of service of summons and of non-appearance. [O. 54, r. 5; O. 67, r. 9.]

I, I. J., of , clerk to Messrs. , the solicitors for the , make oath and say as follows:—

1. I did, on the , before the hour of seven [*or* two *if served on a Saturday*] in the afternoon serve K. L., the solicitor for the above-named in this action with a true copy of the summons hereunto annexed marked "A," by leaving it at the office of the said K. L., situate at , being the address for service in this action.

2. And I further make oath and say that on the at o'clock in the noon, the day and hour upon which the said summons was returnable, I attended at the chambers of the President [*or* Judge] of this Division at the Royal Courts of Justice [*or* of the Registrar at the Principal Probate Registry, Somerset House], sitting to hear summonses, and that neither the nor his solicitor, nor any one on his behalf, attended to oppose the said summons between the said hour of [12] o'clock and [12.30].

Sworn, etc.

(Signed) I. J.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 31.

Affidavit of Personal Service of Writ of Summons (whether within or without the Jurisdiction). [O. 13, r. 2.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.) 19 . E. No. .
In the Estate of F. E., deceased.
G. H. against I. J.

I, A. B., of , clerk to , solicitors, make oath and say as follows :—

1. I did, on the , at , personally serve I. J., the above-named defendant, with a true copy of the writ of summons in this action which appeared to me to have been regularly issued out of the Central Office of the Supreme Court against the above-named defendant at the suit of the above-named plaintiff, and which was dated the day of , 19 .

2. At the time of the said service the said writ and the copy thereof were subscribed in the manner and form prescribed by the Rules of the Supreme Court.

3. I did, on the , indorse on the said writ the day of the month and the week of the said service on the said defendant.

Sworn, etc.

(Signed) A. B.

This affidavit is filed on behalf of the .

Affidavit of personal service of writ of summons (whether within or without the jurisdiction). [O. 13, r. 2.]

FORM No. 32.

Affidavit for Leave to Serve Writ Abroad. [O. 2, r. 4.] (*a*).

[*Heading as in Form No.* 31.]

I, C. D., of , draper, the above-named intended plaintiff, make oath and say as follows :—

1. [*Give particulars of nature of action.*]

2. I am advised and believe that I have a good cause of action against B. B., the intended defendant in respect of the matters aforesaid.

3. The said intended defendant is at present residing at , and is not [*or* is] a British subject.

Sworn, etc. (Signed) C. D.

Affidavit for leave to serve writ abroad. [O. 2, r. 4.]

FORM No. 33.

Affidavit on Application for Substituted Service. [O. 10.] (*a*).

[*Heading as in Form No.* 31.]

I, G. H., of , clerk to , of , solicitor for the above-named plaintiff, make oath and say as follows :—

1. Having been directed by to serve the above-named defendant with a copy of the writ of summons in this action which appeared to me to have been regularly issued out of and under the seal of the Central Office of the Supreme Court of Judicature by the above-named plaintiff against the above-named defendant, and dated the , which said writ and copy were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court, and a true copy of which said writ is now produced and shown to me, marked "A," I did on the , attend for the purpose of serving a copy of the said writ at [*describe efforts to effect service, as to which see Ord.* 10 (*n.*) "*Essential Proceedings in Ordinary Cases*"].

I have made all reasonable efforts and used all due means in my power to serve the said defendant personally with a true copy of the said writ, but I have not been able to do so.

Sworn, etc. (Signed) G. H.

This affidavit is filed on behalf of the .

Affidavit on application for substituted service. [O. 10.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 34.

Affidavit of Insertion of Advertisements for Kin (*a*).

Affidavit of insertion of advertisements for kin.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

I, C. D., of , solicitor, make oath and say that I am the solicitor for E. F., the party applying for letters of administration of the estate of A. B., of , deceased, and that, acting on behalf of the said E. F., I caused an advertisement, calling upon the relatives (if any) of the said A. B. to apply to me, to be inserted [*here insert the names and dates of the newspapers*], copies of which are hereto annexed and marked respectively, but that no application whatever has been made to me in consequence of or in answer to the said advertisements, nor have I been able to obtain any information as to the relatives (if any) of the said A. B., deceased.

Sworn, etc.

(Signed) C. D.

FORM No. 35.

Affidavit as to Insertion of Advertisements for Recovery of a Lost Will (*a*).

[*Heading as in Form No.* 34.]

Affidavit as to insertion of advertisements for recovery of a lost will.

In the Estate of A. B., deceased.

I, C. D., of , make oath and say that I am the solicitor of E. F. and G. H., the executors named in the last will and testament of A. B., of , deceased, and the parties applying for probate of a completed draft of the said will.

On the day of , 19 , I caused an advertisement to be inserted in the newspaper in the words following :—

In the High Court of Justice. Probate, Divorce, and Admiralty Division. The Principal Probate Registry.

A. B., deceased.

Affidavit to lead citation to accept or refuse administration.

A. B., of , butcher, made and duly executed his will on the , in the presence of I. J., of , baker, and K. L., of , spinster. By this will the said A. B. [*state briefly how the deceased's property was disposed of by the said will*], and appointed E. F. and G. H. executors. The said A. B. died on the . The aforesaid will cannot now be found. Whoever shall bring the original will or give such information as shall lead to its recovery to C. D., of , solicitor, will be rewarded.

The said newspaper is hereto annexed marked C. D. 1.

[*Set out any further advertisements that have been made.*]

No application has been made to me in consequence of or in answer to the said advertisements, nor have I been able to obtain any information as to the will of the said A. B., deceased, above referred to.

Sworn, etc.

(Signed) C. D.

FORM No. 36.

Affidavit to lead Citation to Accept or Refuse Administration (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

Affidavit to lead citation to accept or refuse administration.

I, C. D., of , saddler, make oath and say, that A. B., of , deceased, died on the , at , intestate, without child or parent, leaving E. F., his lawful widow and relict him surviving. And I further make oath and say that the said E. F. has not taken upon her as yet the letters of administration of the estate of the said deceased.

And I further make oath and say, that I am the lawful brother of the whole blood and one of the persons entitled to share in the estate of the said deceased, and am desirous of obtaining letters of administration of the estate of the said deceased.

And I further make oath and say, that the estate left by the said deceased consists of [*give nature of property and value*] (*b*).

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) An affidavit to lead a citation must verify all the statements in the citation, and should, therefore, not be sworn until after the draft citation has been settled : *vide ante*, p. 516.

AFFIDAVITS—*continued.*

FORM No. 37.

Affidavit to lead Citation by Creditor (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

I, C. D., of , newsagent, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor without known parent, brother or sister of the whole or half blood, or their issue, grandparent, uncle or aunt of the whole or half blood, or their issue (*b*). Affidavit to lead citation by creditor.

[*State what efforts have been made to discover the kin of the deceased.*]

That the said deceased was at the time of his death justly and truly indebted to me in the sum of £ of lawful money of Great Britain for work and labour done, materials found, and goods sold and delivered by me to the said A. B., between the day of , and the day of , and that no part of such sum has been since received by me or by any person on my behalf, but that the whole thereof still remains justly due and owing to me, and that I hold or have held no security whatever for the same or any part thereof.

That the estate of the said A. B. consists of [*give amount and details*] (*c*).

Sworn, etc.

(Signed) C. D.

FORM No. 38.

Affidavit accepting grant by party cited (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that a citation, issued on the , was served upon me on the , whereby I was cited to accept or refuse letters of administration of the estate [or, *to take probate of the will*] of A. B. of deceased, that on the I entered an appearance to the said citation by my solicitors herein, that notice of the entry of such appearance was on the duly served by my said solicitors on Messrs. , the solicitors for the citor, and that no summons or notice of other proceeding in this matter by the citor has been served upon me since the service of the said notice. Affidavit accepting grant by party cited.

And I further make oath and say that I am ready and willing to take letters of administration of the estate of the said A. B., deceased.

Sworn, etc.

(Signed) C. D.

FORM No. 39.

Affidavit of Widow to lead a Joint Grant—Death before 1926 (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the , at , intestate, leaving me his lawful widow and relict and E. F. and G. H., spinster, his lawful and only children and next-of-kin, the said E. F. being also his heir-at-law. Affidavit of widow to lead a joint grant.

That I have been advised that I, as the lawful widow and relict of the said A. B., am entitled primarily and by preference to have letters of administration of the estate of the said A. B. granted to myself alone, but I am desirous that the said E. F., who is the eldest son of myself and of the said A. B., be joined with me in the letters of administration of the estate of the said A. B., deceased.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) If death occurred before 1926 the persons to be cleared off, in like circumstances, will be "parent, brother or sister, uncle or aunt, nephew or niece, cousin-german, or any known relation," and, if there be real estate, also the heir-at-law.

(*c*) An affidavit to lead a citation must verify all the statements in the citation, and should, therefore, not be sworn until after the draft citation has been settled: *vide ante*, p. 516.

AFFIDAVITS—*continued.*

FORM No. 40.

Affidavit to lead Order assigning a Guardian to an Infant appointed Executor or Residuary Legatee and Devisee (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead order assigning a guardian to an infant appointed executor or residuary legatee and devisee.

In the Estate of A. B., deceased.

I, C. D., of , auctioneer, make oath and say as follows :—

1. That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, and thereof appointed his son E. F. sole executor [*or*, did not in his said will name any executor and appointed his son E. F. residuary legatee and devisee].

2. That the said E. F. is now an infant, to wit, of the age of four years and upwards, but under the age of seven years, and as I am advised is therefore by law incapable of acting in his own name and of electing a guardian to act on his part and behalf.

3. That there is no testamentary or other lawfully appointed guardian of the said E. F.

4. That I am the lawful grandfather and nearest of kin of the said E. F., and I am willing to undertake the guardianship of the said infant for the purpose of taking letters of administration with the said will annexed of the said estate of the said deceased for the use and benefit of the said E. F., and until he shall attain the age of twenty-one years.

Sworn, etc.

(Signed) C. D.

FORM No. 41.

Affidavit to lead Order assigning a Guardian to an Infant to Renounce (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead order assigning a guardian to an infant to renounce.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died there on the , intestate, a widower, leaving E. F., spinster, his lawful child and only person entitled to his estate, who is an infant, to wit, at the age of three years and upwards, but under the age of seven years.

That there is no testamentary or other lawfully appointed guardian of the said E. F.

That I am the lawful grandfather, and one of the nearest-of-kin of the said E. F., and am ready and willing to undertake the guardianship of the said E. F. for the purpose of renouncing on her part and behalf all her right, title and interest to and in the letters of administration of the estate of the said A. B., deceased.

Sworn, etc.

(Signed) C. D.

FORM No 42.

Affidavit to lead Revocation of Probate by Consent (a later Will having been found) (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead revocation of probate by consent (a later will having been found).

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say as follows :—

1. The said A. B., of , deceased, died on the , at , having duly made and executed a will bearing date the , whereof I the said C. D., was appointed the sole executor.

2. I verily believed (until I had, as hereinafter deposed, ascertained to the contrary) that the said will was the last will and testament of the said deceased, and I applied to this Division at the Registry thereof for and obtained on the , a grant of probate of the said will on the suggestion that such will was the last will and testament of the said deceased.

3. That since the date last mentioned I have discovered [*state how*] a will duly made and executed by the said deceased of a later date than the date of the above-mentioned will, to wit, a will bearing date the ,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

whereof the said deceased appointed E. F. sole executor, and whereby the said deceased revoked all wills previously made by him.

4. I am therefore desirous that the probate, heretofore granted to me, shall be revoked and declared null and void by this Division.

Sworn, etc.

(Signed) C. D.

FORM No. 43.

Affidavit to lead Revocation of Grant of Administration by Consent of Administrator (wrongly supposed to be entitled to Share in Estate of Deceased) (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

I, C. D., of , farmer, make oath and say as follows :—

1. That A. B., of , died on the , at , intestate, a bachelor, without parent.

2. I verily believed (until I had, as hereinafter deposed, ascertained to the contrary) that the said deceased left him surviving no brother or sister of the whole or half blood or their issue and no grandparent and being the lawful uncle of the whole blood of the said deceased, I applied to this Division for, and, on the , obtained therefrom, letters of administration of the estate of the said deceased, which were granted to me in my character of uncle of the whole blood on the suggestion that I was one of the persons entitled to share in the estate of the said deceased.

3. Since the date last mentioned I have caused inquiries to be made and advertisements to be inserted in the public newspapers for and respecting the relations of the said deceased, and I have thereby ascertained that , of , is the lawful brother of the half blood of the said deceased.

4. I am therefore desirous that the letters of administration heretofore granted to me shall be revoked and declared null and void.

Sworn, etc.

(Signed) C. D.

Affidavit to lead revocation of grant of administration by consent of administrator (wrongly supposed to be entitled to share).

FORM No. 44.

Affidavit to lead Summons to Exhibit an Inventory (*a*).

[*Heading as in Form No.* 34.]

In the Estate of A. B., deceased.

I, C. D., of , saddler, make oath and say as follows :—

1. The said A. B., of , deceased, died on the , at , intestate, a widower, leaving him surviving E. F., G. H., I. J. and me this deponent his lawful children, and only persons entitled to share in his estate.

2. On the , letters of administration of the estate of the said deceased were granted by authority of this Division at the registry thereof to the said E. F., the lawful son and one of the persons entitled to share in the said estate.

3. The said E. F. has sworn the value of the estate of the said deceased to amount to £ , but I verily believe the same to be considerably less than the true amount and value thereof.

4. Part of the said estate consists of stock and growing crops, which should be forthwith valued and appraised, before the same are removed or sold, in order that the true value thereof as assets belonging to the said estate may be satisfactorily ascertained.

5. Under the circumstances mentioned in the preceding paragraphs of this affidavit, and upon other grounds, I am desirous of obtaining from this Division an order calling upon the said E. F. to exhibit upon and by virtue of his corporal oath a true and perfect inventory of all and singular the estate of the said deceased.

Sworn, etc.

(Signed) C. D.

Affidavit to lead summons to exhibit an inventory.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 45.

Affidavit to lead Alteration in Grant (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead alteration in grant.

I, C. D., of , widow, make oath and say that on the , letters of administration of the estate of the said A. B., of , deceased, were granted by the High Court of Justice to me this deponent, the lawful widow and relict of the said deceased.

That in the said letters of administration the date of the deceased's death is stated to be the , whereas the true date was the , as appears by the certificate of death hereunto annexed.

That the error arose by my not observing when the oath to lead the grant was read over to me that the wrong date, namely, the , had been inadvertently inserted in that document.

That I desire that the said letters of administration may be altered by substituting for the as the date of death of the deceased.

Sworn, etc.

(Signed) C. D.

FORM No. 46.

Affidavit to lead Order for Notation of Domicil, after Grant has passed the Seal (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead order for notation of domicil after grant has passed the seal.

I, C. D., of , confectioner, make oath and say as follows :—

1. That A. B., of , deceased, died on the , at , domiciled in England, and that on the , probate of the will [*or* letters of administration of the estate] of the said deceased was granted to me by the High Court of Justice at the registry thereof.

2. That the gross value of the estate in Great Britain (*b*) in respect of which the grant was made was then sworn to be £ .

3. That no additional estate has since come to my knowledge.

4. That part of the said estate amounting to £ (further particulars of which are set forth in the schedule hereunto annexed) is in Scotland.

[*If the property in Scotland was trust property, insert instead of paragraph* 4 *the following* :—

4. That the whole of the said estate was in England, and that the said deceased was at the time of his death entitled as trustee and not beneficially to certain personal estate amounting to the value of £ (further particulars of which are set forth in the schedule hereunto annexed) the whole of which is in Scotland.]

Sworn, etc. (Signed) C. D.

SCHEDULE.

[*To be signed by deponent.*]

FORM No. 47.

Affidavit to lead Writ of Summons (*a*).

[*Heading as in Form No.* 34.]

Affidavit to lead writ of summons.

In the Estate of A. B., deceased.

I, C. D., of , butcher, make oath and say as follows :—

1. That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , whereof he appointed me, this deponent, sole executor.

2. That a caveat having been entered in the estate of the above-named deceased on the , was duly warned on the .

3. That an appearance has been entered to the said warning on behalf of E. F., of , who is therein described as the surviving executor of an alleged later will of the said deceased, bearing date the day of , 19 .

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) *Vide ante*, p. 440, note (*g*).

AFFIDAVITS—*continued.*

FORM No. 48.

Affidavit to lead Subpœna to bring in a Script (*a*).

[*Heading as in Form No.* 34.]

In the estate of A. B., deceased.

I, C. D., of , stockbroker, make oath and say as follows :— Affidavit to lead subpœna to bring in a script.

That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , and thereof appointed E. F. and G. H. executors, and me, this deponent, residuary legatee.

That the said will is now in the possession, within the power, or under the control of the said E. F. and G. H. or of one of them, and that the said E. F. and G. H. have neglected or declined to prove the said will, or renounce probate thereof, and I am desirous that the said will should be brought into the Principal Registry of this Division that I may prove the same or otherwise act as I may be advised.

And I further make oath and say that the said E. F. resides at , and that the said G. H. resides at .

Sworn, etc. (Signed) C. D.

FORM No. 49.

Affidavit of Scripts. [Rules 30 and 31, C. B.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

N. O. against P. L.

I, N. O., of , plaintiff in this action, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of A. B., late of , deceased, the deceased in this action, or being or purporting to be instructions for, or the draft of, any will, codicil, or other testamentary disposition of the said A. B. has at any time either before or since his death come to the hands, possession or knowledge of me this deponent or the hands, possession, or knowledge of , my solicitors in this action, so far as is known to me, this deponent, save and except the true and original last will of the said deceased now remaining in the Principal Probate Registry of this Court [*or* hereto annexed] the said will bearing date the , also save and except [*give dates and particulars of any other testamentary papers of which deponent has any knowledge*] (*b*). Affidavit of scripts. (Rules 30 & 31, Contentious Business.)

Sworn, etc. (Signed) N. O.

FORM No. 50.

Affidavit as to Documents. [O. 31, r. 13.] (*a*).

[*Heading as in Form No.* 49.]

I, the above-named defendant P. L., make oath and say as follows :— Affidavit as to documents. [O. 31, s. 13.]

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the [*if deponent objects to produce any document, add* first and second parts of the] first schedule hereto.

2. [*State objection, if any, to produce documents in second part of first schedule and grounds thereof.*]

3. I have had, but have not now, in my possession or power the documents relating to the matter in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power [*state when, and what has since become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, or other than and except the documents set forth in the said first and second schedules hereto.

[*Here follow the schedules describing each document and stating its date.*]

Sworn, etc. (Signed) P. L.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) *Vide ante*, pp. 570, 571.

AFFIDAVITS—*continued.*

FORM No. 51.

Affidavit verifying Account of Administrator *pendente lite* (*a*).

[*Heading as in Form No.* 49.]

Affidavit verifying account of administrator *pendente lite.*

I, K. L., of , chartered accountant, the administrator *pendente lite*, appointed in this action, make oath and say as follows:—

1. The account marked "A" produced and shown to me is my account of the rents and profits of the estate of A. B., of , deceased, from the day of , 19 , to the day of , 19 , both inclusive.

2. That the said account contains a true statement of all and every sum of money received by me or by any other person or persons by my order or to my knowledge or belief pursuant to the order on motion dated the .

3. The several sums of money mentioned in the said account hereby verified to have been paid and allowed, have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

4. The said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge, information, and belief.

5. E. F. and L. M., the sureties named in the recognisance, dated the , are both alive, and neither of them has become bankrupt or insolvent.

Sworn, etc. (Signed) K. L.

ANSWERS TO INTERROGATORIES—*See* INTERROGATORIES: ANSWERS TO.

APPEARANCES.

FORM No. 52.

Appearance to Writ of Summons, Memorandum of. [O. 12, r. 9.] (*a*).

[*Heading as in Form No.* 49.]

Appearance to writ of summons, memorandum of. [O. 12, r. 9.]

Enter an appearance for E. F. and G. H., defendants, in this action.

Dated the day of , 19 .

Signed , of ,

Solicitor for the defendants.

FORM No. 53.

Appearance to Writ of Summons, Notice of Entry of. [O. 12, r. 9.] (*a*).

[*Heading as in Form No.* 49.]

Appearance to writ of summons, notice of entry of. [O. 12, r. 9.]

Take notice that have this day entered an appearance at the Central Office, Royal Courts of Justice, for the defendant E. F. to the writ of summons in this action.

[*If the defendant requires a statement of claim, add a note to that effect.*]

Dated the day of , 19 .

Signed , of ,

Solicitors for the defendant.

FORM No. 54.

Appearance to Warning or Citation (*a*).

In the High Court of Justice Probate, Divorce, and Admiralty Division (Probate.)

Caveat No. dated the day of , 19 .

Citation dated the day of , 19 .

In the Estate of A. B., late of .

PLAINTIFFS [*the parties warning or citing*].

Appearance to warning or citation.

Name [*in full*] C. D., of , and E. F., of , the executors of the last will and testament of A. B., deceased, dated .

DEFENDANT [*the party warned or cited*].

Name [*in full*] G. H., of , the lawful son and one of the persons entitled to share in the estate of the said A. B. in the event of an intestacy.

Name and address (within three miles of the General Post Office, London (*b*)) of solicitor or party appearing.

Dated the day of , 19 .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) Appearances to warnings and citations (except citations to see proceedings) are entered at the Contentious Department of the Principal Probate

APPOINTMENTS.

FORM No. 55.

Appointment of Receiver of Real Estate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division (Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Whereas there is now depending in the Probate, Divorce, and Admiralty Division of the High Court of Justice a certain action touching the validity of the will of A. B., late of , deceased, wherein C. D. is plaintiff, and E. F. defendant; and whereas the said will affects the real estate of the said deceased. Now I, the Right Honourable the President of the said Division of the Court, do hereby appoint G. H., of , to be the receiver of the rents and profits of the real estate of the said deceased pending the said action, he having given sufficient security for the faithful performance of the duties committed to him.

Appointment of receiver of real estate.

Dated this day of , 19 .

(Signed)

FORM No. 56.

Appointment of Nominee of the Guardians of the Poor to take a Grant of Letters of Administration (after Citation) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.

At a meeting of the guardians of the poor of the Union, held at on the day of , 19 ,

Present:—

C. D., chairman, and other guardians out of a total number of .

It was resolved that E. F., the clerk to the guardians, be, and he is hereby, appointed nominee of the said guardians for the purpose of taking out letters of administration of the estate of A. B., of asylum, in the county of , who died at on the day of , 19 , and of whom the said guardians are creditors.

Appointment of nominee of the guardians of the poor to take a grant of letters of administration after citation.

I certify that the above is a true copy of the minute of the resolution duly passed as aforesaid.

(L. S.) (Signed) E. F.,
Clerk to the Guardians of the Poor of the Union.

ASSIGNMENT.

FORM No. 57.

Assignment of Bond (*a*).

[*Heading as in Form No.* 56.]

In the Estate of A. B., deceased.

KNOW all men by these presents, that I, C. D., principal probate registrar of the Principal Probate Registry of the High Court of Justice, pursuant to the 167th section of the Supreme Court of Judicature (Consolidation) Act, 1925, and by virtue of an order made on the , have assigned, and by these presents do assign to E. F., of , baker, the annexed bond bearing date the , for the due administration of the estate of A. B., of , deceased, and all benefit and advantage arising therefrom.

Assignment of bond.

Signed, sealed and delivered in the presence of of } (Signed) C. D. Registrar.

[NOTE.—*The assignment must have a stamp for 5s. impressed on it.*]

ASSIGNMENT OF GUARDIANS.—*See* FORMS 212—214.

Registry. In the case of a citation to see proceedings, the appearance is entered at the Central Office, and the address given must be within three miles of the Royal Courts of Justice.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS.

FORM NO. 58.

Bond—Administration (*a*).

Bond—Administration.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal [*or* District] Probate Registry.

KNOW all men by these presents, that we, A. B., of , butcher, C. D., of , baker, and E. F., of , greengrocer, are jointly and severally bound unto the Principal Probate Registrar in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Principal Probate Registrar, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the lawful father and one of the persons entitled to share in the estate of G. H., of , deceased, who died on the day of , 19 , and the intended administrator of all the estate which by law devolves on and vests in the personal representative of the said deceased, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to the hands, possession, or knowledge, of the said intended administrator and the same so made do exhibit, or cause to to be exhibited, into the Principal Probate Registry [*or* the District Probate Registry at , *as the case may be*] of the said Division, whenever required by law so to do. And the said estate do well and truly administer according to law; and further do make, or cause to be made, a true and just account of the administration of the said estate, whenever required by law so to do. And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors or other persons therein named do exhibit the same into the said Division of the said Court, making request to have it allowed and approved accordingly, if the said intended administrator being thereunto required, do render and deliver the letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named A. B., C. D., and E. F., in the presence of } (Signed) A. B. C. D. E. F.

A commissioner for oaths.

FORM NO. 59.

Bond—Administration (with Will) (*a*).

[*Heading as in Form No.* 58.]

Bond—Administration (with will).

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the residuary legatee named in the will [*or as the case may be*] of G. H., of , deceased, who died on the , and the intended administrator (with the will) of all the estate which by law devolves on and vests in the personal representative of the said deceased, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate, which has or shall come to the hands, possession, or knowledge, of the said intended administrator, and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry [*or* the District Probate Registry at , *as the case may be*] of the said Division, whenever required by law so to do. And the said estate do well and truly administer according to law; And further do make, or cause to be made, a just and true account of the administration of the said estate whenever required by law so to do, then this obligation to be void, and of none effect, or else to remain in full force and virtue.

Signed, sealed and delivered, etc. [*as in Form No.* 58].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

FORM No. 60.

Bond—Administration on Application by Guardian of Infants and Co-administrator (*a*).

[*Heading as in Form No.* 58.]

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such that if the above-named A. B., the lawful aunt and nearest-of-kin and the lawfully assigned guardian of E. B. and G. B. (who are now infants) the lawful sons and only persons entitled to share in the estate of H. B., of , deceased, who died on the ; and C. D. the co-administrator nominated by the said A. B., the intended administrators of all the estate which by law devolves on and vests in the personal representative of the said deceased for the use and benefit of the said infants and until one of them shall attain the age of 21 years, do, when lawfully called upon in that behalf, etc. [*complete as in Form No.* 58].

Bond—Administration on application of guardian of infants and co-administrator.

FORM No. 61.

Bond—Administration *de bonis non* (*a*).

[*Heading as in Form No.* 58.]

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such that if the above-named A. B., the lawful brother of the whole blood and one of the persons entitled to share in the estate of C. D., of , deceased, who died on the , and the intended administrator of all the estate which by law devolves on and vests in the personal representative of the said deceased left unadministered by E. F., the lawful brother of the whole blood and one other of the persons entitled to share in the said estate, do, when lawfully called on in that behalf, etc. [*complete as in Form No.* 58].

Bond—Administration *de bonis non.*

FORM No. 62.

Bond—Administration (with Will) on Application by Attorney (*a*).

[*Heading as in Form No.* 58.]

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such that if the above-named A. B., the lawful attorney of E. F., the residuary legatee named in the will of C. D., of , deceased, who died on the , and the intended administrator (with the will annexed) of all the estate which by law devolves on and vests in the personal representative of the said deceased for the use and benefit of the said E. F. and until he shall apply for and obtain letters of administration (with the will annexed) of the said estate of the said deceased, do, when lawfully called on in that behalf, etc. [*complete as in Form No.* 59].

Bond—Administration (will) on application by attorney.

FORM No. 63.

Bond—Administration (with or without Will) on Application by Attorney to Re-seal Colonial Grant (*a*).

[*Heading as in Form No.* 58.].

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if K. L., of , the administrator (with the will dated the day of annexed) by authority of the Court at , acting under letters of administration granted to on the day of , and now about to be sealed in England under the Colonial Probates Act, 1892, of the estate of M. N., late of , deceased, who died on the , do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of

Bond—Administration (with or without will) on application by attorney to re-seal Colonial grant.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

the estate of the said deceased in England which has or shall come to hands, possession, or knowledge, or into the hands and possession of any other person for , and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of His Majesty's High Court of Justice, whenever required by law so to do, and the same estate do well and truly administer according to law; And further do make, or cause to be made, a true and just account of said administration, whenever required by law so to do, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered, etc. [*as in Form No.* 58].

FORM NO. 64.

Bond of Administrator (Creditor) (*a*).

[*Heading as in Form No.* 58.]

Bond of administrator (creditor).

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., a creditor, and the intended administrator of all the estate which by law devolves on and vests in the personal representative of G. H., of , deceased, who died on the , do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to his hands, possession, or knowledge, and, the same so made, do exhibit, or cause to be exhibited, into the Principal Probate Registry [*or* the District Probate Registry at , *as the case may be*] of the said Division whenever required by law so to do, and the said estate do well and truly administer according to law, paying all and singular the debts which he, the said deceased, did owe at his decease in due course of administration rateably and proportionably and according to the priority required by law, not, however, preferring his own debt or the debt of any other person by reason of his being administrator as aforesaid.

And further do make, etc. [*complete as in Form No.* 58].

FORM NO. 65.

Bond—Administration under the 73rd Section of the Court of Probate Act, 1857, or under the 162nd Section of the Supreme Court of Judicature (Consolidation) Act, 1925 (*a*).

[*Heading as in Form No.* 58.]

Bond. Administration under section 73 of the Court of Probate Act, 1857, etc.

KNOW all men by these presents, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the person appointed , under and by virtue of the 73rd section of the Court of Probate Act, 1857 [*or* the 162nd section of the Supreme Court of Judicature (Consolidation) Act, 1925] to be the administrator of all the estate which devolves on and vests in the personal representative of G. H., of , deceased, who died on the , do when lawfully called on in that behalf, etc. [*complete as in Form No.* 58].

FORM NO. 66.

Bond—Administration—Guarantee Society (*a*).

[*Heading as in Form No.* 58.]

Bond—Administration—Guarantee Society.

KNOW all men by these presents that we A. B., of , dentist, and the Society, having its registered offices at , are jointly and severally bound, etc. [*as in Form No.* 58].

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

lawful father and one of the persons entitled to share in the estate of C. D., of , deceased, who died on the , and the intended administrator [*continue as in Form No. 58 down to "full force and virtue"*].

Signed, sealed, and delivered by the within-named A. B. in the presence of E. F., A commissioner for oaths. (Signed) A. B.

(Signed) G. H. } Directors.
I. J. }
K. L., Secretary. (Seal of the Guarantee Society.)

This seal of the Society, and the signatures G. H. and I. J., two of the directors, and of K. L., the secretary of the said Society, were hereunto affixed in the presence of

(Signed) E. F.,
A commissioner for oaths.

[*Exhibit on Bond.*]

This is the bond marked "A," referred to in the affidavit of K. L., sworn before me this day of , 19 .

(Signed) E. F.,
A commissioner for oaths.

FORM No. 67.

Bond of Administrator *pendente lite* (*a*).

[*Heading as in Form No. 58.*]

KNOW all men by these presents, etc. [*as in Form No. 58.*]

Sealed with our seals. Dated the day of , 19 .

Bond of administrator *pendente lite.*

WHEREAS G. H., of , died on the , at , having, as asserted, made and duly executed his last will and testament dated the : And whereas there is now depending in the High Court of Justice a probate action, entitled I. J. against K. L., J. 19 , No. , touching the validity of the said will: And whereas on the , the Right Honourable ordered [*or as the case may be*] that the said A. B. be appointed administrator of all the estate which by law devolves on and vests in the personal representative of the said G. H. pending the said action [*set out the limitations in the said order, if any*].

Now the condition of this obligation is such, that if the above-named A. B., the intended administrator of the said estate of the said deceased [*limited as aforesaid*] do, pending the said action, well and truly administer the said estate, save distributing the residue thereof, under the direction and control of the said Court; and also do make or cause to be made a true and perfect inventory of such estate, and do exhibit the same into the Principal Probate Registry of the said Court, together with a just and true account of his administration thereof, whenever thereunto lawfully required, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered, etc. [*as in Form No. 58*].

CASE ON MOTION.—*See* Motion, Case on.

CAVEAT.

FORM No. 68.

Caveat (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.) The Principal Probate Registry.

Caveat.

Let nothing be done in the estate of C. E., late of , deceased, who died on or about the day of , at , unknown to F. C., of , having interest [*or* to H. G. & Co., of , solicitors for the parties having interest].

Dated this day of , 19 .

(Signed)
[*Signature of person entering caveat.*]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CERTIFICATES.

FORM No. 69.

Certificate of Reason of Delay (*a*).

[*See Affidavit of Delay* (*b*) *Form No.* 19.]

FORM No. 70.

Certificate of Further Security (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Certificate of further security.

I, the undersigned Registrar of the Principal Probate Registry (*c*) of the High Court of Justice, do hereby certify that the gross value of the estate of A. B., of , deceased, originally sworn to amount to the sum of £ , has now been sworn to amount to the sum of £ , and full security has been given for the increased amount.

Dated the day of 19 .

(Signed) W. Y., Registrar.

Letters of administration ( )
were granted at the Principal Probate
Registry on the day of .

FORM No. 71.

Certificate of Service to be Indorsed on Citation (*a*).

Certificate of service to be indorsed on citation.

This citation was served by G. E., on the within-named M. N. at on the day of 19 .

(Signed) G. E.

CITATIONS.

FORM No. 72.

Citation to Accept or Refuse Probate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

GEORGE V. by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith: To A. B., of in the county of .

Citation to accept or refuse probate.

WHEREAS it appears by an affidavit of C. D., sworn the , that E. F., of , died on the , at , having made and duly executed his last will and testament dated the , and thereof appointed you, the said A. B., sole executor, but did not therein name any residuary legatee or devisee: And whereas it further appears by the said affidavit that the said deceased died a bachelor and that the said C. D. is the lawful father and one of the persons entitled to share in the estate of the said deceased:

Now this is to command you the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice, at Somerset House, Strand, London, and accept or refuse Probate of the said will, or show cause why letters of administration with the said will annexed, of all estate which by law devolves to and vests in the personal representative of the said deceased, should not be granted to the said C. D. And take notice, that in default of your so appearing and accepting and extracting probate of the said will, our said Court will proceed to grant letters of administration with the said will annexed of the said estate to the said C. D., your absence notwithstanding.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of ,
Solicitor.

(Signed) G. H., Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) The certificate which is in the same terms as the affidavit is signed by the solicitor, or signed by the applicant and countersigned by the solicitor.

(*c*) Or, District Probate Registry at .

CITATIONS—*continued.*

FORM No. 73.

Citation by Executor of an Executor who Proved, to an Executor to whom Power was Reserved to Accept or Refuse Probate (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:
To A. B., of in the county of .

WHEREAS it appears by an affidavit of C. D., sworn the , that probate of the will of E. F., of , deceased, was on the , granted at the Principal Probate Registry of our High Court of Justice to G. H. one of the executors named in the said will, power being reserved of making a like grant to you the said A. B., the other executor named therein: And whereas it further appears by the said affidavit that the said G. H. for some time intermeddled in the estate of the said E. F., deceased and died on the , leaving part thereof unadministered, and that on the , probate of the will of the said G. H. was granted by our said Court at the said registry to the said C. D., the sole executor named in the said will of the said G. H.:

Citation by executor of an executor who proved, to an executor to whom power was reserved to accept or refuse probate.

Now this is to command you the said A. B. that within eight days after the service hereof upon you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse probate of the will of the said E. F., deceased; and take notice that, in default of your so appearing and accepting and extracting probate of the said will, your rights as such executor will wholly cease, and the representation to the said E. F., deceased, will devolve as if you had not been appointed executor.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 74.

Citation to Accept or Refuse Probate following Grant of Probate limited to Settled Land (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:
To A. B., of in the county of .

WHEREAS it appears by the affidavit of E. F., sworn the , that C. D., of , died at , on the , having made and duly executed his last will and testament bearing date the , whereof he did name you the said A. B., sole executor: And whereas it further appears by the said affidavit that on the probate of the said will limited to land vested in the said deceased which was settled previously to his death and not by his will was granted by our High Court of Justice at the registry thereof to G. H. and I. J. the trustees at the date of death of the said C. D. of the said settled land: And whereas it further appears by the said affidavit that the said E. F. is the residuary legatee and devisee named in the said will:

Citation to accept or refuse probate following probate limited to settled land.

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse probate of the said will save and except settled land or show cause why letters of administration with the said will annexed of all the estate which by law devolves to and vests in the personal representative of the said C. D. should not be granted save and except settled land to the said E. F.: And take notice that in default of your so appearing and accepting and extracting probate, save and except settled land, our said Court will proceed to grant letters of administration with the said will annexed of the said estate of the said deceased, save and except settled land, to the said E. F., your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 75.

Citation to Accept or Refuse Letters of Administration (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72] :
To A. B., of in the county of .

Citation to accept or refuse letters of administration.

WHEREAS it appears by an affidavit of C. D., spinster, sworn the , that E. F., of died on the , at , intestate without issue or parent, brother or sister of the whole or half blood, or their issue or grandparent leaving you the said A. B. his lawful widow and relict : And whereas it further appears by the said affidavit that the said C. D. is the lawful aunt of the whole blood and one of the persons entitled to share in the estate of the said deceased :

Now this is to command you the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why the same should not be granted to the said C. D. : And take notice that in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant letters of administration of the said estate to the said C. D., or as our said Court shall direct, your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 76.

Citation by Creditor to Mother of Bastard dying after 1926 to Accept or Refuse Letters of Administration (*a*).

[*Heading as in Form No.* 72.]

Citation by creditor to mother of bastard dying after 1926 to accept or refuse letters of administration.

GEORGE V., etc. [*as in Form No.* 72] :
To E. F., of in the county of .

WHEREAS it appears by the affidavit of C. D., sworn the , that A. B., of , died there on the , intestate, a widower without issue and a bastard leaving you the said E. F., his natural mother and the only person entitled to his estate and that the said C. D. is a creditor of the said A. B.

Now this is to command you the said E. F. [*complete as in Form No.* 75].

FORM No. 77.

Citation by Creditor to Kin (if any) to Accept or Refuse Administration (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72] :
To the kin (if any) entitled to share and all other persons having or claiming and interest in the estate of A. B., deceased.

Citation by creditor to kin (if any) to accept or refuse administration.

WHEREAS it appears by the affidavit of H. G., sworn the , that A. B., of , died on the , at , intestate, a widower without known issue or parent, brother or sister of the whole or half blood, or their issue, grandparent, uncle or aunt of the whole or half blood, or their issue, and that the said H. G. is a creditor of the said deceased :

Now this is to command you, that within one month after service by publication hereof on you, inclusive of the day of such service, you do cause an appearance to be entered, etc. [*complete as in Form No.* 75].

[N.B.—The form given is applicable to cases of death since 1925. Where the deceased died prior to 1926 the citation is addressed to "the next-of-kin (if any) and all persons," etc., and states that the deceased died a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece, cousin german or any known relation. It must further be shown that the deceased died possessed of no real estate or the citation must also be addressed to the heir-at-law, while the grant made to the creditor will be limited to the personal estate of the deceased.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 78.

Citation to a Minor to Accept or Refuse Letters of Administration (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:
To A. B., of , in the county of .

WHEREAS it appears by an affidavit of C. D. sworn on the , that E. F., of , died on the , at , intestate, a widower, leaving you the said A. B. his lawful son and only person entitled to his estate; and that C. D. is a creditor of the said deceased: And whereas it further appears by the said affidavit that you the said A. B. are in your minority and that G. H. is your lawful uncle and nearest of kin:

Now this is to command you the said A. B., etc. [*complete as in Form No.* 75].

Citation to a minor to accept or refuse letters of administration.

FORM No. 79.

Citation to Trustees of Settled Land to Accept or Refuse Letters of Administration limited to Settled Land (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:
To O. P., of , and R. S., of .

WHEREAS it appears by the affidavit of E. F. sworn on the that A. B., of , died at on the , intestate, a widower, and that there is land vested in the said deceased which was settled previously to his death to wit under the will of C. D., deceased, proved at the Probate Registry of our High Court of Justice on the , and that you the said O. P. and R. S. are the trustees of the said settled land: And whereas it further appears by the said affidavit that the said E. F. is the lawful son and only person entitled to the estate of the said deceased:

Now this is to command you the said O. P. and R. S. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said High Court at Somerset House, Strand, London, and accept or refuse letters of administration of the estate of the said A. B. limited to the said settled land, or show cause why letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased should not be granted including settled land to the said E. F.: And take notice that in default of your so appearing and accepting and extracting letters of administration of the estate of the said A. B. limited to the said settled land, our said Court will proceed to grant letters of administration of the estate of the said A. B., including settled land, to the said E. F., your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

Citation to trustees of settled land to accept or refuse letters of administration limited to settled land.

FORM No. 80.

Citation by the Guardians of the Poor (Creditors) to Widow, a Lunatic without known Relations, to the Next-of-kin of the said Widow, and the Kin (if any) and all Persons having an Interest in the Estate of the Deceased to Accept or Refuse Administration (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:
To A. B., of the Asylum, in the county of . To the next-of-kin of the said A. B., and to the kin (if any) entitled to share in the estate, and all other persons having or claiming an interest in the estate of C. B., deceased.

WHEREAS it appears by an affidavit of D. E., collector to the board of guardians of the poor of the parish of , and their nominee (*b*) sworn the , that C. B., of the county asylum in the county of , died there on the intestate without known issue or parent, brother, or sister

Citation by the guardians of the poor (creditors) to widow, a lunatic without known relations, to the next-of-kin of the said widow, and the kin (if any) and all persons having an interest in the estate of the deceased

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) The sealed nomination must be filed.

CITATIONS—*continued.*

to accept or refuse administration.

of the whole or half blood, or their issue, grandparent, uncle or aunt of the whole or half blood, or their issue, leaving you the said A. B. his lawful widow and relict: And whereas it further appears by the said affidavit that the said A. B. is a person of unsound mind, and that there is no committee of her estate and that she has no known relations. And whereas it further appears by the said affidavit that the said guardians are creditors of the deceased.

Now this is to command you the said A. B. that within eight days after the service hereof on you, and you the next-of-kin of the said A. B. and you the kin (if any) of the said C. B. that within one month after service hereof on you by publication, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why the same should not be granted to the said D. E., for the use and benefit of the said A. B. until she become of sound mind: And take notice that in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant letters of administration of the estate of the said deceased to the said D. E., as aforesaid, or as our Court shall direct, your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

FORM NO. 81.

Citation by Representative of Husband to Heir-at-Law to Accept or Refuse Administration *de bonis non.* **Death before 1926** (*a*).

[*Heading as in Form No.* 72.]

Citation by representative of husband to heir-at-law to accept or refuse administration *de bonis non*—death before 1926.

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of , in the county of .

WHEREAS it appears by an affidavit of C. D., sworn the , that E. F., of , died on the , at , intestate, and that letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, were on the granted by our High Court of Justice at the Principal Probate Registry thereof to G. H., the lawful husband of the said deceased, who for some time intermeddled in the said estate, and died on the , leaving part thereof unadministered: And whereas it further appears by the said affidavit that the said C. D. is the personal representative of the said G. H. deceased, letters of administration of the estate of the said G. H. having been granted to him at the Principal Probate Registry on the , and that you the said A. B. are the heir-at-law of the said deceased:

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse letters of administration of the said unadministered estate, or show cause why the same should not be granted to the said C. D.: And take notice that in default of your so appearing and accepting and extracting the said letters of administration our said Court will proceed to grant letters of administration of the said unadministered estate to the said C. D., your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

FORM NO. 82.

Citation by Guardian of Minor Children of Deceased Person to Widow to propound Paper Writing (as being Executrix thereof) or to Accept or Refuse Letters of Administration (*a*).

[*Heading as in Form No.* 72.]

Citation by guardian of minor children of deceased person to widow to propound paper writing (as being

GEORGE V., etc. [*as in Form No.* 72]:

WHEREAS it appears by an affidavit of C. D., sworn on the , that E. F., of , died on the , leaving you the said A. B. his lawful widow and relict and G. H., spinster, and I. J., his lawful children together the only persons entitled to his estate; and whereas it further appears by the said affidavit that the said G. H. and I. J. are in their minority and have elected their lawful uncle the said C. D. to be their guardian: And whereas it further

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

appears by the said affidavit that the said deceased left a certain paper writing dated the , purporting to be a will whereby he appointed you the said A. B. sole executrix and residuary legatee and devisee.

executrix thereof) or to accept or refuse letters of administration.

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and propound the said paper writing, should you think it for your interest so to do, or accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased as having died intestate, or show cause why the letters of administration as aforesaid should not be granted to the said C. D. for the use and benefit of the said minors: And take notice that, in default of your so appearing and doing as aforesaid, our said Court will proceed to grant letters of administration of the said estate to the said C. D. or as our said Court shall direct, your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 83.

Citation to Bring in Probate (another Will being set up) (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To L. D., of , in the county of .

Citation to bring in probate (another will being set up).

WHEREAS it appears by an affidavit of D. P., sworn the , that probate of the alleged last will and testament dated the of I. J., of , deceased, was on the granted to you by our High Court of Justice at the Principal Probate Registry thereof: And whereas it is alleged in the said affidavit that the said deceased made and duly executed his last will and testament dated the , and thereof appointed the said D. P. executor (*b*) and that the said probate ought to be called in, revoked and declared null and void in law:

Now this is to command you the said L. D. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid probate in order that the said D. P. may proceed in due course of law for the revocation of the same.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 84.

Citation to Bring in Administration (Will set up) (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of , in the county of .

Citation to bring in administration (will set up).

WHEREAS it appears by the affidavit of C. D., sworn the , that letters of administration of all the estate which by law devolves to and vests in the personal representative of E. F., of , deceased, were on the , granted to you by our High Court of Justice at the Principal Probate Registry thereof: And whereas it is alleged in the said affidavit that the said deceased made and duly executed his last will and testament (*c*) dated the , and thereof appointed the said C. D. executor [*or as the case may be*], and that the said letters of administration ought to be called in, revoked, and declared null and void in law:

Now this is to command you the said A. B. that within eight days after service thereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) If the probate is to be brought in, not on the allegation of another will being set up, but on the ground that the deceased died intestate, the citor's claim will be stated as follows:—"And whereas it is further alleged by the said affidavit that the said deceased died intestate a widower leaving the said D. P. his lawful son and only person entitled to his estate and that the said probate ought to be called in, revoked and declared null and void in law."

(*c*) The will must be lodged in the registry before the issue of the citation.

CITATIONS—*continued.*

Somerset House, Strand, London, the aforesaid letters of administration in order that the said C. D. may proceed in due course of law for the revocation of the same.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 85.

Citation to Bring in Administration (Administrator alleged not to be Entitled) (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of , in the county of .

Citation to bring in administration (administrator alleged not to be entitled).

WHEREAS it appears by the affidavit of C. D., sworn the , that letters of administration of all the estate which by law devolves to and vests in the personal representative of E. F., of , deceased, were on the granted to you by our High Court of Justice at the Principal Probate Registry thereof as the lawful nephew of the whole blood and one of the persons entitled to share in the estate of the said deceased: And whereas it is alleged in the said affidavit that you are not entitled to share in the said estate of the said deceased, and that the said deceased died a widower leaving the said C. D., his lawful son and only person entitled to his estate, and that the said letters of administration ought to be called in, revoked, and declared null and void in law:

Now this is to command you, etc. [*continue as in Form No.* 84].

FORM No. 86.

Citation by Person Interested under Codicil to Executor who Proved Will only to Bring in Probate to Await Further Order of the Court (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of , in the county of .

Citation by person interested under codicil to executor who proved will only to bring in probate to await further order of the Court.

WHEREAS it appears by an affidavit of C. D., sworn on the , that probate of the alleged last will and testament of E. D., of , deceased, was on the , granted to you by our High Court of Justice at the Principal Probate Registry thereof: And whereas it is further alleged in the said affidavit that the said deceased made and duly executed a codicil to the said will on the , and that the said C. D. is interested in the estate of the said deceased under the said codicil.

Now this is to command you the said A. B. that within eight days after service hereof of you, inclusive of the day of such service, you do bring into and leave in the said Principal Probate Registry at Somerset House, Strand, London, the aforesaid probate there to await the further order of the Court.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 87.

Citation to see Proceedings (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of , in the county of .

Citation to see proceedings.

WHEREAS it appears by the affidavit of C. D., sworn the , that there is now depending in our High Court of Justice a probate action entitled "D. and another against C., 1927, F. No. 336," wherein the plaintiffs are proceeding to prove in solemn form of law the alleged last will and testament dated the , of E. F., of , who died on the , at : And whereas it further appears by the said affidavit that you are the lawful and one of the persons entitled to share in the estate of the said deceased had he died intestate [*or* a legatee under an alleged will dated , *or as the case may be*] (*b*):

Now this is to give notice to you the said A. B., to appear in the said action,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) It is important to bear in mind that a citation to see proceedings only issues against persons having a *contrary* interest to the citor.

CITATIONS—*continued.*

either personally or by your solicitor, should you think it for your interest so to do, at any time during the dependence of the said action and before final judgment shall be given therein. And take notice that, in default of your so doing, our said Court will proceed to hear the said will proved in solemn form of law and pronounce judgment in the said action, your absence notwithstanding.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 88.

Citation against an Executor who has Intermeddled (*a*).

[*Heading as in Form No.* 72.]

GEORGE V., etc. [*as in Form No.* 72]:

To A. B., of in the county of .

Citation against an executor who has intermeddled.

WHEREAS it appears by an affidavit of C. D., sworn the that E. F., of , died there on the , having made and duly executed his last will and testament bearing date the (now remaining in the Principal Probate Registry of our High Court of Justice), whereof you the said A. B. are the sole surviving executor, and that the said C. D. is interested in the estate of the said deceased under the said will. And whereas it is alleged in the said affidavit that you the said A. B. have intermeddled in the estate of the said deceased (*b*).

Now this is to command you the said A. B. that within eight days after the service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the said Principal Probate Registry at Somerset House, Strand, London, and show cause why you should not be ordered to take probate of the said will under pain of the law and contempt thereof.

Dated at London, etc. [*as in Form No.* 72].

FORM No. 89.

Citation, Abstract of, for Advertisement (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

To A. B., of .

Citation, abstract of, for advertisement.

TAKE NOTICE that a citation has issued citing you to cause an appearance to be entered for you within one month after publication hereof in the Principal Probate Registry, Somerset House, Strand, London, and accept or refuse letters of administration of the estate of C. D., of , deceased, or show cause why letters of administration of the said estate should not be granted to E. F. as , with an intimation that in default of your appearance letters of administration will be granted to the said E. F.

(Signed) W. Y.
Solicitors. Registrar.

To be advertised in the following newspapers :—

COMMISSION.

FORM No. 90.

Commission to Examine Witnesses. [O. 37, r. 6.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith :

To , of , and , of , commissioners named by and on behalf of , and to , of , and , of , commissioners named by and on behalf of the , greeting :

Commission to examine witnesses. [O. 37, r. 6.]

KNOW ye that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *viva voce* as hereinafter mentioned witnesses on behalf of

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) The affidavit must contain instances of the intermeddling. It must appear that the testator has been dead at least six calendar months at the date of swearing of the affidavit.

COMMISSION—*continued.*

the said and respectively at , before you or any two of you, so that one commissioner only on each side be present and act at the examination.

—And we command you as follows :

1. Both the said and the said shall be at liberty to examine on interrogatories and *viva voce* on the subject-matter thereof or arising out of the answers thereto such witnesses as shall be produced on their behalf with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *viva voce*, the party producing any witness for examination being at liberty to re-examine him *viva voce* : and all such additional *viva voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said commission.

2. Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the commissioners or commissioner of that party neglect to attend pursuant to the notice, then one of you, the commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present and acting to be a true and correct copy or extract, shall be annexed to the witness's deposition.

4. Each witness to be examined under this commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the commissioners or commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the commissioners or commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Registrar, the Principal Probate Registry, Somerset House, Strand, London, England, forthwith, enclosed in a cover under the seals or seal of the commissioners or commissioner.

8. Before you or any of you, in any manner act in the execution hereof, you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences. In the absence of any other commissioner a commissioner may himself take the oath.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, etc.

Witnesses' Oath.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth.

So help you God.

COMMISSION—*continued.*

Commissioners' Oath.

You [*or* I] shall, according to the best of your [*or* my] skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. So help you [*or* me] God.

[Where there is only a single commissioner, he may be authorised to administer this oath to himself. (*Wilson* v. *De Coulon*, 22 Ch. D. 841.)]

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which he shall administer to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language.

So help you God.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of Interrogatories, etc., when returned by the Commissioners.

THE SENIOR REGISTRAR, PRINCIPAL PROBATE REGISTRY,
SOMERSET HOUSE, LONDON.

[Letters so addressed travel post free from any part of the United Kingdom.]

FORM No. 91.

Commission for the Examination of Witnesses. (Alternative Form.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith :

To A. B. [*here set forth the name and proper description of the Commissioner*], Greeting.

Commission for the examination of witnesses. (Alternative form.)

WHEREAS a certain action is now depending in the Probate, Divorce and Admiralty Division of our High Court of Justice entitled in the estate of C. D. deceased, between E. F. plaintiff and G. H. defendant. And whereas by an order made in the said cause on the day of , 19 , on the application of the said E. F., it was ordered that a commission should issue under seal of our said Court for the examination of [*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said E. F., the plaintiff (saving all just exceptions).

Now know ye that we do by virtue of this commission to you directed, authorise you within thirty days after the receipt of this commission at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them touching the matters set forth in the pleadings in the said action (true and authentic copies whereof are hereunto annexed), and such oath being administered we do hereby authorise and empower you to take the examination

(*a*) These forms are specimens only, and must be altered to suit individual cases.

COMMISSION—*continued.*

of the said witnesses touching the matters set forth in the said pleadings, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid, and subscribed by you, we do require you forthwith to transmit the said examination, closely sealed up, to the Probate Registry of our said Court at Somerset House, Strand, in the county of Middlesex, England, together with these presents. And we do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful and expedient for the due execution of this our commission.

Dated at London the day of in the year of our Lord, 19 , and in the year of our reign.

(Signed) X. Y.,
Registrar.

DECLARATION.

FORM No. 92.

Declaration of the Estate of a Testator (or an Intestate) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.
In the Estate of A. B., deceased.

Declaration of the estate of a testator (or an intestate).

A TRUE DECLARATION of all the estate which by law devolves to and vests in the personal representative of A. B., of , deceased, who died on the at which has at any time since his death come to the hands, possession, or knowledge of the intended administrator of the said estate made and exhibited upon and by virtue of the corporal oath of the said as follows, to wit :—

First.—This declarant declares the said estate to be as follows :—	£	s.	d.
Cash in the house			
Cash at bankers			
Household goods, furniture, plate, linen, china, jewellery, trinkets, etc., valued by of licensed appraiser at			
Policy of insurance, viz. :—			
Leasehold property :			
Description			
Years unexpired			
Gross rents			
Ground rent			
Outgoings paid by lessee			
Value of property			
Other personal property			
Real property			
Total.....£			

Lastly.—This declarant saith, that no estate devolving to or vesting as aforesaid in the personal representative of the said deceased has since his death come to the hands, possession, or knowledge of this declarant, save as hereinbefore set forth.

On the day of , 19 , the said C. D. was sworn to the truth of the above declaration at , before me
A commissioner for oaths.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

DECREES.

FORM No. 93.

Decree for or against a Will (without jury) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable , the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex, on the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

Decree for or against a will (without jury).

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, pronounced $\frac{\text{for}}{\text{against}}$ the force and validity of the last will and testament and codicil thereto of A. B., the deceased in this action, being the scripts bearing date, respectively now remaining in this Court referred to in the affidavit of scripts of and marked , and propounded in this action on behalf of the , the therein named, and on further application of counsel for the condemned the in the costs incurred or to be incurred in this action on behalf of the .

(Signed) W. Y.,
Registrar.

FORM No. 94.

Decree for Revocation of Grant of Administration—Administrator not entitled (without jury) (*a*).

[*Heading as in Form No.* 93.]

Decree for revocation of grant of administration—Administrator not entitled (without jury).

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, pronounced that E. F. (otherwise E. G.) the defendant was not the lawful son of the deceased in this action [*or as the case may be*] and ordered that the letters of administration of the estate of the said deceased granted to the said defendant at the Registry on the be revoked, and on further application of counsel for the plaintiff condemned the said defendant in the costs incurred or to be incurred in this action on behalf of the plaintiff.

(Signed) W. Y.,
Registrar.

FORM No. 95.

Decree—Jury (*a*).

[*Heading as in Form No.* 93.]

Decree—Jury.

A jury having been sworn to try the questions of fact arising from the pleadings in this action, and the President having in their presence taken the oral evidence of the plaintiff and defendant, and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, the jury aforesaid by their verdict found :—

(1) That the paper writing bearing date the day of , and purporting to be the last will and testament of the deceased, was duly executed in accordance with the provisions of the statute 1 Vict. cap. 26.

(2) That at the time of such execution the testator was of sound mind, memory and understanding.

(3) That at the time of such execution the testator knew and approved of the contents of the said will.

(4) That such execution was not obtained by the undue influence or coercion of .

Whereupon the President on the application of counsel for the by his final decree pronounced for the force and validity of the last will and testament [and codicil thereto] of A. B., the deceased in this action, being the scripts bearing date [respectively] now remaining in this Court and referred to in the affidavit of scripts of the and marked and propounded in this action on behalf of the , the therein named .

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

DECREES—*continued.*

FORM No. 96.

Decree—Judgment after Trial at Assizes with Jury (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
The day of , 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

Decree—Judgment after trial at assizes with jury.

THE issues of fact raised in the pleadings in this action having been tried before the Honourable Mr. Justice with a jury of the county of on the day of 19 , and the jury having found [*the findings of the jury on the several issues are here set out*] and the said Mr. Justice having ordered that judgment should be entered for the on the issues raised on the pleadings this Court doth on the application of pronounce the force and validity of the last will and testament and codicil thereto of A. B., deceased, the deceased in this action, being the scripts bearing date respectively and now remaining in the Principal Probate Registry of this Court, referred to in the affidavit of scripts of the and propounded in this action on behalf of the , the therein named, and doth adjudge that the recover costs incurred or to be incurred in this action against the .

(Signed) W. Y.,
Registrar.

DEFENCE (STATEMENT OF). *See* APPENDIX VIII.

ELECTIONS.

FORM No. 97.

Election by Minors of Guardian to take or renounce Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.
In the Estate of A. B., deceased.

Election by minors of guardian to take grant.

WHEREAS A. B., of , deceased, died on the at , intestate, a widower, leaving C. B. and D. B., spinster, his lawful children and only persons entitled to share in his estate, being now minors of the ages of years and years respectively.

Now we, the said C. B. and D. B., of , do hereby make choice of and elect E. F., of , our lawful grandfather and nearest-of-kin, to be our curator or guardian (*b*) for the purpose of obtaining letters of administration of the estate of the said A. B., deceased, to be granted to him, for our use and benefit and until one of us attain the age of twenty-one years [*or* for the purpose of renouncing letters of administration of the estate of the said A. B., deceased].

In witness whereof we have hereunto set hand and seal , this day of 19 .

Signed, by the said C. B. and D. B. in the presence of (Signed) C. B.
D. B.

(One disinterested witness to sign his or her name, adding address) . . . . . .
. . . . . .

EXEMPLIFICATIONS.

FORM No. 98.

Exemplification of Probate or of Letters of Administration with Will annexed (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.

Exemplification of probate or of letters of administration with will annexed.

BE IT KNOWN, that upon search being made in the Probate Registry of the High Court of Justice it appears that on the day of , in the

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) It should be observed that two persons are now required to *take* the grant. The minors can elect another of their kin to be a second guardian for this purpose, or the duly elected guardian may appoint a co-administrator. *Vide ante*, p. 469.

EXEMPLIFICATIONS—*continued.*

year of our Lord, 19 , the last will and testament with codicils of A. B., late of , deceased, who died at on the , was proved by C D., the executor named therein [*or* letters of administration with the last will and testament and codicils annexed of the estate of A. B., late of, etc., were granted to C. D., as the], and which probate [*or* letters of administration] now remain on record in the said Registry. The true tenor of the said will (and codicils) is in the words following, to wit :

[*Here follow the will, codicils, and such affidavits as are registered.*]

In faith and testimony whereof these letters testimonial are issued.

Given at as to the time of the aforesaid search, and the sealing of these presents, this day of , in the year of our Lord, 19 .

(Signed) E. F.,
(L.S.) Registrar.

Extracted by

FORM No. 99.

Exemplification of Administration (*a*).

[*Heading as in Form No.* 98.]

BE IT KNOWN, that upon search being made in the Probate Registry of the High Court of Justice it appears that on the day of , in the year of our Lord, 19 , letters of administration of the estate of A. B., late of , who died at on the , were granted to C. D., the [*or* one of the] of the said deceased, and which letters of administration now remain on record in the said Registry. The true tenor of the said letters of administration is in the words following, to wit :

Exemplification of administration.

[*Here the letters of administration are to be recited verbatim.*]

In faith and testimony whereof these letters testimonial are issued.

Given at as to the time of the aforesaid search, and the sealing of these presents, this day of , in the year of our Lord, 19 .

(Signed) E. F.,
(L.S.) Registrar.

Extracted by

INTERROGATORIES.

FORM No. 100.

Interrogatories. [O. 31, r. 4.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of X. Y. deceased.
Between A. B., plaintiff.
and
C. D., and E. F., defendants.

Interrogatories on behalf of the above-named plaintiff for the examination of the above-named defendants.

Interrogatories. [O. 31, r. 4.]

1.
2.
3. etc.

[The defendant C. D. is required to answer the interrogatories numbered .]

[The defendant E. F. is required to answer the interrogatories numbered .]

FORM No. 101.

Interrogatories—Answers to. [O. 31, r. 9.] (*a*).

[*Heading as in Form No.* 100.]

The answer of the above-named defendant to the interrogatories for his examination by the above-named plaintiff.

Interrogatories—Answers to. [O. 31, r. 9.]

In answer to the said interrogatories, I, the above-named , make oath and say as follows :—

1.
2. etc.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

INVENTORY.

FORM No. 102.

Inventory (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal [*or* District] Probate Registry.
In the Estate of A. B., deceased.

Inventory.

A true, full and particular inventory of the estate of A. B., of , deceased, which has at any time since his death come to the hands, possession or knowledge of , the sole executor of the last will and testament of the said deceased [*or* administrator of the estate of the said deceased, *as the case may be*], made and exhibited upon and by virtue of the corporal oath of the said , follows, to wit :—

	£	s.	d.
First, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to certain household goods and furniture, plate and jewellery, in and about his dwelling-house, situate at , which have since his death been valued and appraised by of , licensed appraiser, at the sum of pounds shillings and pence			
Second, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to a freehold messuage or dwelling-house and premises situate at , and that the said messuage and premises have been valued and appraised by the said at the sum of pounds shillings and pence			
Third, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to the sum of in the hands of his bankers, the Bank			
Fourth, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to the sum of £ of the stock of the Company, which sum is of the value of pounds shillings and pence			
Total ..... £			

Lastly, this exhibitant saith, that no estate of or belonging to the said deceased has at any time since his death come to the hands, possession or knowledge of this exhibitant, save as is hereinbefore set forth.

(Signed)

On the day of 19 , the said was duly sworn to the truth of the above inventory at .

Before me,
A commissioner for oaths.

MEMORIAL.

FORM No. 103.

Memorial to the Commissioners of Inland Revenue for a Duty-paid Stamp or Certificate as to Duty for a Cessate Grant or a Grant *de bonis non* (*a*).

To the Honourable The Commissioners of Inland Revenue.
The memorial of A. B. of , solicitor (*or agent*) for C. D. of .

Memorial to the Commissioners of Inland Revenue for a duty-paid stamp or certificate as to duty for a cessate grant or a grant *de bonis non*.

SHEWETH that E. F. late of in the of deceased, died on the day of 19 .

1. That on the , a grant of probate of the will [*or as the case may be*] of the said deceased was granted at the Registry of the Probate Division of the High Court of Justice to G. H. of the sole executor [*or as the case may be*], who died on the , leaving part of the estate of the deceased unadministered, by reason whereof a further grant is necessary.

2. That the said G. H. swore the estate to be of the gross value of £ and paid estate duty of £ on the inland revenue affidavit [*or*, "*on the said grant*," *as the case may be*].

[3. That the said G. H., by a corrective affidavit dated the , re-swore

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MEMORIAL—*continued.*

the value of the said estate at £ , and paid further estate duty of £ .

4. That the above-named C. D. as the intended administrator (with the will) of the said unadministered estate has, by a corrective affidavit, dated the , re-sworn the said estate at £ and paid further estate duty of £ .]

5. That the estate of the said deceased within the operation of the said grant consisted of the items set forth in the following account No. 1 :—

ACCOUNT No. 1.

[*Insert full particulars of estate referred to in paragraphs* 2, 3, *and* 4 *above.*]

6. That the estate of the said deceased remaining unadministered consists of the items in the following account No. 2 :—

ACCOUNT No. 2.

[*Insert full particulars of unadministered estate, and if not fresh assets, state which asset in Account No.* 1 *each represents.*]

7. That the said C. D., who is the residuary legatee named in the said will [*or as the case may be*] is now applying for a grant of administration with the will annexed of the said unadministered estate [*or as the case may be*], and has sworn the said estate to be of the value of £ .

Your memorialist therefore humbly prays that your honourable Board will be pleased to grant the usual duty-paid stamp or certificate on the inland revenue affidavit for the proposed grant.

Dated this day of 19 .

(Signed) A. B.

MINUTE.

FORM No. 104.

Minute to found Jurisdiction of the County Court (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

ON reading the affidavit of G. H. sworn on the , it appears to the satisfaction of the undersigned Registrar of the Principal Probate Registry of the High Court of Justice that A. B., of , in respect of whose estate a grant of $\frac{\text{probate}}{\text{letters of administration}}$ is applied for, had at the time of his death, which happened on the , a fixed place of abode in the district of , and that the personal estate of the said deceased which he died possessed of or entitled to, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person and not beneficially, and without deducting anything on account of the debts due and owing from the said deceased, were at the time of his death under the value of two hundred pounds, and that the said deceased at the time of his death was not seised or

Minute to found jurisdiction of the County Court.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MINUTE—*continued.*
entitled beneficially of or to any real estate of the value of three hundred pounds or upwards.
Dated the day of 19 . (Signed) C. D.,
Registrar.

MOTION, Case on. *See* APPENDIX VIII.

NOMINATION. *See* "APPOINTMENT."

NOTICES.

FORM No. 105.

Notice of Change of Country Solicitor and London Agent. [O. 7, r. 3.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
Between C. D., plaintiff,
and
E. F., defendant.

Notice of change of country solicitor and London agent. [O. 7, r. 3.]

TAKE notice that of has been appointed to act as the solicitor of the above-named in this action, in the place of , and that the undersigned of has been appointed to act as the London agents of the said in this action in the place of .
The address for service of the above-named is .
Dated this day of 19 .
Yours, etc.,
To the above-named or his solicitor.

FORM No. 106.

Notice of Change of Solicitor. [O. 7, r. 3.] (*a*).

[*Heading as in Form No.* 105.]

Notice of change of solicitor. [O. 7, r. 3.]

TAKE notice that of has been appointed to act as the solicitor of the above-named in the place of .
The address for service of the above-named is .
Dated this day of 19 .
Yours, etc.,
To the above-named or his solicitor.

FORM No. 107.

Notice of Change of Town Agent of Country Solicitor. [O. 7, r. 3.] (*a*).

[*Heading as in Form No.* 105.]

Notice of change of town agent of country solicitor. [O. 7, r. 3.]

TAKE notice that of has been appointed by the undersigned of , the solicitors of the above-named , to act as his London agents in this action, in the place of .
The address for service of the above-named is .
Dated this day of 19 .
Yours, etc.,
To the above-named or his solicitor.

FORM No. 108.

Notice of Change of Solicitor, Plaintiff or Defendant, in Person, in Place of Acting Solicitor. [O. 7, r. 3.] (*a*).

[*Heading as in Form No.* 105.]

Notice of change of solicitor, plaintiff or defendant, in person, in place of acting solicitor. [O. 7, r. 3.]

TAKE notice that I [*name*] the above-named plaintiff [*or* defendant] intend to act in person in this action in the place of [*name of solicitor*] and that my address for service is [*this must be within three miles of Temple Bar*].
Dated the day of 19 .
Yours, etc.,
[*Signature of plaintiff or defendant.*]
To the above-named defendant [*or* plaintiff].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

FORM No. 109.

Notice of Motion (Specimen of) (*a*).

[*Heading as in Form No.* 105.]

TAKE notice that the Court will be moved on the at 11 o'clock in the forenoon, or so soon thereafter as counsel can be heard, by counsel on behalf of the above-named plaintiff, to appoint T. W., of , chartered accountant, or some other fit and proper person administrator *pendente lite* of the estate of the said C. E. deceased, and to make such further and other order as may be just. Notice of motion (specimen of).

Dated the day of 19 .

D. W. and Co.,
of
Solicitors for the applicant.

To Messrs. L. & M.
of
Solicitors for the defendants.

FORM No 110.

Notice of Trial. [O. 36, r. 13.] (*a*).

[*Heading as in Form No.* 105.]

TAKE notice of trial of this action [*or* of the issues in this action ordered to be tried] in for the day of next. Notice of trial. [O. 36, r. 13.]

G. H., plaintiff's solicitor,
Dated

To defendant's solicitor.

FORM No. 111.

Notice to Produce. [O. 32, r. 8.] (*a*).

[*Heading as in Form No.* 105.]

TAKE notice that you are hereby required to produce and show to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly . Notice to produce. [O. 32, r. 8.]

Dated the day of 19 .

To the above-named / his solicitor / *or* agent — (Signed)
of
Solicitor for the above-named .

FORM No. 112.

Notice to Admit Facts. [O. 32, r. 5.] (*a*).

[*Heading as in Form No.* 105.]

TAKE notice that the in this action requires the to admit, for the purposes of this action only, the several facts respectively hereunder specified; and the is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause. Notice to admit facts. [O. 32, r. 5.]

Dated, etc. (Signed, etc.)

To Y. Z., solicitor for .

The facts, the admission of which is required, are—

1. That .
2. That .
3. That .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

FORM No. 113.

Admission of Facts, pursuant to Notice. [O. 32, r. 5.] (*a*).

[*Heading as in Form No.* 105.]

Admission of facts, pursuant to notice. [O. 32, r. 5.]

THE in this action, for the purposes of this action only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this action.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the on any other occasion, or by anyone other than the [*or party requiring the admission*].

Delivered, the

To, etc. (Signed, etc.)

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That .	1.
2. That .	2.
3. That .	3. But not that .

FORM No. 114.

Notice to Produce Documents. [O. 31, r. 16.] (*a*).

[*Heading as in Form No.* 105.]

Notice to produce documents. [O. 31, r. 16.]

TAKE notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim*, or *defence*, or *affidavit, dated the*].

Describe documents required.

X. Y., Solicitor to the .

To Z., Solicitor for .

FORM No. 115.

Notice to Inspect Documents. [O. 31, r. 17.] (*a*).

[*Heading as in Form No.* 105.]

Notice to inspect documents. [O. 31, r. 17.]

TAKE notice that you can inspect the documents mentioned in your notice dated the [*except the deed numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the on the ground that [*state the ground*].

FORM No. 116.

Notice to Admit Documents. [O. 32, r. 3.] (*a*).

[*Heading as in Form No.* 105.]

Notice to admit documents. [O. 32, r. 3.]

TAKE notice that the plaintiff [*or* defendant] in this action proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his solicitor or agent, at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, etc. (Signed)

G. H., solicitor [*or* agent] for plaintiff [*or* defendant].

To E. F., solicitor [*or* agent] for defendant [*or* plaintiff].

[*Here describe the documents, the manner of doing which may be as follows:*—]

ORIGINALS.

Description of Documents.	Dates.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

FORM No. 117.

Notice to Prove Will in Solemn Form, and of Intention merely to Cross-examine Witnesses. To be Delivered with the Defence. [O. 21, r. 18.] (*a*).

[*Heading as in Form No.* 105.]

TAKE notice that upon the hearing of this action the defendant will merely insist upon the plaintiff proving the will propounded in solemn form of law, and that he only intends to cross-examine the witnesses produced by the plaintiff in support of the said will.

X. and Y., solicitors for the defendant.

Dated the day of 19 .

To Messrs. L. and M.,
Solicitors for the plaintiff.

Notice to prove will in solemn form, and of intention merely to cross-examine witnesses. To be delivered with the defence. [O. 21, r. 18.]

OATHS.

FORM No. 118.

Oath—Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , upholsterer, make oath and say, that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament [with a codicil *or as the case may be*] of A. B., of , formerly of , deceased, who died on the , at , and that to the best of my knowledge, information and belief there is no land vested in the deceased which was settled previously to his death and

Oath—Probate.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

not by his will (*b*) and that I am the son of the said deceased and the sole executor named in the said will , and will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ : : and no more, to the best of my knowledge, information, and belief.

(Signed) C. D.

Sworn by at
this day of 19 .
Before me
A commissioner for oaths.

FORM No. 119.

Oath—Probate Save and Except Settled Land (*a*).

[*Heading as in Form No.* 118.]

Oath—Probate save and except settled land.

In the Estate of A. B., deceased.

We, C. D., of , organist, and E. F., of , poultry farmer, make oath and say that we believe the paper writing hereto annexed and marked by us to contain the true and original last will and testament of A. B., of , deceased, who died on the , at ; that there is land vested in the deceased which was settled previously to his death and not by his will; that we are the nephews of the said deceased and the executors named in his said will; that we will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased save and except settled land, and will exhibit a true and perfect inventory of the said estate save and except settled land, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate save and except settled land amounts in value to the sum of £ and no more, to the best of our knowledge, information and belief.

Sworn, etc.

(Signed) C. D.
E. F.

FORM No. 120.

Oath—Probate including Settled Land (*a*).

[*Heading as in Form No.* 118.]

Oath—Probate including settled land.

In the Estate of A. B., deceased.

I, C. D., of , sculptor, make oath and say that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of A. B., of , deceased, who died on the , at ; that there is land vested in the deceased which was settled previously to his death and not by his will, to wit under the will and two codicils of E. F. proved in the probate registry on the 10th day of May, 1917, and that I, this deponent, was at the date of death of the said deceased the sole surviving trustee of the said settled land; that there is no other settled land; that I am the sole executor named in the said will; that I will administer according to law all the estate including the said settled land which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate including the said settled land, and that I will render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate including the said settled land amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) It is not necessary to include the statement as to settled land in cases of death before 1926.

OATHS—*continued.*

FORM No. 121.

Oath—Probate—Limited to Settled Land (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

We, C. D., and E. F., both of , chartered accountants, make oath and say that we believe the paper writing hereto annexed and marked by us to contain the true and original last will and testament of A. B., of , deceased, who died on the , at ; that there is land vested in the said deceased which was settled previously to his death and not by his will, to wit under an indenture of settlement dated the , and that we were the trustees of the said settled land at the date of death of the said deceased and as such are executors of the settled land; that we will administer according to law all the estate of the said deceased limited to the said settled land, and will exhibit a true and perfect inventory of the said estate limited to the said settled land and will render a just and true account thereof whenever required by law so to do; and that the gross value of the said settled land amounts in value to the sum of £ and no more, to the best of our knowledge, information and belief.

Oath—Probate—Limited to settled land.

Sworn, etc.

(Signed) C. D.
E. F.

FORM No. 122.

Oath—Probate—Trust Corporation (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , departmental manager, make oath and say that I believe the paper writing hereto annexed to contain the true and original last will and testament of E. F., of , deceased, who died on the , at ; that the Bank, Limited, is the sole executor named in the said will, and that the said Bank is a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925; that by a resolution dated the the said Bank did appoint me, this deponent, to apply for probate of the said will on behalf of the said Bank; [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms* 119 *and* 120] that the said Bank will administer [*complete as in Form No.* 118].

Oath—Probate—Trust corporation.

FORM No. 123.

Oath—Double Probate (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , butcher, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true original last will and testament of A. B., of , formerly of , deceased, who died on the at ; that in the month of , 19 , probate of the said will was granted at to E. F., one of the executors named in the said will , power being reserved of making the like grant to C. D., the other executor therein named; that I am the other executor named in the said will ; [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120] and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate now unadministered amounts to £ and no more, to the best of my knowledge, information and belief.

Oath—Double Probate.

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 124.

Oath—Probate of Draft Will Pronounced for in Action (*a*).

[*Heading as in Form No.* 118.]

Oath—Probate of draft will pronounced for in action.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , whereof he appointed his sister, me this deponent, sole executrix.

That at the time of the death of the said A. B. the said will was whole and unrevoked, but that since the death of the said A. B. the said will has been lost and cannot now be found.

That on the the Right Honourable , the President of this Division, in an action entitled, "E. F. against G. H. and others," pronounced for the force and validity of the said will as contained in a draft thereof, and ordered that probate of the said will as contained in the said draft be granted and committed to me the sole executrix therein named, limited until the original will or a more authentic copy thereof be brought into and left in the said registry.

That I believe the said paper writing now hereto annexed and marked by me to contain the true last will and testament (the same being the original draft thereof) of the said testator, and that I am the sole executrix therein named; [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120].

That I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased until the said original will or a more authentic copy thereof shall be brought into and left in the said registry; that I will exhibit a true and perfect inventory, etc. [*continue as in Form No.* 118].

FORM No. 125.

Oath—Probate of Copy Will—Original Abroad (*a*).

[*Heading as in Form No.* 118.]

Oath—Probate of copy will—Original abroad.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say as follows:—

That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament bearing date the , whereof he appointed his relict, me the deponent, sole executrix. That the said will was executed by the said A. B. when he was resident at , in the kingdom of , and the same was deposited by the said A. B. after the execution thereof with E. F., of aforesaid, who still retains possession of the said will.

That on the a copy of the said will was handed to me by the said E. F., the same having been examined by him with the original and found to agree therewith.

That I further make oath and say that there is not now in Great Britain a more authentic copy of the said will than the aforesaid copy, and that it is essential to the interest of the estate of the said A. B. that probate of the said will should be granted without waiting for the arrival of the said original will or a more authentic copy thereof.

That I believe the paper writing hereto annexed and marked by me to contain the true last will and testament (being the aforesaid copy) of the said A. B., and that I am the sole executrix therein named [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120].

That I will, until the original will or a more authentic copy thereof shall be brought into and left in the Principal Probate Registry aforesaid, administer according to law all the estate, etc. [*continue as in Form No.* 118].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 126.

Oath—Probate of Copy of Lost Will (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

We, C. D., of , baker, and E. F., of , widow, make oath and say as follows :— Oath—Probate of copy of lost will.

That A. B., of , deceased, died on the , having made and duly executed his last will and testament bearing date the , whereof he appointed us the said C. D. and E. F. executors.

That at the time of the death of the said A. B. the said will was whole and unrevoked and in the same state as when executed, but that since the death of the said A. B. the said will has been lost and cannot now be found.

That during the lifetime of the said A. B., a copy of the said will was made by G. H. of , solicitor, and the same was by him examined with the original will and found to agree therewith.

That we believe the paper writing hereto annexed and marked by us to contain the true last will and testament (being the copy thereof as aforesaid) of the said A. B., and that we are the executors named in the said will. [*In cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120.] That we will administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased, until the original will or a more authentic copy thereof be brought into the Principal Probate Registry of this Division, and that we will exhibit a true and perfect inventory, etc. [*continue as in Form No.* 118].

FORM No. 127.

Oath—Probate—Probate of Earlier Will Revoked (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the , at having made and duly executed his last will and testament bearing date the , whereof he appointed me, this deponent, sole executor; that probate of an earlier will of the said A. B. bearing date the , was on the granted at the Principal Probate Registry to E. F. and G. H., the executors therein named; that the said probate has since been voluntarily brought into the said registry by the said E. F. and G. H., and revoked, [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120], that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the sole executor named in the said will; that I will administer according to law all the estate, etc. [*continue as in Form No.* 118]. Oath—Probate—Probate of earlier will revoked.

FORM No. 128.

Oath—Probate—*Save and Except* (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , bank manager, make oath and say as follows :—

That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , whereby he did appoint his son, me this deponent, executor, save and except as regards his business as a farmer at in the county of ; [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120]; that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B. deceased, and that I am the executor therein named as aforesaid; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, save and except so far as relates to the property aforesaid; Oath—Probate—*Save and except.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

that I will exhibit a true and perfect inventory of the said estate save and except as aforesaid, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said A. B., under the exception aforesaid, amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 129.

Oath—Probate—*Cæterorum* (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

Oath—Probate—*Cæterorum.*

I, C. D., of , barrister-at-law, make oath and say as follows:—

That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the whereby he named E. F. executor in respect of his leasehold property situated in the city of Bristol, and his son, me this deponent, executor in respect of the rest of his estate.

That in the month of , 19 , probate of the said will, limited so far only as respected the said leasehold property, was granted in the Principal Probate Registry to the said E. F. [*In cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120.]

That I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the executor therein named as to the rest of his estate; and that I will administer according to law all the rest of the estate which by law devolves to and vests in the personal representative of the said deceased, and that I will exhibit a true and perfect inventory of the rest of the said estate and render a just and true account thereof whenever required by law so to do; and that the rest of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 130.

Oath—Probate—General Estate following Grant Limited to Settled Land (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , actor, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament.

Oath—Probate—General estate following grant limited to settled land.

That on the probate of the said will was granted in this Division at the registry thereof to E. F. and G. H. the trustees at the date of death of the said deceased of the land vested in the said deceased under the will of I. J. proved in the registry on the , and as such the executors as to the said settled land, limited to the said settled land.

That there is no other land vested in the said A. B. which was settled previously to his death and not by his will.

That I am the sole executor named in the said will and that I will administer according to law all the estate, save and except the said settled land, which by law devolves to and vests in the personal representative of the said A. B.; that I will exhibit a true and perfect inventory of the said estate save and except the said settled land and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate, save and except the said settled land, amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 131.

Oath—Probate—Settled Land after Grant Save and Except (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

We, C. D. and E. F., both of , estate agents, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , which said will was proved in this Division at the registry thereof on the in respect of the estate of the said deceased save and except settled land by K. L. and M. N. the executors named in the said will.

Oath—Probate—Settled land after grant save and except.

That there was land vested in the said deceased which was settled previously to his death and not by his will, to wit, under an indenture of settlement dated the , and that at the date of death of the said A. B. we were the trustees of the said settled land and as such special executors in respect of the said settled land.

That we will administer according to law all the estate of the said deceased limited to the said settled land and we will exhibit a true and perfect inventory of the said estate limited as aforesaid and render a just and true account thereof whenever by law required so to do; and that the gross value of the said estate limited as aforesaid amounts to £ and no more, to the best of our knowledge, information and belief.

Sworn, etc. (Signed) C. D.
E. F.

FORM No. 132.

Oath—Cessate Probate—Sole Executor having attained the Age of 21 (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

I, C. D., of , surveyor, make oath and say that A. B., of , deceased, died on the at , having made and duly executed his last will and testament, and thereof appointed his son, me the said C. D., sole executor, I being then a minor of the age of years only.

Oath—Cessate probate—Sole executor having attained the age of twenty-one.

That on the letters of administration (with the said will annexed) of the estate of the said deceased were granted by this Division at the Principal Registry thereof to , my lawful uncle and one of my next-of-kin, and the curator or guardian duly elected by me, for my use and benefit, and until I should attain the age of twenty-one years.

That since the premises, to wit, on the I, the said C. D. attained the age of twenty-one years. [*In cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120.]

That I believe the paper writing hereunto annexed and marked by me to contain the true last will and testament of the said deceased.

That I will well and faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof, whenever required by law so to do; and that the gross value of the said estate of the said deceased left unadministered amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 133.

Oath—Cessate Probate—Executor—Where Attorney Originally Proved (*a*).

[*Heading as in Form No.* 118.]

In the Estate of Y. Z., deceased.

I, X. Z., of , grocer, make oath and say, that the said Y. Z., of , deceased, died on the , at , having made and duly executed his last will and testament, and that I am the son of the said deceased, and the sole executor therein named.

Oath—Cessate probate—Executor—Where attorney originally proved.

That on the , letters of administration with the said will annexed

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

of the estate of the said deceased were by authority of this Division granted at the Principal Probate Registry to W. V. as the lawful attorney and for the use and benefit of me, this deponent, and until I should apply for and obtain probate of the said will. [*In cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120.]

And I further make oath and say that I believe the paper writing hereto annexed and marked by me to contain a true copy of the last will and testament of the said deceased; that I will administer, etc. [*complete as in Form No.* 132].

FORM NO. 134.

Oath—Cessate Probate—Substituted Executor (*a*).

[*Heading as in Form No.* 118.]

In the Estate of A. B., deceased.

Oath—Cessate probate—Substituted executor.

I, C. D., of , farmer, make oath and say that A. B. of , deceased, died on the , at , having made and duly executed his last will and testament.

That on the , probate of the said will was granted at the Principal Probate Registry to E. F., widow, the relict of the said A. B., the executrix for life named in the said will. That the said E. F. died on the day of , 19 . [*In cases of death after* 1925 *clear off settled land as shown in Form No.* 118. *See also Forms Nos.* 119 *and* 120.]

That I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the brother of the said A. B. and the executor substituted in the said will; that I will administer, etc. [*complete as in Form No.* 132].

FORM NO. 135.

Oath—Administration (with Will)—Attorney of Executor (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.
In the Estate of A. B., deceased.

Oath—Administration (with will)—Attorney of executor.

I, C. D. of , chemist, make oath and say that A. B. of , deceased, died on the , at , having made and duly executed his last will and testament, and thereof appointed his son E. F. sole executor, who now resides at . And I further make oath and say that I am the lawful attorney of the said E. F.

That no person has a life interest in the estate and that no beneficiary is a minor (*b*), and that to the best of my knowledge, information and belief there is no land vested in the said deceased which was settled previously to his death and not by his will (*c*).

And I further make oath and say that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament of the said deceased, and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased for the use and benefit of the said E. F., and until he shall duly apply for and obtain probate of the said will to be granted to him. That I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) A grant may be made to a single attorney (or guardian) of an *executor*, notwithstanding that there is a minority or life interest.

(*c*) See also Forms Nos. 118—120, 137 and 138 as to clearing off settled land. No averment as to settled land is required where death occurred before 1926.

OATHS—*continued.*

FORM No. 136.

Oath—Administration (with Will)—Residuary Legatee (no Executor Named in Will) (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say, that I believe the paper writing hereunto annexed, and marked by me, to contain the true and original last will and testament of A. B., of , formerly of deceased, who died on the , at , and that the said deceased did not in his said will name any executor; and that I am the relict of the said deceased and the residuary legatee named in the said will; that [*here state whether any person has a life interest in the estate and whether any beneficiary is a minor, and, in cases of death after* 1925, *clear off settled land as shown in Form No.* 135. *See also Forms Nos.* 137 *and* 138]; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate amounts to £ and no more, to the best of my knowledge, information and belief.

Oath—Administration (with will)—Residuary legatee (no executor named in will).

Sworn, etc. (Signed) C. D.

FORM No. 137.

Oath—Administration (with Will)—Save and Except Settled Land—Residuary Legatee (the Executor having Renounced) (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

I, C. D. of , baker, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of A. B., of , deceased, who died on the , at , and that E. F., the sole executor named in the said will, has duly renounced the probate and execution thereof; that I am the son of the said deceased and the residuary legatee named in the said will; that no person has a life interest in the estate of the said deceased and that no beneficiary is a minor; that there is land vested in the deceased which was settled previously to his death and not by his will; that I will administer according to law all the estate save and except settled land which by law devolves to and vests in the personal representative of the said deceased and will exhibit a true and perfect inventory of the said estate save and except settled land and will render a just and true account thereof whenever required by law so to do; and that the whole of the said estate save and except settled land amounts to £ and no more, to the best of my knowledge, information and belief.

Oath—Administration (with will)—Save and except settled land—Residuary legatee (the executor having renounced).

Sworn, etc. (Signed) C. D.

FORM No. 138.

Oath—Administration (with Will)—Including Settled Land—Residuary Legatees (no Executor Named in the Will) (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

We, M. N., of , land agent, and R. S., of , bank manager, make oath and say that we believe the paper writing hereunto annexed and marked by us to contain the true and original last will and testament of A. B., of , deceased, who died on the , at ; that the said deceased did not in his said will name any executor thereof; and that we the said M. N. and R. S. are the nephews of the said deceased and the residuary legatees named in the said will; that [*here state whether any person has a life interest in the estate and whether any beneficiary is a minor*]; that there is land vested in the said deceased which was settled previously to his death and

Oath—Administration (with will)—Including settled land—Residuary legatees (no executor named in the will).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

not by his will, namely under the will with two codicils thereto of C. D., of which will and codicils probate was on the granted by our High Court of Justice at the registry thereof; that at the date of death of the said A. B. there were no trustees of the said settled land, but that by an order of the Chancery Division made on the , we the said M. N. and R. S. were appointed trustees of the said settled land; that there is no other settled land vested in the said A. B. as aforesaid.

And we further make oath and say that we will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, including the said settled land, and that we will exhibit a true and perfect inventory of the said estate, including the said settled land, and will render a just and true account thereof whenever required by law so to do, and that the gross value of the said estate, including the said settled land, amounts to £ and no more, to the best of our knowledge, information and belief.

Sworn, etc. (Signed) M. N.
R. S.

FORM No. 139.

Oath—Administration (with Will)—Limited to Settled Land after Grant of Probate Save and Except Settled Land (*a*).

[*Heading as in Form No.* 135.]

Oath—Administration (with will)—Limited to settled land after grant of probate save and except settled land.

In the Estate of A. B., deceased.

I, C. D., of , publisher, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , probate of which said will was granted in this Division at the registry thereof on the , in respect of the estate of the said deceased, save and except settled land, to me, this deponent, the surviving executor named in the said will.

That there was land vested in the said deceased which was settled previously to his death and not by his will, to wit, under an indenture of settlement dated the , and that at the date of death of the said deceased there were no trustees of the said settled land; that by a deed of appointment dated , I the said C. D. was appointed a trustee of the said settled land.

That I will administer according to law all the estate of the said deceased limited to the said settled land, and will exhibit a true and perfect inventory of the said estate limited to the said settled land and will render a just and true account thereof whenever required by law so to do, and that the gross value of the said estate limited as aforesaid amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 140.

Oath—Administration (with Will)—Residuary Devisee, Executor having Died (*a*).

[*Heading as in Form No.* 135.]

Oath—Administration (with will)—Residuary devisee, executor having died.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of A. B., of , deceased, who died on the , at ; that E. F., the son of the deceased and sole executor named in the said will, survived the said deceased, and is since dead, without having taken upon him the probate and execution of the said will; that I am the grandson of the said deceased and one of the residuary devisees named in the said will; that [*complete, with statements as to minorities, life interests and settled land, as in Form No.* 135].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 141.

Oath—Administration (with Will)—Heir-at-Law (there being Real Estate)—Death before 1926 (*a*).

[*Heading as in Form No.* 135.]

In the Estate of K. L., deceased.

I, O. M., of , upholsterer, make oath and say, that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of K. L. of deceased, who died on the at ; that N. P., the sole executor named in the said will, survived the said deceased and has since died without having taken upon him the probate and execution of the said will; that the deceased did not by his said will dispose of his residuary estate and died a bachelor; that I am the heir-at-law of the said deceased; that [*complete, with statement as to minorities and life interests, as in Form No.* 135].

Oath—Administration (with will)—Heir-at-law (there being real estate)—Death before 1926.

FORM No. 142.

Oath—Administration (with Will)—Substituted Residuary Legatees (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

We, C. D., of , artist, and E. F., of , spinster, jointly make oath and say, that we believe the paper writing hereto annexed, and marked by us, to contain the true and original last will and testament of A. B., of , deceased, who died on the at ; that E. F., widow, the relict of the deceased, the sole executrix and residuary legatee for life named in the said will has duly renounced the probate and execution thereof; that we are the children of the said deceased, and the residuary legatees substituted in the said will; that, [*complete, with statements as to minorities and settled land, as in Form No.* 135].

Oath—Administration (with will)—Substituted residuary legatees.

FORM No. 143.

Oath—Administration (with Will)—Legatee (*a*).

[*Heading as in Form No.* 135.]

In the Estate of S. T., deceased.

I, V. W., of , farmer, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of S. T , of , deceased, who died on the at ; that X. Y., the nephew of the deceased and the sole executor and sole residuary legatee and devisee named in the said will, has duly renounced probate and execution of the said will; that I am a legatee named in the said will; that [*complete, with statements as to minorities, life interests and settled land, as in Form No.* 135].

Oath—Administration (with will)—Legatee.

FORM No. 144.

Oath—Administration (with Will)—Creditor (*a*).

[Use the above Form No. 143, substituting the word "creditor" for the word "legatee."]

Oath—Administration (with will)—Creditor.

FORM No. 145.

Oath—Administration (with Will)—Persons Entitled to Share (Executors and Residuary Legatees and Devisees and Widow having Renounced) (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

We, W. X., of , baker, and Y. Z., of , tailor, make oath and say that we believe the paper writing hereto annexed, and marked by us, to contain the true and original last will and testament of A. B., of ,

Oath—Administration (with will)—Persons entitled to share (executors, residuary legatees and devisees and widow having renounced).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

deceased, who died on the , at ; that E. F. and G. H., the executors and residuary legatees and devisees named in the said will, have duly renounced probate and execution thereof; that C. D. the lawful widow and relict of the said deceased has renounced letters of administration (with the said will annexed) of the estate of the said deceased; that no beneficiary is a minor, but a life interest arises in the said estate and that [*in cases of death after* 1925 *clear off settled land as shown in Form No.* 135]; and that we are the lawful sons and two of the persons entitled to share in his estate and that we will administer, etc. [*complete as in Form No.* 135].

FORM NO. 146.

Oath—Administration (with Will)—Committee of Lunatic (Executor) (*a*).

[*Heading as in Form No.* 135.]

Oath—Administration (with will)—Committee of lunatic (executor).

In the Estate of A. B., deceased.

I, C. D., of , estate agent, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , whereof he appointed his son E. F. sole executor.

That on the the said E. F. was, upon an inquisition directed by the judge in lunacy, found to be a lunatic or person of unsound mind, and incapable of managing his affairs, and by an order made in lunacy on the , I was appointed committee of the estate of the said lunatic.

That [*here include statement as to minorities, life interests, and settled land as shown in Form No.* 135].

That I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said E. F. and until he shall become of sound mind; that I will exhibit, etc. [*complete as in Form No.* 135].

FORM NO. 147.

Oath—Administration (with Will)—Under the 73rd Section of the Court of Probate Act, 1857—Death before 1926 (*a*).

[*Heading as in Form No.* 135.]

Oath—Administration (with will) under section 73 of the Court of Probate Act, 1857.

In the Estate of A. B., deceased.

I, C. D., of , chemist, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, whereof he appointed E. F. sole executor and sole residuary legatee, who is now a lunatic [*or* who is now resident out of the jurisdiction, *or as the case may be*]; that I am a creditor of the said deceased; that on the , the Honourable Sir , Knight, Judge of this Division, appointed me to be the administrator (with the said will) of the estate of the said A. B. under and by virtue of the 73rd section of the Court of Probate Act, 1857.

That I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of the said A. B.; that I will administer according to law all the estate, etc. [*complete as in Form No.* 135].

FORM NO. 148.

Oath—Cessate Administration (with Will)—Residuary Legatee (or Devisee) having Attained his Majority (*a*).

[*Heading as in Form No.* 135.]

Oath—Cessate administration (with will)—Residuary legatee (or devisee) having attained his majority.

In the Estate of A. B., deceased.

I, C. D., of , booking office clerk, make oath and say as follows:—

That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, whereof he appointed E. F. executor, and his son, me this deponent, residuary legatee [*or* devisee].

That the said E. F. died in lifetime of the said A. B., to wit, on the

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

; that on the letters of administration (with the said will annexed) of the estate of the said A. B. were granted at the Principal Probate Registry to G. H. my lawful grandfather and only next-of-kin, the guardian duly assigned to me the said C. D., then an infant, for my use and benefit and until I should attain the age of twenty-one years; that on the I attained the age of twenty-one years by reason of which the said letters of administration, with the said will annexed, have ceased and expired; that no person has a life interest in the estate of the said A. B., and that no beneficiary is now a minor, and [*here, in cases of death after* 1925, *clear off settled land as shown in Form No.* 135].

I further make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said A. B.; that I am the residuary legatee [*or* devisee] named in the said will; and I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said A. B.; that I will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate now unadministered amounts to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 149.

Oath—Administration (with Will) *de bonis non* **to Residuary Legatee and Devisee** (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say as follows :—

(1) That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, and thereof appointed his son E. F. sole executor.

(2) That in the month of , 19 , the said E. F., duly proved the said will in this Division at the Registry thereof, and afterwards died, to wit, on the intestate [*or* having duly made and executed his last will and testament bearing date the , but did not appoint any executor thereof] leaving part of the said estate of the said deceased unadministered.

(3) That [*here include statement as to minorities, life interests, and settled land as shown in Form No.* 135].

(4) That I believe the paper writing hereto annexed, and marked by me, to contain the true [and original] last will and testament of the said A. B.; that I am the relict of the said A. B. and the residuary legatee and devisee named in the said will, and that I will administer according to law all the unadministered estate which by law devolves, etc. [*complete as in Form* 148].

Oath—Administration (with will) *de bonis non* to residuary legatee and devisee.

FORM No. 150.

Oath—Administration (with Will) *de bonis non* **to Representative of Sole Executor and Residuary Legatee and Devisee** (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

I, C. D., of , auctioneer's clerk, make oath and say as follows :—

(1) That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, and thereof appointed his daughter E. F. (spinster) sole executrix and residuary legatee and devisee.

(2) That in the month of , 19 , the said E. F. duly proved the said will in this Division at the Registry thereof, and afterwards died, to wit, on the , intestate, leaving part thereof unadministered.

(3) That I am the administrator of the estate of the said E. F., deceased, letters of administration of her estate having been granted to me by this Division at the Registry thereof on the day of , 19 .

Oath—Administration (with will) *de bonis non* to representative of sole executor and residuary legatee and devisee.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

(4) That [*here include statement as to minorities, life interests, and settled land as shown in Form No.* 135].

(5) That I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said testator; that I will well and faithfully administer according to law all the unadministered estate which by law devolves, etc. [*complete as in Form No.* 148].

FORM No. 151.

Oath—Administration (with Will) *de bonis non*—**Legatee** (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

Oath—Administration (with will) *de bonis non*—Legatee.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the , at , having made and duly executed his last will and testament whereof he appointed E. F. and G. H. executors.

That on the , probate of the said will was granted at the Principal Probate Registry to the said E. F., the surviving executor named in the said will. That the said E. F. has since died, to wit, on the , intestate, leaving part of the estate of the said deceased unadministered.

That the said A. B. did by his said will appoint his son J. K. residuary legatee and devisee, who has renounced his right to letters of administration (with the said will annexed) of the said unadministered estate.

That [*here include statement as to minorities, life interests, and settled land as shown in Form No.* 135].

That I believe the paper writing hereunto annexed, and marked by me, to contain the true [and original] last will of the said deceased; that I am a legatee named in the said will; that I will administer according to law all the unadministered estate which by law devolves, etc. [*complete as in Form No.* 148].

FORM No. 152.

Oath—Administration (with Will) *de bonis non*—**Creditor** (*a*).

Oath—Administration (with will) *de bonis non*—Creditor.

[The above form (No. 151) is to be used, substituting for the words "a legatee named in the said will" the words "a creditor of the said A. B."]

FORM No. 153.

Oath—Administration (with Will) *de bonis non* **to Legatee on Renunciation of Representative of Residuary Legatee and Devisee** (*a*).

[*Heading as in Form No.* 135.]

In the Estate of A. B., deceased.

Oath—Administration (with will) *de bonis non* to legatee for life on renunciation of representative of residuary legatee and devisee.

I, C. D., of , spinster, make oath and say as follows:—

(1) That A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, whereby he appointed his brother E. F. sole executor, who duly proved the said will in this Division at the Registry thereof, in the month of , 19 , and has since died, to wit on the , intestate.

(2) That the said A. B. in the said will named G. H. his residuary legatee and devisee, who survived the said testator and died on the day of , 19 .

(3) That in the month of , 19 , letters of administration of the estate of the said G. H., deceased, were granted by this Division at the Registry thereof, to I. J. his lawful widow and relict, who has duly renounced letters of administration (with the said will annexed) of the estate of the said A. B. left unadministered as aforesaid.

(4) That [*here include statement as to minorities, life interests, and settled land as shown in Form No.* 135].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

(5) That I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said A. B., deceased; that I am the niece of the said A. B., and a legatee named in the said will; that I will administer according to law all the unadministered estate which by law devolves, etc. [*complete as in Form No.* 148].

FORM No. 154.

Oath—Administration (Husband and Daughter)—Life Interest (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. The Principal [*or* District] Probate Registry.

In the Estate of A. B., deceased.

We, C. D., of , stationer, and E. F., of , spinster, make oath, and say that A. B., of , deceased, died on the , at , intestate, and that I, the said C. D., am the lawful husband, and I, the said E. F., am the lawful daughter and that we are two of the persons entitled to share in the estate of the said deceased; that no minority but a life interest arises under the intestacy, and that to the best of our knowledge, information and belief there is no land vested in the deceased which was settled previously to her death (*b*); and that we will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of our knowledge, information and belief.

Oath—Administration (husband and daughter)—Life interest.

Sworn, etc. (Signed) C. D.
E. F.

FORM No. 155.

Oath—Administration—Widow and Daughter—Life Interest (*a*).

[*The above Form (No.* 154) *is to be used, the widow describing herself as "the lawful widow and relict of the deceased."*]

Oath—Administration—Widow and daughter—Life interest.

FORM No. 156.

Oath—Administration—Issue of Husband (or Widow) who has Renounced and Consented (*a*).

[*Heading as in Form No.* 154.]

In the Estate of Y. Z., deceased.

I, W. X., of , hairdresser, make oath and say that Y. Z., of , deceased, died on the , at , intestate, leaving V. Z., her lawful husband (*or* his lawful widow and relict) the only person entitled to her (*or* his) estate* who has duly renounced letters of administration of her (*or* his) estate and consented to the same being granted to me this deponent; that no minority or life interest arises under the intestacy and that [*here clear off settled land as shown in Form No.* 154]; that I am the lawful son of the said V. Z.; that I will administer, etc. [*complete as in Form No.* 154].

Oath—Administration—Issue of husband (or widow) who has renounced and consented.

* *It must be clear from the oath that the net estate, excluding personal chattels, does not exceed* £1000.

FORM No. 157.

Oath—Administration—Issue (Widow having Renounced) (*a*).

[*Heading as in Form No.* 154.]

In the Estate of Y. Z., deceased.

We, S. T., of , spinster, and W. X., of , engineer, make oath and say that Y. Z., of , deceased, died on the , at ,

Oath—Administration—Issue (widow having renounced).

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

(*b*) See also Forms 118—120 and 135—138. In an administrator's oath, if there be settled land, trustees of the settled land must be cleared off before a general grant will be made. No averment as to settled land is required if the deceased died before 1926.

OATHS—*continued.*

intestate, leaving V. Z., his lawful widow and relict him surviving, who has duly renounced letters of administration of his estate, and that we are the lawful children and two of the persons entitled to share in the estate of the said deceased; that [*here include statement as to minorities, life interests and settled land as shown in Form No.* 154]; that we will administer, etc. [*complete as in Form No.* 154].

FORM No. 158.

Oath—Administration—Issue (Husband having Died) (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Issue (husband having died).

In the Estate of A. B., deceased.

I, C. D., of , chemist, make oath and say that A. B., of , deceased, died on the at , intestate, leaving E. B., her lawful husband, who is since dead, without having taken out letters of administration of her estate, and that I am the lawful grandson and one of the persons entitled to share in the estate of the said A. B.; that [*complete, including statements as to minorities, life interests and settled land, as in Form No.* 154].

FORM No. 159.

Oath—Administration—Child or Heir-at-Law—Death before 1926 (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Child or heir-at-law.

In the Estate of A. B., deceased.

I, C. D., of , make oath and say that A. B., of , deceased, died on the at , intestate, a widow (*or* widower), and that I am the lawful son and one of the next-of-kin [*or* heir-at-law] of the said deceased; that [*complete, including statement as to minorities and life interests, as in Form No.* 154].

FORM No. 160.

Oath—Administration—Issue (Wife having been Divorced) (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Issue (wife having been divorced).

In the Estate of A. B., deceased.

I, C. D. , bootmaker, make oath and say that A. B., of , deceased, formerly the wife of E. F., but whose marriage with the said E. F. was dissolved by the final decree pronounced in this Division on the , died a single woman on the , at , intestate, leaving me, her lawful son and one of the persons entitled to share in her estate, her surviving.

That [*complete, including statements as to minorities, life interests and settled land, as in Form No.* 154].

FORM No. 161.

Oath—Administration—Representative of Widow or Issue (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Representative of widow or issue.

In the Estate of A. B., deceased.

I, C. D., of , civil servant, make oath and say that A. B., of , deceased, died on the , at , intestate, leaving E. B., his lawful widow and relict, and G. B., I. B., and K. B., his lawful and only sons, together the only persons entitled to his estate; that the said E. B., G. B., I. B. and K. B. have all since died without having taken upon themselves letters of administration of the estate of the said deceased; that I am one of the executors of the will of the said E. B. [*or* of G. B., or I. B., or K. B.], deceased (probate of the said will having been granted to me by this Division

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(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925.

OATHS—*continued.*

at the Registry thereof, in the month of , 19); that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM NO. 162.

Oath—Administration—Father or Mother (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , baker [*or* widow], make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, (or spinster), and that I am the lawful father [*or* mother] and only person entitled to the estate of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Father or Mother.

FORM NO. 163.

Oath—Administration—Representative of Father (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , auctioneer, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, without mother, leaving E. B., his lawful father and only person entitled to his estate him surviving, who is since dead, without having taken upon him letters of administration of his estate; that I am one of the executors of the will of the said E. B., deceased, probate of the said will having been granted to me by the Registry of the High Court of Justice in the month of , 19 ; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Representative of Father.

FORM NO. 164.

Oath—Administration—Issue of Mother (who has Renounced and Consented) (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , gentleman, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor (or spinster) without father, leaving him surviving E. F., widow, his lawful mother and only person entitled to his estate, who has renounced letters of administration of his estate and consented to letters of administration being granted to me, the deponent, and that I am the lawful son of the said E. F.; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Issue of mother (who has renounced and consented).

FORM NO. 165.

Oath—Administration—Brother or Sister (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , banker, make oath and say that A. B., of , deceased, died on the , at , intestate, a spinster, without parent, and that I am the lawful brother [*or* sister] of the whole blood and one of the persons entitled to share in the estate of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Brother or sister.

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925.

OATHS—*continued.*

FORM No. 166.

Oath—Administration—Nieces of the Half Blood (on Husband Renouncing) (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Nieces of the half blood (on husband renouncing).

In the Estate of A. B., deceased.

We, G. H., of , and I. J., of , spinsters, make oath and say that A. B., of , deceased, died on the , at , intestate, without issue or parent, brother or sister of the whole blood, or their issue, leaving, her surviving, C. D., her lawful husband, who has renounced letters of administration of the estate of the said deceased; that we are the lawful daughters of E. F., the lawful sister of the half blood of the said A. B., who died in the lifetime of the said A. B., and we are, therefore, the lawful nieces of the half blood of the said A. B. and two of the persons entitled to share in the estate of the said deceased; that a life interest but no minority arises under the intestacy, and that [*complete, including statement as to settled land, as shown in Form No.* 154].

FORM No. 167.

Oath—Administration—Uncle or Aunt (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Uncle or aunt.

In the Estate of A. B., deceased.

I, C. D., of , compositor [*or* widow], make oath and say that A. B., of , deceased, died on the , at , intestate, a widow, without issue, or parent, brother or sister of the whole or half blood, or their issue, or grandparent; that I am the lawful uncle [*or* aunt] of the whole blood and the only person entitled to the estate of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 168.

Oath—Administration—Cousin German (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Cousin german.

In the Estate of A. B.

I, C. D., of , musician, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, without parent, brother or sister of the whole or half blood, or their issue, or grandparent; that I am the lawful cousin german of the whole blood (being the lawful son of E. F., a lawful uncle of the said A. B., who predeceased the said A. B.) and one of the persons entitled to share in the estate of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 169.

Oath—Administration—Second Cousin (Next-of-kin)—Death before 1926 (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Second cousin (next-of-kin)—Death before 1926.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece, cousin german, or cousin german once removed; that I am the lawful second cousin and one of the next-of-kin of the said A. B.; that [*complete, including statements as to minorities and life interests, as shown in Form No.* 154].

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

OATHS—*continued.*

FORM No. 170.

Oath—Administration—Trust Corporation (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, E. F., of , manager of the trust department of the Bank, Ltd., make oath and say that A. B., of , deceased, died on the , at , intestate, leaving G. H., his lawful widow and relict, and I. J., his lawful son (now a minor of sixteen years and upwards), together the only persons entitled to his estate; that the said G. H., being also the lawful mother and statutory guardian of the said I. J., has consented to administration of the said estate being granted to the said Bank; that the said Bank is a trust corporation within the meaning of section 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that by a resolution, dated , I, this deponent, was appointed by the said Bank to apply for letters of administration of the estate of the said deceased on behalf of the said Bank; that [*here include statement as to settled land as shown in Form No.* 154]; that the said Bank will administer according to law (*b*) all the estate which by law devolves to and vests in the personal representative of the said deceased until further representation be granted, and will exhibit, etc. [*complete as in Form No.* 154].

Oath—Administration—Trust corporation.

FORM No. 171.

Oath—Administration—Representative of Person Entitled to Estate (*a*).

[*Heading as in Form No.* 154.]

In the Estate of G. H., deceased.

I, J. K., of , carpenter, make oath and say that G. H., of , deceased, died on the , at , intestate, a bachelor, without [*clear off as shown in the preceding Forms*], leaving L. M., his lawful and only person entitled to his estate him surviving; that the said L. M. has since died, without having taken out letters of administration of the estate of the said G. H.; that I am the sole executor of the will of the said L. M., probate of the said will having been granted to me in this Division at the Registry thereof, on the day of , 19 ; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Representative of person entitled to estate.

FORM No. 172.

Oath—Administration—Creditor (Person Entitled having Renounced) (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , chemist, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, without mother, leaving E. F., his lawful father, and the only person entitled to his estate, him surviving, who has duly renounced letters of administration of the estate of the said A. B.; that I am a creditor of the said A. B.; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Creditor (person entitled having renounced).

FORM No. 173.

Oath—Administration—Creditor after Citation of Kin (if any) (*a*).

[*Heading as in Form No.* 154.]

In the Estate of E. G.

I, H. C., of , journalist, make oath and say that E. G., of , deceased, died on the , at , intestate, a widower, without known issue, brother or sister of the whole or half blood, or their issue, grandparent,

Oath—Administration—Creditor after citation of kin (if any).

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

(*b*) The bond must be given by the trust corporation itself.

OATHS—*continued.*

uncle or aunt of the whole or half blood or their issue; that the kin (if any) entitled to share and all other persons having or claiming any interest in the estate of the said intestate have been duly cited to accept or refuse letters of administration of the estate of the said intestate, and that no one has entered an appearance to the said citation; that His Majesty's Procurator-General has declined to interfere; that by an order on motion made on the , the Right Honourable , the President, ordered that letters of administration of the estate of the said intestate be granted to me this deponent and that I am a creditor of the said intestate; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 174.

Oath—Administration under Section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925—Death after 1925 only (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925—Death after 1925 only.

In the Estate of A. B., deceased.

I, C. D., of , land agent, make oath and say that A. B., of , deceased, died on the , at , intestate, a bachelor, without mother, leaving E. F., his lawful father and only person entitled to his estate, who in the year , left Great Britain and whose whereabouts is now unknown; that on the , the Right Honourable , the President of this Division, under the authority of the 162nd section of the Supreme Court of Judicature (Consolidation) Act, 1925, appointed me, this deponent, to be administrator of the estate of the deceased; that I am a creditor of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 175.

Oath—Administration—Settled Land—Personal Representatives of Settlor (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Settled land—Personal representatives of settlor.

In the Estate of A. B., deceased.

We, E. F., and G. H., both of , in the county of , respectively electrical engineer and civil servant, make oath and say that A. B., of , deceased, died on the , at , intestate; that there is land vested in the said deceased which was settled previously to his death, to wit, under the will of L. M., which said will was proved in the registry of the High Court of Justice on the ; that there are no trustees of the said settled land, and that we these deponents are the administrators (with the said will annexed) of the estate of the said L. M.; that we administer according to law all the said estate of the said A. B. limited to the said settled land, and will exhibit a true and perfect inventory of the said estate limited to the said settled land and will render a just and true account thereof whenever required by law so to do; and that the whole of the said estate limited to the said settled land amounts in value to the sum of £ and no more to the best of our knowledge, information and belief.

Sworn, etc. (Signed) E. F.
G. H.

FORM No. 176.

Oath—Administration—Attorneys of Husband (or Widow) (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Attorneys of husband (or widow).

In the Estate of A. B., deceased.

We, C. D., of , tinker, and G. H., of , labourer, make oath and say that A. B., of , deceased, died on the at , intestate, leaving E. F., her lawful husband [*or* his lawful widow and relict] her [*or* him] surviving, who now resides in ; that we are the lawful attorneys of the said E. F.; that a life interest but no minority arises under the intestacy; and that to the best of our knowledge, information and belief there is no land vested in the said intestate which was settled previously to his death (*b*); that we will administer according to law all the estate which by law

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

OATHS—*continued.*

devolves to and vests in the personal representative of the said A. B. for the use and benefit of the said E. F., and until he [*or* she] shall duly apply for and obtain letters of administration of the said estate to be granted to him [*or* her]; that we will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of our knowledge, information and belief.

Sworn, etc. (Signed) C. D.
G. H.

FORM No. 177.

Oath—Administration—Attorney of Issue (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , upholsterer, make oath and say that A. B., of , deceased, died on the , at , intestate, a widower, leaving E. F. his lawful son and only person entitled to his estate, who now resides at ; that I am the lawful attorney of the said E. F., and that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

Oath—Administration—Attorney of issue.

FORM No. 178.

Oath—Administration—Guardians of Minors and Infants (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

We, C. D., of , widow, and N. M., of , spinster, make oath and say that A. B., of , deceased, died on the , at , a widower, and intestate, leaving E. F., spinster, and G. H., his lawful children and only issue and the only persons entitled to his estate, who are now in their minority and infancy respectively, to wit, the said E. F. being of the age of ten years and upwards, and the said G. H. being an infant of the age of five years only; that there is no testamentary or other lawfully appointed guardian of the said minor and infant; that we are the lawful aunts and only [*or* two of the] next-of-kin of the said minor and infant; and that the said minor has, by an instrument in writing bearing date the , elected or chosen us to be her curatrixes or guardians for the purpose of taking out letters of administration of the estate of the said intestate, to be granted to us for the use and benefit of the said minor and infant, and until one of them shall attain the age of twenty-one years; that no life interest arises under the intestacy, and that to the best of our knowledge, information and belief there is no land vested in the said deceased which was settled previously to his death (*b*); that we will administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased for the use and benefit of the said minor and infant, and until one of them shall attain the age of twenty-one years; that we will exhibit a true and perfect inventory of the said estate and render a true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of our knowledge, information and belief.

Sworn, etc. (Signed) C. D.
N. M.

Oath—Administration—Guardians of minors and infants.

FORM No. 179.

Oath—Administration—Guardians of Infant (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

We, C. D., of , boat-builder, and E. F., of , lorry driver, make oath and say as follows:—

1. That A. B., of , deceased, died on the , at , intestate, a widower, leaving G. H., spinster, his lawful child and only issue and the

Oath—Administration—Guardians of infant.

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

(*b*) See also Forms 118—120 and 135—138. In an administrator's oath, if there be settled land, the trustees thereof must be cleared off before a general grant will be made. No averment as to settled land is required where death occurred before 1926.

OATHS—*continued.*

sole person entitled to his estate, who is now in her infancy, to wit, of the age of three years only, and under the age of seven years.

2. That there is no testamentary or lawfully appointed guardian of the said infant.

3. That I, the said C. D., am the lawful grandfather and only next-of-kin, and I, the said E. F., am the lawful uncle, of the said infant, and that we have been duly assigned her curators or guardians for the purpose of taking letters of administration of the estate of the said deceased for the use and benefit of the said infant and until she shall attain the age of twenty-one years.

4. That [*complete, including statements as to life interests and settled land, as shown in Form No.* 178].

FORM No. 180.

Oath—Administration—Testamentary Guardians for the Use of Minors (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Testamentary guardians for the use of minors.

In the Estate of A. B., deceased.

We, C. D., of , draper, and L. K., of , plumber, make oath and say that A. B., of , deceased, died on the , at , intestate, a widow, leaving G. B. and I. B., her lawful and only children and only persons entitled to her estate, her surviving, who are now in their minority, to wit, the said G. B. of the age of years and upwards, and the said I. B. of the age of years and upwards; that K. B., late of , deceased, the lawful father of the said minors, by his will, dated the , and proved in the month of , 19 , in the Principal Probate Registry, appointed us these deponents, to be guardians of his said children; that [*complete, including statement as to life interests and settled land, as shown in Form No.* 178].

FORM No. 181.

Oath—Administration—Elected Guardian and Co-administrator for the Use of Minors—Statutory Guardian having Renounced (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Elected guardian and co-administrator for the use of minors—Statutory guardian having renounced.

In the Estate of A. B., deceased.

We, C. D., of , postman, and N. M., of , bailiff, make oath and say that A. B., of , deceased, died on the , at , intestate, leaving E. F., his lawful widow and relict, and G. H. and J. K. his lawful children together the only persons entitled to his estate; that the said G. H. and J. K. are now both minors being of the ages of and respectively, and that there is no testamentary or other lawfully appointed guardian of the said minors; that the said E. F., the lawful mother and the statutory guardian of the said minors has on her own part, and on behalf of the said minors renounced letters of administration of the estate of the said deceased; that the said minors have by an instrument in writing, dated the , elected me, the said C. D., their lawful uncle, to be their guardian for the purpose of taking out letters of administration of the said estate for their use and benefit and until one of them shall attain the age of twenty-one years; that I, the said C. D., by an instrument in writing, bearing date the , and signed by me, have nominated the said N. M. to be my co-administrator; that a minority and a life interest arises under the intestacy, and that we [*complete, including statement as to settled land, as shown in Form No.* 178].

FORM No. 182.

Oath—Administration—Committee of Lunatic (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Committee of lunatic.

In the Estate of A. B., deceased.

I, C. D., of , architect, make oath and say as follows :—

That A. B., of , deceased, died on the , at , intestate, a bachelor, without parent, leaving E. F. his lawful brother of the whole blood

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

OATHS—*continued.*

and only person entitled to his estate him surviving; that the said E. F. is a lunatic so found by inquisition, and that by an order made in lunacy on the , I was appointed committee of the estate of the said E. F.; that no minority or life interest arises under the intestacy, and that to the best of my knowledge, information and belief there is no land vested in the intestate which was settled previously to his death (*b*); that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said A. B. for the use and benefit of the said E. F. during his lunacy; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 183.

Oath—Administration—Person Appointed under Lunacy Acts (*a*).

[*Heading as in Form No.* 154.]

In the Estate of G. H., deceased.

I, J. K., of , greengrocer, make oath and say that G. H., of , deceased, died on the , at , intestate, a bachelor, leaving L. M. his lawful father the only person entitled to his estate him surviving; that the said L. M. is now a lunatic, and that I am the person entrusted by an order made in Lunacy, and dated the , with the administration of the estate to which the said L. M. is or may be entitled; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 182].

Oath—Administration—Person appointed under Lunacy Acts.

FORM No. 184.

Oath—Administration—Nearest-of-Kin of Lunatic (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , joiner, make oath and say that A. B., of , deceased, died on the , at , intestate, a widower, leaving E. F. his lawful son and only person entitled to his estate him surviving, who is now a lunatic; that no committee has been appointed of the estate of the said E. F., nor has any order been made in Lunacy intrusting the administration of his estate to any person; that I am the lawful son and one of the next-of-kin of the said E. F.; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 182].

Oath—Administration—Next of-kin of lunatic.

FORM No. 185.

Oath—Administration—Former Grant of Administration Revoked by Consent (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , grocer, make oath and say as follows :—

That A. B., of , deceased, died on the , at , intestate, a widower.

That notwithstanding the premises, letters of administration of the estate of the said deceased were, on the , granted at the Principal Probate Registry of the High Court of Justice to E. F., the lawful nephew of the whole blood of the said deceased, on the suggestion that the said deceased died

Oath—Administration—Former grant of administration revoked by consent.

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death after 1925.

(*b*) See also Forms 118—120 and 135—138. In an administrator's oath, if there be settled land, the trustees thereof must be cleared off before a general grant will be made. An averment as to settled land is not required where the deceased died before 1926.

OATHS—*continued.*

intestate, a widower, without issue or parent, and that the said E. F. was the only person entitled to the estate of the said deceased.

That the said letters of administration have been since voluntarily brought in by or on behalf of the said E. F., and have been duly revoked and declared null and void.

That I am the lawful son and one of the persons entitled to share in the estate of the said deceased; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 186.

Oath—Administration—Death Presumed (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—Death presumed.

In the Estate of A. B., deceased.

I, C. D., of , greengrocer, make oath and say as follows :—

That A. B., of , deceased, died on or since the day of , 19 , intestate, a widower, but I am unable to depose as to the place of his death.

That on the , by an order on motion made in this Division it was ordered that upon an application being made for letters of administration of the estate of the said A. B., his death might be sworn to have occurred on or since the said day of , 19 .

That I am the lawful son and one of the persons entitled to share in the estate of the said A. B.; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 154].

FORM No. 187.

Oath—Administration—*Ad Colligenda* (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration—*Ad colligenda.*

In the Estate of A. B., deceased.

I, C. D., of , merchant, make oath and say that A. B., of , deceased, died on the , at , intestate, a widower, leaving, as I believe, three lawful children and only persons entitled to his estate whose names and addresses are unknown to me; that I am a creditor of the said deceased; that by an order on motion, dated the , it was ordered that letters of administration of the estate of the said A. B. be granted to me limited for the purpose only of collecting and getting in and receiving the personal estate and doing such acts as may be or become necessary for the preservation of the same until the person or persons entitled by law to the said estate, or one of them, apply for and obtain letters of administration of the said estate, but no further or otherwise; that I will faithfully administer the said estate of the said A. B., limited only as aforesaid; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do, and that the said estate of the said deceased amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 188.

Oath—Administration *pendente lite* (*a*).

[*Heading as in Form No.* 154.]

Oath—Administration *pendente lite.*

In the Estate of A. B., deceased.

I, C. D., of , stock broker, make oath and say as follows :—

That A. B., of , deceased, died on the , at ; that there is now depending in this Division an action entitled E. and another against G. and others touching the validity of the will of the said A. B.; that the Honourable Sir , Knight, a Judge of the aforesaid Division, did, on

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925.

OATHS—*continued.*

the , order that letters of administration of the estate of the said deceased be granted to me the said C. D. pending the said action; that I will faithfully administer according to law the said estate pending the said action, save distributing the residue thereof, under the control and direction of this Court; that I will exhibit, etc. [*complete as in Form No.* 154].

Sworn, etc. (Signed) C. D.

FORM No. 189.

Oath—Cessate Administration—Minor having Attained his Majority (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

Oath—Cessate administration—Minor having attained his majority.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the , at , a widower, and intestate; that in the month of , 19 , letters of administration of the estate of the said intestate were granted by this Division at the Registry thereof, to E. F. and G. H. the lawful [*relationship*] and two of the next-of-kin and the curators or guardians lawfully elected of me this deponent (then a minor) the lawful and only child and only person entitled to the estate of the said intestate, for my use and benefit, and until I should attain the age of twenty-one years.

And I further make oath and say, that on the , I, this deponent, attained the age of twenty-one years, whereby the said letters of administration have ceased and expired.

And I further make oath and say that I am the lawful son and only person entitled to the said estate of the said intestate; that no minority or life interest now arises under the intestacy; and that to the best of my knowledge, information and belief there is no land vested in the said intestate which was settled previously to his death (*b*); that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased left unadministered amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 190.

Oath—Cessate Administration—Attorney (Administrator) of Applicant having Died (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

Oath—Cessate administration—Attorney (administrator) of applicant having died.

I, C. D., of , stationer, make oath and say that A. B., of , deceased, died on the , at , intestate, a widower, leaving me, his lawful son and the only person entitled to his estate him surviving; that at the date of the death of the said A. B., I was residing in ; that in the month of , 19 , letters of administration of the estate of the said A. B. were granted to E. F., my lawfully appointed attorney, for my use and benefit and until I should duly apply for and obtain letters of administration of the said estate; that the said E. F. died on the day of , 19 , by reason of which the said letters of administration have ceased and expired; that I am the lawful son, etc. [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 189].

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925

(*b*) See also Forms 118—120 and 135—138. In an administrator's oath, if there be settled land, the trustees thereof must be cleared off before a general grant will be made. No averment as to settled land is required where death occurred before 1926.

OATHS—*continued.*

FORM No. 191.

Oath—Administration *de bonis non*—**Intestate's Issue** (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

Oath—Administration *de bonis non*—Intestate's issue.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the , at , intestate, a widower; that in the month of , 19 , letters of administration of the estate of the said deceased were by the authority of this Division at the Registry thereof, granted to E. F., his lawful son and one of the persons entitled to share in his estate, who died on the day of , 19 , leaving part thereof unadministered; that I am the lawful son and one other of the persons entitled to share in the estate of the said deceased; that no minority or life interest arises under the intestacy and that to the best of my knowledge, information and belief there is no land vested in the said intestate which was settled previously to his death (*b*); that I will administer according to law all the unadministered estate which by law devolves to and vests in the personal representative of the said deceased, left unadministered as aforesaid; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased, left unadministered as aforesaid, amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 192.

Oath—Administration *de bonis non*—**Representative of Only Issue** (*a*).

[*Heading as in Form No.* 154.]

In the Estate of E. F., deceased.

Oath—Administration *de bonis non*—Representative of only issue.

I, G. H., of , baker, make oath and say that E. F., of , deceased, died on the , at , a widower, and intestate; that in the month of , 19 , letters of administration of the estate of the said E. F. were granted at the Principal Probate Registry to I. J., spinster, the lawful daughter and only person entitled to the estate of the said E. F.; that the said I. J. died on the , leaving part of the said estate unadministered; that I am the administrator of the estate of the said I. J. under a grant of letters of administration made to me at the said Registry on the ; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 191].

FORM No. 193.

Oath—Administration *de bonis non*—**Mother's Representative** (*a*).

[*Heading as in Form No.* 154.]

In the Estate of G. H., deceased.

Oath—Administration *de bonis non*—Mother's representative.

I, I. J., widow, make oath and say that G. H., of , deceased, died on the , at , intestate, a bachelor, leaving K. L. his lawful mother and only person entitled to his estate him surviving; that in the month of , 19 , letters of administration of the estate of the said G. H. were granted in this Division at the Registry thereof to the said K. L., who died on the , leaving part of the said estate unadministered; that I am the administratrix of the estate of the said K. L. under a grant of letters of administration made to me at the said Registry on the day of , 19 ; that [*complete, including statements as to minorities, life interests, and settled land, as shown in Form No.* 191].

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925.

(*b*) See also Forms 118—120 and 135—138. In an administrator's oath, if there be settled land, the trustees thereof must be cleared off before a general grant will be made. No averment as to settled land is required if the deceased died before 1926.

OATHS—*continued.*

FORM No. 194.

Oath—Administration *de bonis non*—**Nephew (Entitled in Distribution)—Death before 1926** (*a*).

[*Heading as in Form No.* 154.]

In the Estate of G. H., deceased.

I, J. K., of , merchant, make oath and say that G. H., of , deceased, died on the , at , intestate, a widower, without child or parent, and not possessed of real estate (*b*), leaving L. M., his lawful brother and only next-of-kin him surviving; that in the month of , 19 , letters of administration of the estate of the said G. H. were granted in this Division at the Registry thereof to the said L. M.; that the said L. M. died on the , leaving part of the said estate unadministered; that I am the lawful nephew and one of the persons entitled in distribution to the personal estate of the said deceased, being the lawful son of N. O., the lawful sister of the said G. H., who died in his lifetime; that [*complete, including statements as to minorities and life interests, as shown in Form No.* 191].

Oath—Administration *de bonis non*—Nephew (entitled in distribution)—Death before 1926.

FORM No. 195.

Oath—Administration *de bonis non* **on Death of Lunatic for whose use original Grant was made** (*a*).

[*Heading as in Form No.* 154.]

In the Estate of A. B., deceased.

I, C. D., of , miner, make oath and say that A. B., of , deceased, died on the , at , intestate, a spinster, without parent, brother or sister, of the whole or half blood, or their issue, grandparent or uncle or aunt of the whole blood, or their issue, leaving E. F. her lawful uncle of the half blood and the only person entitled to her estate, who was then and until the time of his death continued to be a lunatic or person of unsound mind; that in the month of , 19 , letters of administration of the estate of the said deceased were granted to me by this Division at the Registry thereof as the lawful nephew and one of the next-of-kin of the said E. F., for his use and benefit during his lunacy; that the said E. F. died on the , and that part of the said estate of the said A. B., deceased, remains unadministered; that I am the administrator of the estate of the said E. F., deceased, letters of administration of his estate having been granted to me by this Division at the Registry thereof on the ; that [*complete, including statements as to minorities, life interests and settled land, as shown in Form No.* 191].

Oath—Administration *de bonis non* on death of lunatic next-of-kin for whose use original grant was made.

FORM No. 196.

Oath—Application to Re-seal Colonial Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., [*or* E. F.], of , make oath and say :—

1. That a grant of probate of the will [*or* letters of administration of the estate] of A. B., late of , deceased, was granted to me [*or* C. D.] by the Court at on the day of .

2. That the said deceased was at the time of his death domiciled at , [*the following words to be struck out if inapplicable*] within the jurisdiction of the said Court (*c*).

3. That the notice hereunto annexed was inserted in the "Times" newspaper on the day of .

4. That I am the attorney lawfully appointed of C. D. under his hand and seal, and am duly authorised to apply to this Court for the sealing of the said grant. [*This paragraph to be struck out if inapplicable.*]

Oath—Application to re-seal colonial grant.

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated they are framed for use in cases of death after 1925.

(*b*) If the deceased died possessed of real estate the heir-at-law must be cleared off.

(*c*) Unless it is shown by the oath that the deceased died domiciled in the colony, the provisions of section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925 must be observed, if there is (i) a minority or (ii) a life interest under English law.

OATHS—*continued.*

5. That the value of the estate in England amounts in value to the sum of and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D. [*or* E. F.]

[NOTE.—*See additional Rules and Orders; Non-contentious Business (dated 7th November*, 1892); *Colonial Probates Act*, 1892.]

ORDERS.

FORM No. 197.

Order on Motion—Grant to Solicitor of Treasury after Citation (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable , the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Grant to Solicitor of Treasury after citation.

On reading the statement filed on behalf of the Solicitor for the affairs of his Majesty's Treasury and the affidavits of , and on hearing counsel thereon in default of the appearance of the parties cited, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the Solicitor for the affairs of his Majesty's Treasury and his successors in the said office, for the use of his Majesty on his exhibiting a statement instead of an inventory of the said estate.

(Signed) W. Y.,
Registrar.

FORM No. 198.

Order on Motion—Grant of Administration (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

Order on motion—Grant of administration.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the said C. D., the lawful of the said A. B., deceased.

(Signed) W. Y.,
Registrar.

FORM No. 199.

Order on Motion—Probate—Presumed Death (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., presumed deceased.

Order on motion—Probate—Presumed death.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that upon an application for probate of the will of A. B., to be granted to the executor therein named the death may be sworn to have occurred on or since the day of .

(Signed) W. Y.,
Registrar.

FORM No. 200.

Order on Motion—Administration—Presumed Death (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., presumed deceased.

Order on motion—Administration—Presumed death.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that upon an application for letters of administration of the estate of A. B., intestate, to be granted to the person entitled thereto, death may be sworn to have occurred on or since the day of , such person exhibiting a declaration on oath of the particulars and value of the said estate, and his or her sureties justifying.

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 201.

Order on Motion—Grant in Default of Appearance to Citation (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, in default of the appearance of the person cited, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the said C D., a creditor of the said deceased [*or as the case may be*].

Order on motion—Grant in default of appearance to citation.

(Signed) W. Y.,
Registrar.

FORM No. 202.

Order on Motion—Grant of Probate—Copy (or Draft) Will (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

On reading the statement filed on behalf of R. S., and the affidavits of , and on hearing counsel thereon, it is ordered that probate of the last will and testament, with codicil thereto bearing date respectively , of A. B., deceased (as contained in a copy thereof exhibited to the said affidavit of), be granted to the said R. S., the executor named in the said will, limited until the original will or a more authentic copy thereof shall be brought into the Registry.

Order on motion—Grant of probate—Copy (or draft) will.

(Signed) C. D.,
Registrar.

FORM No. 203.

Order on Motion for the Examination of an Attesting Witness before the Court (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

On reading the statement filed on behalf of S. T., and the affidavits of , and on hearing counsel thereon, it is ordered that C. D., of , and E. F., of , unless within seven days they do make the required affidavits as to the execution of the will of this deceased, do attend at the sitting of the Court on such day as shall be set out in the notice to be served upon them, for the purpose of being examined as to the execution of the said will.

Order on motion for the examination of an attesting witness before the Court.

And it is further ordered that the costs of this application be, in any event, paid by the said C. D. and E. F.

(Signed) G. H.,
Registrar.

FORM No. 204.

Order on Motion—To Discharge Prisoner (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing counsel for the defendant E. F., who alleged that the said E. F. is a prisoner in his Majesty's prison at , in the custody of the sheriff of , under an attachment issued against him pursuant to the order dated for his contempt in not [*set out default*], and that the said E. F. hath since [*state the compliance*], and upon hearing counsel for the plaintiff and upon reading the affidavits of , it is ordered that the said E. F. be discharged out of the custody of the said sheriff as to his said contempt; and it is further ordered that the said E. F. do pay to the plaintiff his costs of this application.

Order on motion to discharge prisoner.

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 205.

Order on Motion—Appointment of an Administrator Pending Suit (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

C. D. against E. F.

Order on motion—Appointment of an administrator pending suit.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel on behalf of , it is ordered that G. H., of , [*or* such person or persons as shall be agreed upon between the parties, or, in default of agreement, as shall be nominated by one of the registrars], be appointed the administrator, pending this action, of the estate of A. B., the deceased in this action, on exhibiting a declaration on oath of the particulars and value of the said estate and on his entering into a bond with two sufficient sureties, in a penal sum to be fixed by one of the registrars, for the faithful performance of the duties committed to him, and on his sureties justifying.

(Signed) W. Y.,
Registrar.

FORM No. 206.

Order on Motion to an Executor who has intermeddled with an Estate, and who has been Cited but has not Appeared, to take a Grant of Probate (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

Order on motion to an executor who has intermeddled with an estate, and who has been cited but has not appeared, to take a grant of probate.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, in default of the appearance of E. F., the person cited, it is ordered that the said E. F. do within days from the service of this order upon him take probate as executor of the will bearing date , and now in the Principal Probate Registry of this Division, of A. B., deceased, and it is further ordered that the said E. F. do pay the taxed costs of the said C. D. of this application.

(Signed) W. Y.,
Registrar.

FORM No. 207.

Order on Motion—Grant of Administration *ad colligenda* (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

Order on motion—Grant of administration *ad colligenda.*

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of A. B., deceased, be granted to C. D., limited for the purpose only of collecting and getting in and receiving the estate, and doing such acts as may be necessary for the preservation of the same during the absence of the person or persons entitled by law to the said estate, and until they or one of them obtain letters of administration of the same, but no further or otherwise.

Declaration to be filed and sureties to justify.

(Signed) W. Y.,
Registrar.

FORM No. 208.

Order on Motion—Revocation of Grant of Letters of Administration (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

Order on motion—Revocation of grant of letters of administration.

On reading the statement filed on behalf of E. F., and the affidavits of , and on hearing counsel thereon, it is ordered that the letters of administration of the estate of A. B., deceased, granted on the , at , on the suggestion that the said deceased had died intestate, be revoked.

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued*

FORM No. 209.

Order on Motion — Grant of Administration under the 162nd section of the Supreme Court of Judicature (Consolidation) Act, 1925 — Death after 1925 (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the said C. D., a creditor of the said deceased, under the 162nd section of the Supreme Court of Judicature (Consolidation) Act, 1925.

(Signed) E. F.,
Registrar.

Order on motion—Grant of administration under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925—Death after 1925.

FORM No. 210.

Order on Motion—Grant of Administration (with Will) under the 73rd section of the Court of Probate Act, 1857—Death before 1926 (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration (with the will dated the annexed) of the estate of A. B., deceased, be granted to the said C. D. under the 73rd section of the Court of Probate Act, 1857.

(Signed) W. Y.,
Registrar.

Order on motion—Grant of administration (with will) under section 73 of the Court of Probate Act, 1857—Death before 1926.

FORM No. 211.

Order for the Hearing of a Probate action as a Short Cause (*a*).

[*Heading as in Form No.* 197.]

In the Estate of A. B., deceased.

C. D. against E. F.

On hearing counsel on behalf of the , it is ordered that this action be placed in the list for hearing on Monday next, the day of , 19 , and be heard as a Short Cause.

(Signed) W. Y.,
Registrar.

Order for the hearing of a probate action as a short cause.

FORM No. 212.

Order assigning a Guardian to Infants (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn the , whereby it appeared that A. B., of died at on the , intestate, a widower, leaving him surviving E. F. and G. H., his lawful children and the only persons entitled to his estate, now infants under the age of seven years, and therefore by law incapable of acting in their own name, or of electing a guardian to act on their part and behalf, and that there is no testamentary or other lawful guardian of the said infants, and that the said C. D. is the lawful grandfather and only next-of-kin of the said infants, and is ready and willing to accept the guardianship of the said infants for the purpose of taking letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said infants until one of them shall attain the age of twenty-one years; the undersigned Registrar of the Principal Probate Registry assigned the said C. D. guardian to the said infants for the purpose aforesaid.

Dated the day of , 19 .

(Signed) I. J.,
Registrar.

Order assigning a guardian to infants.

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise stated, they are framed for use in cases of death after 1925.

ORDERS—*continued.*

FORM No. 213.

Order assigning a Guardian to Infants for the Purpose of Renouncing (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order assigning a guardian to infants for the purpose of renouncing.

On reading the affidavit of C. D., sworn the , whereby it appeared that A. B., of , died on the , at , intestate, a widower leaving him surviving, E. F., spinster, and G. H., his lawful children and only persons entitled to his estate, now infants under the age of seven years, and therefore by law incapable of acting in their own name, or of electing a guardian to act on their part and behalf, and that there is no testamentary or other lawful guardian of the said infants, and that the said C. D. is the lawful uncle and one of the next-of-kin of the said infants and is ready and willing to accept the guardianship of the said infants for the purpose of renouncing for them and on their part and behalf the letters of administration of the estate of the said deceased, the undersigned Registrar of the Principal Probate Registry assigned the said C. D. guardian to the said infants for the purpose aforesaid.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM No. 214.

Order assigning Guardian to Infant cited (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. against E. F.

Order assigning guardian to infant cited.

On reading the affidavit of G. H., whereby it appears that a citation has issued under seal of this Division bearing date the , at the instance of C. D., alleging himself to be a creditor of A. B., deceased, citing E. F., the residuary legatee named in the last will and testament of the said A. B., bearing date the , to accept or refuse letters of administration with the said will annexed, of the estate of the said A. B., or show cause why the same should not be granted to the said C. D. as a creditor of the said deceased; and it further appearing by the said affidavit that the said E. F. is now an infant of the age of years only, and that G. H. is the lawful uncle and only next-of-kin of the said infant and is ready and willing to accept the guardianship of the said infant for the purpose of appearing to the said citation, and accepting the said letters of administration, with the said will annexed, of the said estate as his guardian, to be granted to him for the use and benefit of the said infant until he shall attain the age of twenty-one years, the undersigned registrar assigned the said G. H. guardian to the said infant for the purpose aforesaid.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM No. 215.

Order for Grant to Party cited (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order for grant to party cited.

X. Y. & Co., the solicitors of the defendant in this cause, exhibited affidavit of sworn on the , whereby it appeared that the said defendant by a citation issued on the , had been duly cited to accept or refuse letters of administration of the estate of A. B. late of , the deceased in this cause, and that the said defendant had entered an appearance to the said citation, and that notice of the entry of such appearance was on the duly served on the solicitor of the plaintiff, and that no summons has been served

(*a*) These forms are specimens only, and must be altered to suit individual cases. Except where otherwise indicated, they are framed for use in cases of death since 1925.

ORDERS—*continued.*

or other proceeding taken in this cause on behalf of the plaintiff since the service of the said notice. And the said , the solicitor of the defendant, alleged that the said defendant is willing to take upon himself the said letters of administration, whereupon the undersigned registrar on his application ordered that the said letters of administration should issue under seal to the said defendant if entitled thereto notwithstanding the caveat entered in the estate of the said deceased by or on behalf of the plaintiff on taking out the said citation.

Dated the day of , 19 . (Signed) W. Y.,
Registrar.

FORM No. 216.

Order for Discontinuance of Proceedings and Grant (*a*).

[*Heading as in Form No.* 212.]

In the Estate of C. D., deceased.

A. against B.

Order for discontinuance of proceedings and grant.

Upon hearing the and by consent, I do order that the contentious proceedings in this $\frac{\text{matter}}{\text{action}}$, arising from caveat No. , entered on the day of , 19 (and also from writ of summons issued on the day of , 19), be discontinued, and that probate of the will dated the , [*or letters of administration of the estate*] of C. D., late of , the deceased herein, be granted to G. H. and I. J. (the executors therein named), the plaintiffs in this $\frac{\text{matter}}{\text{action}}$ if entitled thereto.

Dated the day of , 19 . (Signed) E. F.,
Registrar.

FORM No. 217.

Order for Grant to Person Entrusted by the Court of the Deceased's Domicil (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for grant to person entrusted by the Court of the deceased's domicil.

On reading the affidavit of C. D., sworn on the , and the order of the Court of First Instance in the Department of in France, dated I do order that letters of administration of the estate of A. B., of No. 22, Rue de Rivoli, Paris, in France, deceased, who died on the , domiciled in France aforesaid, be granted to the said C. D., the person entrusted with the administration of the estate of the deceased by the Court having jurisdiction at the place where the said deceased died domiciled.

Dated the day of , 19 .
(Signed) G. H.,
Registrar.

FORM No. 218.

Order for Grant to the Attorney of the Person Entitled thereto by the Law of Deceased's Domicil (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for grant to attorney of person entitled thereto by the law of the deceased's domicil.

On reading the affidavit of C. D., sworn the , and the affidavit of E. F., sworn the (*b*) and the power of attorney dated the , I do order that letters of administration of the estate of A. B., of Oslo, in Norway, deceased, who died on the , intestate, domiciled in Norway, aforesaid, be granted to the said C. D., the lawful attorney, and for the use and benefit of G. H., who now resides in Norway, the person entitled to administer the estate of the said deceased by the law of the place where the said deceased died domiciled and until further representation be granted.

Dated the day of , 19 . (Signed) I. J.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) *I.e.*, the affidavit to be sworn by an advocate competent to state the law of the place of domicil.

ORDERS—*continued.*

FORM No. 219.

Registrar's Order for Grant of Probate of Draft (or Copy) Will (*a*).

[*Heading as in Form No.* 212.]

Registrar's order for grant of probate of draft (or copy) will.

In the Estate of A. B., deceased.

On reading the affidavits of C. D., sworn the day of , and of E. F., sworn the day of , I do order that probate of the last will and testament of A. B., of , deceased, bearing date the day of , as contained in a completed draft thereof (*or* in a copy thereof) be granted to G. H., the sole executor named therein until the original will or a more authentic copy thereof be brought into the Principal Probate Registry, I. J., K. L. and M. N., the only persons entitled to the estate of the said deceased had he died intestate having duly consented thereto.

Dated the day of , 19 .

(Signed) O. P.,
Registrar.

FORM No. 220.

Order revoking Grant of Probate (*a*).

[*Heading as in Form No.* 212.]

Order revoking grant of probate.

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn on the , whereby it appeared that on the , probate of the will (and codicil) of A. B. of , deceased, bearing date the , was granted by this Court at the Principal Probate Registry thereof, to C. D. and E. F., the executors therein named, and that it has since been discovered that the said deceased made and duly executed a later will bearing date the , whereof he appointed G. H. the sole executor; and the said probate having been voluntarily brought into and left in the said Probate Registry, the undersigned Registrar of the Principal Probate Registry on the application of the said , revoked the said grant made to the said C. D. and E. F. as aforesaid, and declared the same to be null and void to all intents and purposes in law whatsoever.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 221.

Order revoking Grant of Letters of Administration (*a*).

[*Heading as in Form No.* 212.]

Order revoking grant of letters of administration.

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn on the , whereby it appeared that on the , a grant of letters of administration of the estate of A. B., of , deceased, was, on the suggestion that the said deceased died intestate a widower without issue or parent, brother or sister, of the whole or half blood, or their issue, or grandparent, made by this Court at the Principal Probate Registry thereof to E. F., the lawful uncle of the whole blood of the said deceased, and that it has since been discovered that the said deceased made and duly executed his will and testament bearing date the , whereof he appointed G. H. and I. J. the executors [*or as the case may be*], and the said letters of administration having been voluntarily brought into and left in the said probate registry the undersigned Registrar of the Principal Probate Registry on the application of the said , revoked the said letters of administration made to the said E. F. as aforesaid and declared the same to be null and void to all intents and purposes in law whatsoever.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 222.

Order for Filing Renunciation of Executor to whom Power has been Reserved (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for filing renunciation of executor to whom power has been reserved.

On reading an instrument of renunciation under the hand of C. D., and referring to the probate of the will [and codicil] of A. B., of , deceased, whereby it appeared that on the , the said probate was granted by this Court at the Principal Probate Registry to G. H., one of the executors, the usual power being reserved of making the like grant to the said C. D., the other executor, and that the said C. D. had in and by the said instrument under his hand renounced the probate and execution of the said will and codicil, the undersigned Registrar of the Principal Probate Registry ordered that the said instrument of renunciation be filed in the said registry, and that the renunciation be noted on the record of the said probate.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 223.

Order for Alteration of Grant (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for alteration of grant.

On reading the affidavit of C. D., sworn on the , and referring to the grant of probate of the will [*or letters of administration (with will) of the estate*] of A. B., deceased, made by this Court at the [*Principal*] Probate Registry thereof on the , whereby it appears that in the said grant the death of the said deceased is stated to have occurred on the , whereas it in fact occurred on the , [*or as the case may be*], the undersigned Registrar of the Principal Probate Registry ordered that the said grant be altered by striking out and substituting therefor in the line thereof.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 224.

Order for Notation of Domicil (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for notation of domicil.

On reading the affidavit (with schedule annexed) sworn on the , of C. D., the executor [*or the administrator*] named in the grant of probate of the will [ ] of [*or letters of administration (with will) of the estate*] of A. B., deceased, made by this Court at the Principal Probate Registry thereof on the , whereby it appeared that the said deceased died on the , at , and was at the time of his death domiciled in England, and that the gross value of the estate in Great Britain in respect of which the said grant was made was sworn to be £ , and that a part of the said estate of the value of £ (particulars of which are set forth in the said schedule), is in Scotland, the undersigned Registrar of the principal Probate Registry, on the application of the said C. D., ordered the said grant to be noted that "the deceased died domiciled in England."

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 225.

Order for Impounding Grant (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for impounding grant.

On reading the affidavit of C. D. sworn on the , and the joint affidavit of E. F. and G. H., sworn on the , whereby it appeared that on the , a grant of probate of the will [*or letters of administration* (*with will*) *of the estate*] of A. B., of , deceased, was made by this Court at the [*Principal*] Probate Registry thereof to I. J., and that since taking upon himself the said probate [*or letters of administration* (*with will*)] the said I. J. has become a person of unsound mind and incompetent to manage himself or his affairs, and that there is no Committee or other person appointed under an order in Lunacy with the management of his estate, it is ordered by the undersigned Registrar of the Principal Probate Registry that letters of administration (with the said will) of the estate of the said deceased be forthwith granted to the said C. D., for the use and benefit of the said I. J., during his lunacy and until he shall become of sound mind, and that the said probate [*or letters of administration* (*with will*)] be first brought into the said Principal Probate Registry and during such lunacy be impounded.

Dated the day of , 19 . (Signed) A. Z.,
Registrar.

FORM No 226.

Order on Summons for Directions (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. against D.

Order on summons for directions.

Upon hearing the solicitors for the plaintiff and defendant I do order

1. { Indorsement on writ to stand for statement of claim.
   { Statement of claim to be delivered in days from to-day.

Statement of defence to be delivered in days from { to-day. / delivery of statement of claim.

Pleadings to be delivered with particulars, if necessary.

2. Affidavits of scripts of all parties to be filed within days from to-day.

3. After delivery of statement of defence, affidavit of documents to be filed by either party within days from service of notice : inspection within days from filing affidavit.

4. Place of trial . Mode of trial.

5. Liberty to apply.

Dated the day of 19 . (Signed) E. F.,
Registrar.

FORM No. 227.

Order for Service out of Jurisdiction (*a*).

[*Heading as in Form No.* 212.]

In the matter of an intended action

Between A. B., plaintiff,
and
C. D., defendant.

Order for service out of jurisdiction.

Upon reading the affidavit of E. F. sworn on the , I do order that the intended plaintiff be at liberty to issue a writ of summons against the intended defendant C. D., of , in France.

And I further order that the said intended plaintiff be at liberty to serve the said writ (*b*) on the said intended defendant , at , or elsewhere in France, and that the time for appearance to the said writ (*b*) by the said intended defendant be within after the service of the said writ (*b*).

Dated the day of , 19 .

(Signed)
(Signature of judge making the order.)

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) If the said intended defendant is a foreigner, insert "notice of" before the word "writ."

ORDERS—*continued.*

FORM No. 228.

Order for Substituted Service. [O. 10.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.
C. D. against E. F.

Upon hearing and upon reading the affidavit of , filed the , and

It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a prepaid post letter, addressed to the defendant at , [*or such other substituted service as may be ordered*] shall be good and sufficient service of the writ.

Dated the day of , 19 .

Order for substituted service. (O. 10.)

FORM No 229.

Order to Bespeak Request for Substituted Service Abroad. [O. 11, r. 8.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.
C. D. *v.* E. F.

Upon reading the [certificate, declaration, *or, as the case may be, describing the same*]

It is ordered that the plaintiff be at liberty to bespeak a request for substituted service of notice of the writ of summons herein on the defendant at , or elsewhere in the [*name of country*] and that the said defendant have days after such substituted service within which to enter appearance.

Dated this day of , 19 .

Order to bespeak request for substituted service abroad. (O. 11, r. 8.)

FORM No. 230.

Order for Renewal of Writ. [O. 8, r. 1.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.
C. D. *v.* E. F.

Upon hearing and upon reading the affidavit of , filed the day of , 19 , and

It is ordered that the writ in this action be renewed for six months from the date of its renewal, pursuant to the Rules of the Supreme Court, Order VIII., Rule 1.

Dated the day of , 19 .

Order for renewal of writ. (O. 8, r. 1.)

FORM No. 231.

Order for Affidavit as to Documents. [O. 31, r. 12.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.
C. D. *v.* E. F.

Upon hearing

It is ordered that the do, within days from the date of this order, answer on affidavit stating what documents are or have been in possession or power relating to the matters in question in this action, and that the costs of this application be .

Dated the day of , 19 .

Order for affidavit as to documents. (O. 31, r. 12.)

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 232.

Order to Produce Documents for Inspection. [O. 31, r. 14.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order to produce documents for inspection. (O. 31, r. 14.)

Upon hearing and on reading the affidavit of , filed the , and

It is ordered that the do, at all reasonable times, on reasonable notice, produce at [*insert place of inspection*], situate at , the following documents, namely , and that the be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom at his expense. In the meantime it is ordered that all further proceedings be stayed, and that the costs of this application be .

Dated the day of , 19 .

FORM No. 233.

Order for Delivery of Interrogatories. [O. 31, r. 1.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order for delivery of interrogatories. (O. 31, r. 1.)

Upon hearing and on reading the affidavit of , filed the , and

I do order that the be at liberty to deliver to the interrogatories in writing, as marked and initialed by me, and that the said do answer the interrogatories within days, and that the costs of this application be .

Dated the day of , 19 .

FORM No. 234.

Order for *viva voce* Examination of Witness within the Jurisdiction (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order for *viva voce* examination of witness within the jurisdiction.

On reading the affidavit of G. H., sworn the , and of L. M., sworn the , and on hearing the solicitor for the [*and by consent*] I do order that witness on behalf of the said and now within the jurisdiction of this Court, may be examined *viva voce* before I. J., of , barrister-at-law, as examiner at such time and place as the said examiner shall think fit and cause to be notified to the parties four days at least before the time so appointed by him; and that the shall be at liberty to cross-examine the said witness , and that the said witness may be further examined before the said examiner, if he shall think fit; And I further order that it shall and may be lawful for the said examiner, and he is hereby required to make, if need be, a special report touching the said examination hereby directed, and that the said examination and other proceedings had before him shall be returned to the Probate Registry of this Court, at Somerset House, Strand, certified under his hand and seal forthwith. And I further order that either party may be at liberty to take office copies of the said examination, and that the same may be read in evidence at the trial of this action, saving all just exceptions.

Dated the day of , 19 .

(Signed) K. L.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 235.

Order on Summons for Commission for Examination of Witnesses (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

A. B. *v.* E. F.

Order on summons for commission for examination of witnesses.

On hearing the solicitors for the , and on reading the affidavit of , sworn the , I do order that a commission do issue under seal of this Court for the examination of G. H. and others, witnesses on behalf of the , such commission to be addressed to I. J., of , and to be returned into the Principal Probate Registry of this Court with the depositions of the witnesses taken thereunder, forthwith; and I do further order that either party may be at liberty to take office copies of the said examination, and that the same may be read in evidence at the trial of this action, saving all just exceptions.

Dated the day of , 19 .

(Signed) K. L.,
Registrar.

FORM No. 236.

Order for Appointment of Special Examiner to take Evidence Abroad (*a*).

[*Heading as in Form No.* 212.]

Order for appointment of special examiner to take evidence abroad.

Upon hearing the solicitors on both sides, and upon reading the affidavit of ,

It is ordered that G. H., of , barrister-at-law, be appointed as special examiner for the purpose of taking the examination, cross-examination, and re-examination, *viva voce*, on oath or affirmation, of witnesses on the part of the at aforesaid. The solicitors to give to the solicitors days' notice in writing of the date on which they propose to send out this order to for execution, and that days after the service of such notice the solicitors for the plaintiffs and defendants respectively do exchange the names of their agents at , to whom notice relating to the examination of the said witnesses may be sent. And that days (exclusive of Sunday) prior to the examination of any witness hereunder notice of such examination shall be given by the agent of the party on whose behalf such witness is to be examined to the agent of the other party (unless such notice be dispensed with). And that the depositions when so taken, together with any documents referred to therein, or certified copies of such documents, or of extracts therefrom, be transmitted by the examiner, under seal, to the Senior Registrar of the Principal Probate Registry, Somerset House, London, forthwith, there to be filed in the proper office. And that either party be at liberty to read and give such depositions in evidence on the trial of this action, saving all just exceptions. And that the trial of this action be stayed until the filing of such depositions. And that the costs of and incident to this application and such examination be costs in the action.

Dated the day of , 19 .

(Signed) I. J.,
Registrar.

FORM No. 237.

Order under the Bankers' Books Evidence Act [42 & 43 Vict. c. 12, s. 7.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order under the Bankers' Books Evidence Act (42 & 43 Vict. c. 12, s. 7.)

Upon hearing the solicitor of the and upon reading the affidavit of , sworn the , I do order that the said be at liberty to inspect and take copies of all entries in the books of the Bank, situate at , in the name of the above-named deceased from the beginning of the year , to the .

Dated the day of , 19 .

(Signed) W. Y.,
Registrar

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 238.

Order for Interim Injunction [Jud. (Cons.) Act, 1925, s. 45; O. 50, r. 6.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order for interim injunction (Supreme Court of Judicature (Consolidation) Act, 1925, s. 45; O. 50, r. 6.)

Upon hearing for the plaintiff and upon reading the affidavit of , filed the , and the plaintiff by his said undertaking to abide by any order the Court or a judge may make as to damages in case the Court or a judge should hereafter be of opinion that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay. It is ordered and directed that the defendant his agents and servants and every of them be restrained and an injunction is hereby granted restraining them and every of them from until after the trial of this action or until further order.

Dated the day of , 19 .

FORM No. 239.

Order for Subpœna to bring in a Script (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

Order for subpœna to bring in a script.

On reading the affidavit of C. D., sworn on the , and filed in the Principal Probate Registry of this Court, whereby it appeared that a certain paper writing, being or purporting to be testamentary, to wit, the last will and testament of A. B., of , deceased, bearing date the , is now in the possession, within the power, or under the control of E. F., of , and G. H., of , or one of them, it is ordered by the undersigned registrar that a subpœna do issue under seal requiring the said E. F. and G. H., within eight days after service thereof, to produce and bring into, and leave in the Principal Registry of this Division (or in a district registry) the said paper writing, under pain of the law, and the contempt thereof.

Dated the day of , 19 . (Signed) I. J.,
Registrar.

FORM No. 240.

Order to bring up Witness in Criminal Custody [16 & 17 Vict. c. 30, s. 9.] (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. against E. F. and others.

Order to bring up witness in criminal custody (16 & 17 Vict. c. 30, s. 9).

Upon reading the affidavit of , I do order that the keeper of His Majesty's prison at shall have before on the day of , 19 , at of the clock in the noon, the body of , a prisoner in his custody (as it is said), then and there to testify the truth and give evidence in this cause on behalf of , and so from day to day until the said shall have given evidence as aforesaid, and when shall have given evidence that be taken back without delay to the said , and there detained until be discharged by due course of law.

Dated the day of , 19 .

FORM No. 241.

Order for Security for Costs (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

C. D. *v.* E. F.

Order for security for costs.

Upon hearing the solicitors on both sides, and reading the affidavits of .

It is ordered that the plaintiff give security for the defendant's costs in this action to the satisfaction of the registrar, and that in the meantime all further proceedings be stayed.

And that the costs of such application be .

Dated the day of , 19 .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 242.

Order for Payment of Costs (*a*).

[*Heading as in Form No.* 212.]

In the Estate of A. B., deceased.

A. B. *v.* C. D.

I do order that [C. D.] the [*defendant*] do, within seven days from the service of this order, pay to Messrs. E. and F., of the solicitors of the [*plaintiff*] the sum of £ , being the amount of the [*plaintiff's*] costs, as taxed and certified by one of the registrars of this Division.

Order for payment of costs.

Dated the day of , 19 .

PLEADINGS. *See* APPENDIX VIII.

POWERS OF ATTORNEY.

FORM No. 243.

Power of Attorney to take Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

WHEREAS A. B., late of , deceased, died on the , at , intestate, leaving me C. D. his lawful widow and relict. And whereas I the said C. D. am now residing at .

Power of attorney to take administration

Now I, the said C. D., do hereby nominate and appoint E. F., of , and G. H., of , to be my lawful attorneys to apply to the Probate Division of his Majesty's High Court of Justice in England and obtain letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased to be granted to them for my use and benefit and until I shall duly apply for and obtain letters of administration of the said estate of the said deceased to be granted to me, and I hereby promise to ratify and confirm whatsoever my said attorneys shall lawfully do or cause to be lawfully done in the premises by virtue of these presents. In witness whereof I have hereunto set my hand and seal at this day of , 19 .

Signed, Sealed, and Delivered by the said C. D. in the presence of } (Signed) C. D.

FORM No. 244.

Power of Attorney to take Letters of Administration (with Will) given by Executors (*a*).

[*Heading as in Form No.* 243.]

In the Estate of A. B., deceased.

WHEREAS A. B., of , died on the , at , having made and duly executed his last will and testament, bearing date the , and thereof appointed C. D. and E. F. executors.

Power of attorney to take letters of administration (with will) given by executors.

Now we, the said C. D. and E. F., at present residing at , do hereby nominate, constitute, and appoint G. H., of , to be our lawful attorney for the purpose of obtaining letters of administration (with the said will annexed) of the estate of the said A. B., deceased, to be granted to him by the High Court of Justice for our use and benefit, and until we shall duly apply for and obtain probate of the said will to be granted to us; and we hereby promise to ratify and confirm whatever our said attorney shall lawfully do or cause to be done in the premises.

In witness whereof we have hereunto set our hands and seals this day of , 19 .

Signed, Sealed, and Delivered by the said C. D. and E. F. in the presence of } (Signed) C. D. E. F.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS.

FORM No. 245.

Renunciation of Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal [*or* District] Probate Registry.

In the Estate of A. B., deceased.

Renunciation of probate.

WHEREAS A. B., of , deceased, died on the , at , having made and duly executed his last will and testament , bearing date the , and thereof appointed me, the undersigned C. D., sole executor. Now I, the said C. D., do hereby declare that I have not intermeddled in the estate of the said deceased and will not hereafter intermeddle therein with intent to defraud creditors, and I hereby renounce all my right and title to the probate and execution of the said will.

Signed by the said C. D. this day of , 19 , in the presence of } (Signed) C. D.

FORM No. 246.

Renunciation of Letters of Administration (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation of letters of administration.

WHEREAS A. B., of , deceased, died on the , at , intestate, a widower; and whereas I, C. D., am his lawful son and only person entitled to his estate. Now I, the said C. D., do hereby renounce all my right and title to letters of administration of the estate of the said deceased.

Signed, etc. [*as in Form No.* 245].

FORM No. 247.

Renunciation of Letters of Administration (with Will) (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation of letters of administration (with will).

WHEREAS A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , and did not thereof name any executor, but therein named me, the undersigned C. D., residuary legatee. Now I, the said C. D., do hereby renounce all my right and title to letters of administration (with the said will annexed), of the estate of the said deceased.

Signed, etc. [*as in Form No.* 245].

FORM No. 248.

Renunciation of Guardianship of a Minor (or Infant) (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation of guardianship of a minor (or infant).

WHEREAS A. B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , and thereof appointed no executor but did name C. D. residuary legatee and devisee; and whereas the said C. D. is now a minor [*or* infant] of the age of years.

And whereas I, the undersigned E. F., am the lawful grandfather and only next-of-kin of the said C. D.

Now I, the said E. F., do hereby renounce all my right and title in and to the guardianship of the said minor [*or* infant].

Signed, etc. [*as in Form No.* 245].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS—*continued.*

FORM No. 249.

Renunciation of Letters of Administration by Guardian of Minor and Infant (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation of letters of administration by guardian of minor and infant.

WHEREAS A. B., of , deceased, died on the , at , intestate, a widower, leaving C. B. and D. B. his lawful children and only persons entitled to his estate: And whereas the said C. B. is now in his minority, to wit, of the age of years and upwards, but under the age of twenty-one years, and the said D. B. is now in his infancy, to wit, of the age of years only: And whereas the said C. B., the minor aforesaid, has in and by an instrument under his hand expressly elected me, the undersigned E. F., his lawful and only next-of-kin, to be his guardian for the purpose of renouncing in his name and on his part letters of administration of the estate of the said deceased: And whereas I have been duly assigned the guardian of the said D. B.

Now I, the said E. F., do hereby as guardian of the said minor and infant, renounce all their right, title, and interest in and to letters of administration of the said estate.

Signed, etc. [*as in Form No.* 245].

FORM No. 250

Renunciation of Letters of Administration by Guardian of Infant (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation of letters of administration by guardian of infant.

WHEREAS A. B., of , deceased, died on the , at , intestate, a widower, leaving C. D. and E. F. his lawful children and only persons entitled to his estate: And whereas the said C. D. and E. F. are now in their infancy, to wit, of the ages of and respectively, and both under the age of seven years: And whereas by order dated the , G. H., one of the Registrars of the Principal Probate Registry of this Division, assigned I. J., the lawful uncle and only next-of-kin of the said infants, guardian to the said infants for the purpose of renouncing on their part and behalf the letters of administration of the estate of the said deceased.

Now I, the said I. J., do hereby as guardian of the said infants, renounce all their right, title, and interest in and to letters of administration of the said estate.

Signed, etc. [*as in Form No.* 245].

FORM No. 251.

Renunciation and Consent of Father of Intestate (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Renunciation and consent of father of intestate.

WHEREAS A. B., of , deceased, died on the , at , intestate, a bachelor, without mother, leaving me, the undersigned C. D., of , his lawful father and only person entitled to his estate.

Now I, the said C. D., do hereby renounce all my right and title in and to the letters of administration of the estate of the said deceased, and I do also hereby consent that letters of administration of the said estate may be granted to E. F., my lawful son.

Signed, etc. [*as in Form No.* 245].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS—*continued.*

FORM No. 252.

Retractation of Renunciation (*a*).

[*Heading as in Form No.* 245.]

In the Estate of A. B., deceased.

Retractation of renunciation.

WHEREAS A B., of , deceased, died on the , at , having made and duly executed his last will and testament, bearing date the , and thereof appointed C. D. executor and me the undersigned E. F. residuary legatee; and whereas the said C. D. duly renounced the probate and execution of the said will, and I the said E. F. also duly renounced letters of administration with the said will annexed of the estate of the said deceased; and whereas letters of administration, with the said will annexed, of the said estate were on the granted by authority of this Division to G. H., a creditor of the said deceased; and whereas the said G. H. died on the , leaving part of the said estate unadministered.

Now I, the said E. F., do hereby declare that I retract the renunciation of the letters of administration with the said will annexed of the said estate, so as aforesaid by me heretofore made.

Signed, etc. [*as in Form No.* 245].

REPLY. *See* APPENDIX VIII.

REQUESTS.

FORM No. 253.

Letter forwarding Request for Service Abroad. [O. 11, r. 8.] (*a*).

Letter forwarding request for service abroad. (O. 11, r. 8.)

The President of the Division of the High Court of Justice presents his compliments to his Majesty's Principal Secretary of State for Foreign Affairs, and begs to enclose a notice of a writ of summons issued in an action of *versus* pursuant to order, out of the High Court of Justice in England for transmission to the Ministry of Foreign Affairs in [*name of country*] with the request that the same may be served personally upon [*name of defendant to be served*] against whom proceedings have been taken in the English Court, and with the further request that such evidence of the service of the same upon the said defendant may be officially certified to the English Court, or declared upon oath, or otherwise, in such manner as is consistent with the usage or practice of the Courts of the [*name of country*] in proving service of legal process.

The President begs further to request that in the event of efforts to effect personal service of the said notice of writ proving ineffectual the Government or Court of the said country be requested to certify the same to the English Court.

[R. S. C. (July) 1903, Sched.]

FORM No. 254.

Request for Service Abroad. [O. 11, r. 8.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased

C. D. against E. F.

Request for service abroad. (O. 11, r. 8.)

I [*or* we] hereby request that a notice of writ of summons in this action be transmitted through the proper channel to [*name of country*] for service [*or* substituted service] on the defendant [*naming him*] at [*address of defendant*] or elsewhere in [*name of country*].

And I [*or* we] hereby personally undertake to be responsible for all expenses incurred by his Majesty's Principal Secretary of State for Foreign Affairs in respect of the service hereby requested, and on receiving due notification of the amount of such expenses I [*or* we] undertake to pay the same to the Chief Clerk at the Foreign Office, and to produce the receipt for such payment to the proper officer of the High Court.

Dated, etc.

(Signature of solicitor.).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

REQUESTS—*continued.*

FORM No. 255.

Letter forwarding Request for Substituted Service. [O. 11, r. 8.] (*a*).

Letter forwarding request for substituted service. (O. 11, r. 8.)

The President of the Division of the High Court of Justice presents his compliments to his Majesty's Principal Secretary of State for Foreign Affairs, and begs to enclose a notice of a writ of summons in the case of *versus* in which the plaintiff has obtained an order of the English High Court (which is also enclosed) giving leave to bespeak a request that the said notice of writ may be served by substituted service on the defendant at in the [*name of country*].

The President requests that the said notice of writ and order may be forwarded to the proper authority in [*name of country*] with the request that the same may be transmitted by post addressed to the defendant at [the last known place of abode *or* the place of business] of the said defendant, or there delivered in such manner as may be consistent with the usage or practice of the Courts of [*name of country*] for service of legal process where personal service cannot be effected; and with the further request that the same may be officially certified to the English Court, or declared upon oath, or otherwise, in such manner as is consistent with the practice of the Courts of the [*name of country*] in proving service of legal process.

STATEMENT OF CLAIM. *See* APPENDIX VIII.

SUBPŒNAS.

FORM No. 256.

Subpœna *ad Testificandum* **(General Form).** [O. 37, r. 27.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

19 . [*Here put the letter and number.*]

In the Estate of A. B., deceased.

Between plaintiff,

and

defendant.

Subpœna *ad testificandum* (general form). (O. 37, r. 27.)

GEORGE V., by the grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, to [*the names of three witnesses may be inserted*] greeting:

We command you to attend before at on day the day of , 19 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the plaintiff [*or* defendant].

Witness, etc.

FORM No. 257.

Subpœna *duces tecum.* [O. 37, r. 27.] (*a*).

[*Heading as in Form No.* 256.]

Subpœna *duces tecum.* (O. 37, r. 27.)

GEORGE V., by the grace of God, etc., to [*the names of three witnesses may be inserted*] greeting:

We command you to attend before at , on day the day of , 19 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*].

Witness, etc.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUBPŒNAS—*continued.*

FORM No 258.

Subpœna to bring in a Script (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
GEORGE V., by the grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith :
To of .

Subpœna to bring in a script.

WHEREAS it appears by an affidavit of sworn the , and filed in the Principal Probate Registry of our High Court of Justice, that a certain original paper or script, being or purporting to be testamentary, to wit [*here describe the paper, and give name and last address of the testator*], bearing date the , is now in your possession, within your power, or under your control :

Now this is to command you, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the said Principal Probate Registry the said original paper or script now in the possession, within the power, and under the control of you the said : And this you shall in no wise omit under pain of the law and contempt thereof.

Witness, the Right Honourable , the day of , 19 , in the year of our reign.

(Signed) E. F.
Registrar.

Subpœna to bring in a script [*name and address of solicitor*], solicitor.

[N.B.—*The Principal Probate Registry of the High Court of Justice is at Somerset House, Strand, in the county of Middlesex.*]

FORM No. 259.

Subpœna to Bring in a Script Decreed by the Court (*a*).

[*Heading as in Form No.* 258.]

In the Estate of A. B., deceased.
GEORGE V., by the grace of God, etc. [*as in Form No.* 258.]
To of .

Subpœna to bring in a script decreed by the Court.

WHEREAS there is now depending in our High Court of Justice a probate action entitled "D. against F., 1927, B. No. 121," wherein the plaintiff is proceeding to prove in solemn form of law the alleged last will and testament of A. B. , late of , deceased, who died on or about , at , the said will bearing date the , propounded by C. D., the sole executor [*or as the case may be*] therein named, against E. F. the lawful widow and relict of the said deceased [*or as the case may be*] : And whereas the Right Honourable the President of the Probate, Divorce and Admiralty Division of our said Court did, by his order made in the said action, and bearing date , order and direct that a subpœna do issue, under seal of our said Court, to the purport and effect hereinafter mentioned.

Now this is to command you, that, within eight days after service on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court, a certain original paper writing or script purporting to be testamentary, to wit [*here describe the script accurately*], if the same be now in your possession or under your control : or in case the said paper writing or script be not in your possession, or under your control, that you, within eight days after the service hereof on you, inclusive of the day of such service, do file in the Principal Registry of our said Court an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said paper writing or script. And this you shall in no wise omit, under pain of the law and contempt thereof.

Witness, etc. [*complete as in Form No.* 258] (*b*).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) After service, the subpœna should be indorsed as follows : "This subpœna was served by on the within named , of , at , on the day of , 19 ."

SUBPŒNAS—*continued.*

FORM No. 260.

Subpœna to a Witness to be Examined Touching a Testamentary Paper (*a*).

[*Heading as in Form No.* 258.]

In the Estate of A. B., deceased.

GEORGE V., by the grace of God, etc. [*as in Form No.* 258.]

To , of , greeting :

Subpœna to a witness to be examined touching a testamentary paper.

We command you to attend at the sittings of the Probate, Divorce and Admiralty Division of our High Court of Justice at the Royal Courts of Justice, Strand, in our county of Middlesex, on the day of , 19 , by half-past ten of the clock in the forenoon of the same day, and so from day to day whenever the said Division of our said Court is sitting, until the action or proceeding is heard, to testify the truth according to your knowledge [*or* to answer certain interrogatories to be administered to you], in a certain action now in the said Division of our said Court, depending between plaintiff, and defendant, touching a certain paper writing or script, being or purporting to be testamentary, to wit [*here describe the script, giving the date as accurately as possible*], of which said paper writing or script reasonable grounds have been furnished to our said Court for believing you have knowledge. And this you shall by no means omit, under pain of the law and contempt thereof.

Witness, etc. [*continue as in Form No.* 258.]

SUMMONSES.

FORM No. 261.

Summons for Directions. [R. S. C., O. 30.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

19 , B., No. .

In the Estate of A. B., deceased.

Between C. D., plaintiff,

and

E. F. and others, defendants.

Summons for directions. (R. S. C., O. 30.)

Let all parties concerned attend one of the registrars, at the Principal Probate Registry, at Somerset House, Strand, in the county of Middlesex, on day, the day of , 19 , at o'clock in the noon, on the hearing of an application on the part of the to show cause why an order for directions should not be made in this action as follows :—

Affidavit of scripts.—

Pleadings.—Indorsement on writ to stand for statement of claim. Statement of claim containing full particulars in days. Statement of defence containing full particulars in days. Reply (if necessary) in days.

Discovery.—That after defence delivered the plaintiff and defendant do respectively within days after notice file an affidavit of documents. Inspection days from filing affidavit.

Place of trial.—

Mode of trial.—

Liberty to apply .

And that the costs of this application be costs in the cause.

Dated the day of , 19 .

This summons was taken out by , of , solicitor for .

To .

FORM No. 262.

Judge's or Registrar's Summons (*a*).

[*Heading as in Form No.* 261.]

Judge's or Registrar's summons.

Let the attend one of the Judges of this Division at his Chambers at the Royal Courts of Justice [*or* one of the Registrars at the Principal Probate Registry, Strand, London], on next, the day of , 19 , at of the clock, to show cause why the .

Dated the day of , 19 .

This summons issued by , solicitor for the .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUMMONSES—*continued.*

FORM No. 263.

Notice under Summons for Directions (*a*).

[*Heading as in Form No.* 261.]

Notice under summons for directions.

TAKE notice that the above-named plaintiff intends to apply to one of the Registrars at the Principal Probate Registry at Somerset House, Strand, London, on the day of , 19 , at 12 o'clock noon, for further directions in this action as to .

Dated, etc.

G. H. & Co.,
Solicitors for the plaintiff.

To Messrs. I. J. & Co., defendant's solicitors.

FORM No. 264.

Summons to discontinue Contentious Proceedings (*a*).

[*Heading as in Form No.* 261.]

Summons to discontinue contentious proceedings.

Let the defendant attend one of the registrars at the Principal Probate Registry of the High Court of Justice, at Somerset House, Strand, in the county of Middlesex, on [Tuesday], the day of , 19 , at [12] of the clock, to show cause why the contentious proceedings in this action [*or* matter, *if before writ of summons*] arising from Caveat No. , entered on the , and also from writ of summons issued on the , should not be discontinued and why [probate of the will dated the ,] of A. B., of , the deceased, therein should not be granted to [*C. D., the sole executor named in the said will*], the plaintiff in this action [*or* matter] if entitled thereto.

Dated the day of , 19 .

Summonses issued by X. Y.,
Solicitor for the plaintiff.

WARNING.

FORM No. 265.

Warning to Caveat (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. The Principal Probate Registry.

Dated the day of , 19 .

To A. B., of , [*or* C. D., of , solicitor].

Warning to caveat.

You are hereby warned, within six days (exclusive of Sunday) after the service of this warning upon you, inclusive of the day of such service, to cause an appearance to be entered for you in the said Principal Probate Registry to the caveat entered by you in the estate of E. F., of , deceased, who died at , on or about the , and to set forth your [*or* your client's] interest.

And take notice that in default of your so doing, the said Court will proceed to do all such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

Issued at the instance of G. H. [add the interest (*b*) of G. H. in the matter, and give an address for service of notices within three miles.]

(Signed) I. J.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) *Vide ante*, p. 506.

WRITS.

FORM No. 266.

Writ of Summons (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

19 . [*Here put the letter and number.*]

In the estate of X. Y., deceased.

Between A. B., plaintiff,

and

C. D., defendant.

Writ of summons.

GEORGE V., by the grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith:

To C. D., of , in the county of .

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, the Right Honourable , Lord High Chancellor of Great Britain at the High Court of Justice in London, the day of , 19 , and in the year of our reign.

[N.B.—*This writ is to be served within twelve calendar months from the date thereof, or, if renewed within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.*

The defendant [or *defendants*] *may appear hereto by entering an appearance* [or *appearances*] *either personally or by solicitor at the Central Office, Royal Courts of Justice, London.*]

Indorsement.

The plaintiff claims, etc. (*see* APPENDIX VIII.).

Certificate.

A sufficient affidavit in verification of the indorsement on this writ to authorise the sealing thereof has been produced to me this day of , 19 . (Signed) V. W., Registrar.

This writ was issued by the said plaintiff, who resides at , [*or*, by E. F., of , whose address for service is , solicitor for the said plaintiff, who resides at , *or*, this writ by G. H., of , whose address for service is , agent for , of , solicitor for the said plaintiff, who resides at] (*b*).

FORM No. 267.

Writ for Service out of the Jurisdiction, or where Notice in lieu of Service is to be given out of the Jurisdiction. [O. 2, r. 5.] (*a*).

[*Heading and title as in Form No.* 266.]

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction. (O. 2, r. 5.)

GEORGE V., by the grace of God, etc. [*as in Form No.* 266.]

To C. D., of .

We command you, C. D. (*c*), That within [*here insert the number of days directed by the Court or judge ordering the service or notice*] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, etc. [*continue as in Form No.* 266.]

Indorsement to be made on the writ before the issue thereof.

The plaintiff claims, etc.

This writ [*or* notice of writ] is issued against you as .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

(*b*) After service the writ should be indorsed as follows: "This writ was served by me at on the defendant, on the day of , 19 .

Indorsed the day of , 19 .

(Signed)

(Address).

(*c*) This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

WRITS—*continued.*

FORM No. 268.

Notice of Writ in lieu of Service to be given out of the Jurisdiction.

[O. 2, r. 5.] (*a*).

[*Heading and title as in Form No.* 266.]

Notice of writ in lieu of service to be given out of the jurisdiction. (O. 2, r. 5.)

To G. H., of

TAKE notice, that A. B., of , has commenced an action against you, G. H., in the Probate, Divorce and Admiralty Division of His Majesty's High Court of Justice in England, by writ of that court, dated the day of , A.D. 19 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said A. B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the Central Office, Royal Courts of Justice, London.

(Signed) A. B. of etc.
or X. Y., of etc.
Solicitor for A. B.

[N.B.—*This notice is to be used where the person to be served is not a British subject, and is not in British dominions.*]

FORM No. 269.

Writ of Attachment. [O. 44.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. In the Estate of A. B., deceased.

C. D. against E. F.

Writ of attachment. (O. 44.)

GEORGE V., by the grace of God, etc. [*as in Form No.* 266.]

To the sheriff of , greeting :

We command you to attach C. D. so as to have him before us in the Probate Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and, further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, etc. [*continue as in Form No.* 266.]

Notice to Sheriff.—*This writ, if issued for default in payment of money, is subject to the following limitation:—*

If under section 4 *of the Debtors Act*, 1869, *it does not authorise imprisonment for any longer period than* one year.

Indorsement.—*This writ was issued by, etc., solicitors for the who resides at , and was issued pursuant to order dated the day of , 19 , for such default as is therein mentioned* [*being a default in payment of money under section* 4 *of the Debtors Act*, 1869] or [*not being a default in payment of money*].

[*Note.*—The above "Notice to the sheriff" (which forms a footnote to the official forms now in use) and the "Indorsement" were added to the above form under O. 61, r. 33.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

APPENDIX VIII.

PRECEDENTS OF PLEADING.

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INDORSEMENTS ON WRIT.

[*For the formal parts of a writ of summons, see App. VII., Form* 266.]

PRECEDENT No. 1. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Executor (or Legatee) propounds Will. [*Adapted from R. S. C.* 1883, *App. A., Pt. III., Sec. V., Form No.* 1.]

The plaintiff claims to be executor of the last will dated the day of of C. W., late of , deceased, who died on the day of , 1926, and to have the said will established.

This writ is issued against you as the lawful brother of the whole blood and one of the persons entitled to share in the estate of the said deceased in the event of an intestacy [*or as the case may be*].

PRECEDENT No. 2. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Residuary Legatee propounds Lost Will, Undated.

The plaintiff claims as residuary legatee for life under the last will undated, but in fact executed in the month of December, 1924, of I. R., late of Alpha, in the county of Beta, who died on the 1st day of April, 1925, to have the contents of the said will as contained in the completed draft thereof, admitted to probate.

This writ is issued against you, C. D. and E. F., as executors of a will and codicil of the deceased dated respectively the 10th day of May, 1923, and the 15th day of June, 1923, and against you, P. W., as residuary legatee under the said will and codicil, and also as executor and residuary legatee under the will dated the 12th day of June, 1926, of Sarah R., widow of the deceased, who died on the 8th day of July, 1926, and as such interested in the estate of the deceased in the event of an intestacy.

PRECEDENT No. 3. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Executors propound Will but not Codicil.

The plaintiffs claim, as executors of the last will dated the 1st day of June, 1922, of Caroline P., late of Alpha, in the county of Beta, spinster, who died on the 4th day of August, 1924, to have the said will established.

This writ is issued against you, the above-named defendants, as beneficiaries under a pretended codicil of the said deceased dated the 7th day of May, 1923.

INDORSEMENTS ON WRIT—*continued.*

PRECEDENT No. 4. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Beneficiary propounds Will without Alterations.

The plaintiff claims to be a joint tenant of a third of the real and personal estate of Mary Ann Thompson, late of 15, Elmdale Road, Chiswick, in the county of London, spinster, deceased, who died on the 2nd day of May, 1919, under and by virtue of her will dated the 31st day of March, 1908, and to have the said will, without alteration, established.

This writ is issued against you S. J. as the residuary legatee in trust named in the said will by an alteration thereof which is unexecuted; against you T. M. and H. F. as entitled to one fourth of the deceased's estate by virtue of the said alteration.

PRECEDENT No. 5. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Executor or Legatee of a Former Will, or a Next-of-Kin, etc., of the Deceased seeks to obtain Revocation of a Probate Granted in Common Form. [*Reprinted from R. S. C.* 1883, *App. A., Pt. III., Sec. V., Form* 2.]

The plaintiff claims to be executor of the last will dated the day of , of C. D., late of , deceased, who died on the day of , and to have the probate of a pretended will of the said deceased, dated the day of , revoked.

This writ is issued against you as the executor of the said pretended will [*or as the case may be*].

PRECEDENT No. 6. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Legatee claims to have Will Established omitting Certain Words.

The plaintiff claims as residuary legatee for life under the last will with two codicils thereto dated respectively the 16th day of June, 1921, the 12th day of November, 1921, and the 1st day of November, 1922, of R. W., late of Alpha, in the county of Beta, deceased, who died on the 17th day of November, 1922, to have the probate in common form of the said will and codicils revoked, and the said will and codicils established, omitting therefrom certain words wrongfully included in the said probate.

This writ is issued against you, I. L., as having on the 3rd March, 1923, obtained probate in common form of the said will and codicils, and against you, C. L., as interested in the said will and codicils as originally admitted to probate.

INDORSEMENTS ON WRIT—*continued.*

PRECEDENT No. 7. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Next-of-Kin claims Revocation of Probate in Common Form.

The plaintiff claims to be the lawful brother of the whole blood and one of the persons entitled to a share of the estate of A. B., late of Alpha, in the county of Beta, spinster, deceased, who died on the 14th day of November, 1926, intestate, and to have as such a grant of administration to the estate of the said deceased and to have probate of a pretended will of the said deceased dated the 4th day of February, 1925, revoked, and the said will pronounced against.

This writ is issued against you, A. K. and W. L., as having obtained probate in common form of the said pretended will.

PRECEDENT No. 8. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Legatee under Will attacks Codicil.

The plaintiff claims revocation of the probate, granted on the 22nd May, 1924, of the will dated the 31st December, 1915, and a codicil dated the 13th November, 1917, and a pretended codicil dated the 30th November, 1918, of Sarah Hannibal, late of 14, Palace Mansions, Chapel Hill, Hampstead, in the county of Middlesex, spinster, who died on the 7th December, 1923. The plaintiff claims as a legatee under the said will dated the 31st December, 1915, and is adversely affected by the said pretended codicil dated the 30th November, 1918.

This writ is issued against you, the above-named defendants, as the executors to whom probate of the said will and of the said codicil dated the 13th November, 1917, and of the said pretended codicil dated the 30th November, 1918, was granted.

[For Statement of Claim see precedent No. 25.]

PRECEDENT No. 9. INDORSEMENT ON WRIT.

Action for Revocation of Administration—Executor or Legatee of a Will when Letters of Administration have been granted as on Intestacy. [*Reprinted from R. S. C.*, 1883, *App. A., Pt. III., Sec. V., Form* 3.]

The plaintiff claims to be executor of the last will of C. D., late of , deceased, who died on the day of , dated the day of .

The plaintiff claims that the grant of letters of administration of the [personal (*a*)] estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

[(*a*) Omit if the deceased died on or since January 1, 1898.]

INDORSEMENTS ON WRIT—*continued.*

PRECEDENT No. 10. INDORSEMENT ON WRIT.

Action for Revocation of Administration—Executors of Will claim Revocation of Administration as on Intestacy.

The plaintiffs claim as the executors named in the will dated the 1st day of May, 1920, of I. D., late of Alpha, in the county of Beta, deceased, who died on the 8th day of July, 1925, to have the said will established and a grant of administration to the estate of the said deceased issued from the principal probate registry on the 7th day of September, 1925, revoked.

This writ is issued against you, W. T., as having obtained the said grant of administration.

PRECEDENT No. 11. INDORSEMENT ON WRIT.

Interest Action—By Person claiming a Grant of Administration as a Next-of-Kin of the Deceased, whose Interest as Next-of-Kin is disputed—Death before 1926. [*Reprinted from R. S. C.*, 1883, *App. A., Pt. III., Sec. V., Form* 4.]

The plaintiff claims to be the brother and sole next-of-kin of C. D., of , deceased, who died on the day of , intestate, and to have as such a grant of administration to the [personal (*a*)] estate of the said intestate.

This writ is issued against you because you have entered a caveat and have alleged that you are the sole next-of-kin of the deceased [*or as the case may be*].

[(*a*) Omit if the deceased died on or since January 1, 1898.]

PRECEDENT No. 12. INDORSEMENT ON WRIT.

Interest Suit—By Person claiming a Grant of Administration as Kin of the Deceased, whose Interest as such is disputed—Death since 1925.

The plaintiff claims to be the lawful brother of the whole blood and only person entitled to the estate of C. D., of Alpha in the county of Beta, deceased, who died on the 16th day of February, 1926, intestate, and to have as such a grant of administration to the estate of the said intestate.

This writ is issued against you because you have entered a caveat and have alleged that you are the lawful son and only person entitled to the said estate of the said deceased.

STATEMENTS OF CLAIM.

PRECEDENT No. 13. STATEMENT OF CLAIM.

Formal Parts of a Statement of Claim.

[1927, L. No. 156.]

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Probate.)
In the estate of E. L., deceased.
Writ issued the 1st day of August, 1927.
Between F. L. ..... Plaintiff.
and
M. C. and A. C. ..... Defendants.

Statement of Claim.

1. The plaintiff is .....

The plaintiff claims:—
(1) .....
(2) .....

[Signature of counsel.]

Delivered the 14th day of August, 1927, by Omega and Taw, of 16 Canchester Street, E.C.4 in the county of London, solicitors for the plaintiff.

PRECEDENT No. 14. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will with Alterations.

Statement of Claim.

1. The plaintiff is the executor and residuary legatee named in the will of A. B., late of Alpha, in the county of Beta, widow, deceased, who died on the 1st day of July, 1922, the said will bearing date the 14th day of January, 1922.

2. The alterations appearing in the fifth line of the second page of the said will were written by the testatrix prior to the execution of the said will.

3. The alterations now appearing in the second line of the third page of the said will, whereby a legacy of £1,000 is given to the defendant, were written subsequent to the execution of the said will.

The plaintiff claims:—
(1) That the Court shall pronounce for the said will together with the alterations referred to in paragraph 2 hereof, but omitting therefrom the alterations referred to in paragraph 3 hereof.
(2) Such further or other order as may be just.

[Signature of counsel.]

STATEMENTS OF CLAIM—*continued.*

PRECEDENT No. 15. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will and Incorporated Document.

Statement of Claim.

1. The plaintiff is the executor named in the will dated the 5th day of April, 1923, of P. W., late of Alpha, in the county of Beta, who died on the 5th day of March, 1924.

2. The said will, in the third, fourth, and fifth lines of the third page thereof, contains a reference to a document then in existence in the terms following, that is to say: "I direct my executor to distribute my plate, pictures, and my collection of engravings in accordance with the directions contained in the list signed by me on the 14th day of March, 1922, which is now shown to me and which I annex to this my will."

The document referred to by the said words of reference and thereby incorporated in the said will is the paper writing marked E. F. annexed to the plaintiff's affidavit of scripts.

The plaintiff claims:—

(1) That the Court shall pronounce for the said will and the said paper writing as together constituting the true last will of the deceased.

(2) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT No. 16. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Lost Will.

[See also *Sugden* v. *Lord St. Leonards*, 1 P. D. at p. 154, and for Defence see Precedent No. 34.]

Statement of Claim.

1. The plaintiff is the executor and residuary legatee named in the true last will of G. B., late of Alpha, in the county of Beta, who died on the 10th day of February, 1926, the said will bearing date the 25th day of January, 1919.

2. The said will never was revoked or destroyed by the testator nor by any person in his presence and by his direction with the intention of revoking the same and the same was at the time of his death a valid and subsisting will, but the same cannot be found.

3. The contents of the said will were in substance and effect as follows: "This is the last will and testament of me, G. B., of Alpha, in the county of Beta. I leave all my property to my son John, and appoint him my sole executor" [*or*, 3. The contents of the said will are contained in a draft thereof marked A. B. annexed to the plaintiff's affidavit of scripts].

The plaintiff claims:—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Probate of the said will as set forth in paragraph 3 of this statement of claim [*or*, as contained in the said draft] until the said original will be found.

(3) Such further or other order as may be just.

[Signature of counsel.]

STATEMENTS OF CLAIM—*continued.*

PRECEDENT No. 17. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Destroyed Will and alleges Dependent Relative Revocation.

Statement of Claim.

1. The plaintiff is the executor named in the true last will dated the 17th day of March, 1926, of M. H., late of Alpha, in the county of Beta, widow, deceased, who died on the 3rd day of September, 1927.

2. The said deceased subsequently signed another testamentary paper bearing the date the 20th day of February, 1927.

3. The said last-mentioned paper was not duly executed according to the provisions of the statute 1 Vict. c. 26.

4. Either in contemplation of duly executing or in the erroneous belief that she had duly executed the said last-mentioned testamentary paper, the said deceased destroyed her said will dated the 17th day of March, 1926.

5. In the events which have happened the said deceased never in law revoked the said will of the 17th day of March, 1926, and the said will of the 17th day of March, 1926, remains in all respects a valid and subsisting will and should be admitted to probate.

6. The contents of the said will of the 17th day of March, 1926, are contained in a completed draft thereof marked A. B. annexed to the plaintiff's affidavit of scripts.

The plaintiff claims:—

(1) That the Court shall pronounce for the force and validity of the said will of the 17th day of March, 1926, as alone constituting the true last will of the said deceased, and decree probate thereof as contained in the said completed draft.

(2) Such further and other order as the case may require.

[Signature of counsel.]

Substance of the Case.

Under paragraph 3, the plaintiff alleges that the said deceased never signed the said paper in the presence of two witnesses, etc.

PRECEDENT No. 18. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Foreign Will.

Statement of Claim.

1. The plaintiff is the executor named in the will, dated the 1st day of June, 1920, of Antonio Clampetti, late of the Hotel Corso, Naples, in the kingdom of Italy, who died on the 15th day of December, 1920, an Italian subject, domiciled in Italy, the said will being duly executed in accordance with the law of Italy.

The plaintiff claims:—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further or other order as may be just.

[Signature of counsel.]

STATEMENTS OF CLAIM—*continued.*

PRECEDENT No. 19. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will of British Subject.

Statement of Claim.

1. The plaintiff is the executor named in the will, dated the 1st day of April, 1916, of Amelia, Baroness von Liebestraum, late of Berlin, in the Republic of Germany, widow, who died there on the 15th day of May, 1925, a British subject, whose domicil of origin was English, the said will being duly executed in accordance with the statutes 1 Vict. c. 26 and 24 & 25 Vict. c. 114.

The plaintiff claims:—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further or other order as may be just.

[Signature of counsel.]

[See Defence, Precedent No. 35; and see Precedent No. 44.]

PRECEDENT No. 20. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executors propound partially revoked Will.

Statement of Claim.

1. The plaintiffs are two of the executors named in the will of N. F., late of Alpha, in the county of Beta, widow, who died on the 8th day of May, 1920, the said will bearing date the 1st day of June, 1919.

2. On the 4th day of January, 1920, the said deceased duly executed a codicil to her said will, and thereby revoked the bequests contained in the second and fourth clauses of her said will.

3. The said deceased subsequently revoked the said codicil.

The plaintiffs claim:—

(1) That the Court shall decree probate of so much of the said will as was not revoked by the said codicil.

(2) Such further or other order as may be just.

[Signature of counsel.]

Substance of the Case (*a*).

The plaintiffs will prove that the said codicil was, after its execution, in the possession of the deceased and was not forthcoming at her death, and they rely on the presumption of law that she destroyed the same *animo revocandi.*

(*a*) It is not essential to give the substance of the case in a statement of claim, other than a statement of claim for the revocation of a grant, but where issues of this description are raised it is advisable to let the defendants know the nature of the case they have to meet. The same observations are applicable to a reply.

STATEMENTS OF CLAIM—*continued.*

PRECEDENT No. 21. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executors propound Will and Codicil, claiming Omission of Mistaken Words of Reference in Codicil and a Declaration that Legacies are not cumulative.

Statement of Claim.

1. A. B., late of Alpha, in the county of Beta, widow, deceased, died on the 10th day of June, 1925, having made a will dated the 15th day of May, 1917, whereof she appointed the plaintiff sole executor.

2. On the 18th day of September, 1921, the deceased duly executed a will which revoked all former testamentary dispositions and appointed the plaintiff sole executor thereof.

3. By the said will dated 18th September, 1921, the deceased bequeathed certain legacies to the defendants.

4. The deceased subsequently, on the 21st day of November, 1924, executed a codicil which in error purported to be a codicil to her will of the 15th day of May, 1917.

5. By the said codicil the deceased bequeathed certain legacies to the defendants.

The plaintiff claims:—

(1) Probate of the said will dated 18th September, 1921, together with the said codicil dated 21st November, 1924, omitting from the probate of the said codicil the words "fifteenth day of May, 1917."

(2) A declaration that the said codicil is a codicil to the will dated 18th September, 1921.

(3) A declaration that the legacies bequeathed to the defendants by the said codicil are in lieu of or in substitution for the legacies bequeathed to the defendants by the said will of 18th September, 1921.

(4) In the alternative, probate of such of the hereinbefore mentioned testamentary documents as the Court shall declare to constitute the will of the deceased.

[Signature of counsel.]

PRECEDENT No. 22. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Universal Legatee propounds Will and claims Declaration that it exercised Power of Appointment.

Statement of Claim.

1. On the 25th day of March, 1916, P. W., late of Alpha, in the county of Beta, who died on the 3rd day of December, 1918, duly executed a will, and thereby exercised a power of appointment under the will dated the 5th day of September, 1895, of her father, P. L. M., in favour of her husband, the plaintiff, to the extent of £1,000 per annum during such portion of her said husband's life as he should remain her widower.

2. On the 30th day of June, 1917, the said P. W. duly executed her true last will, and thereby left everything she had power to will to the plaintiff.

STATEMENTS OF CLAIM—*continued.*

3. The said P. W., by her said will dated the 30th day of June, 1917, duly exercised the aforesaid power of appointment, and revoked the said will dated the 25th day of March, 1916.

The plaintiff claims:—

(1) That the Court shall pronounce for the said will dated the 30th day of June, 1917, in solemn form of law.

(2) A declaration that the deceased, by her said will dated the 30th day of June, 1917, duly exercised the power of appointment given to her by the said will of her father, P. L. M., in favour of the plaintiff.

(3) In the alternative, that the Court shall pronounce for the said two wills dated respectively the 25th day of March, 1916, and the 30th day of June, 1917, in solemn form of law.

(4) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT No. 23. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Residuary Legatees propound Will destroyed by Testatrix while of Unsound Mind.

Statement of Claim.

1. The plaintiffs are two of the residuary legatees named in the true last will of A. B., late of Alpha, in the county of Beta, widow, who died on the 4th day of May, 1925, the said will bearing date the 8th day of June, 1922.

2. The said will was never revoked by the deceased, but the same was destroyed by the deceased at a time when she was of unsound mind.

3. The contents of the said will are contained in a draft thereof, marked A. B., and annexed to the plaintiffs' affidavit of scripts.

The plaintiffs claim:—

(1) That the Court shall pronounce for the said will in solemn form of law, and decree probate thereof as contained in the said draft.

(2) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT No. 24. STATEMENT OF CLAIM.

Action for Revocation of Probate—Person entitled upon an Intestacy attacks Will.

[For Defence see Precedent No. 37.]

Statement of Claim.

1. The plaintiff is the lawful brother of the whole blood and only person entitled to the estate of John B., late of Alpha, in the county of Beta, who died on the 7th day of June, 1926, intestate, a widower without issue or parent.

2. On the 22nd day of October, 1926, probate of a pretended

STATEMENTS OF CLAIM—*continued.*

will of the said deceased, bearing date the 1st day of April, 1923, was granted to the defendant out of the principal probate registry as the executor named therein.

3. The said alleged will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

4. At the time when the said alleged will purports to have been executed the deceased was not of sound mind, memory, or understanding.

5. At the time when the said alleged will purports to have been executed the deceased did not know and approve of the contents thereof.

The plaintiff claims:—

(1) Revocation of the probate granted out of the principal registry of this Court to the defendant on the 22nd day of October, 1926.

(2) That the Court shall pronounce against the validity of the said will and declare the same null and void.

(3) A grant to him of letters of administration to the estate of the said deceased.

(4) Such other order as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraph 3 the plaintiff puts the defendants to proof that the requirements of the statute were duly complied with.

Under paragraphs 4 and 5 the plaintiff alleges, etc., etc. [as in a Defence, *q.v.*].

PRECEDENT No. 25. STATEMENT OF CLAIM.

Action for Revocation of Probate—Legatee under Will attacks Codicil (*a*).

Statement of Claim.

1. The above-named Sarah Hannibal, late of 14, Palace Mansions, Chapel Hill, Hampstead, in the county of Middlesex, spinster, died there on the 7th December, 1923, having made her last will and testament dated the 31st December, 1915, whereby she appointed the defendants executors and trustees thereof and named the plaintiff a legatee thereunder.

2. Probate of the said will, together with two alleged codicils dated the 13th November, 1917, and the 30th November, 1918, respectively, was on the 22nd May, 1924, granted to the defendants out of the principal probate registry.

3. The interest of the plaintiff under the said will is not affected by the provisions contained in the said alleged codicil dated the 13th November, 1917.

4. The said alleged codicil dated the 30th November, 1918, was not duly executed according to the provisions of the statute 1 Vict. c. 26.

5. The said Sarah Hannibal was not at the time when the said

(*a*) For Writ of Summons see Precedent No. 8.

STATEMENTS OF CLAIM—*continued.*

alleged codicil purports to have been executed of sound mind, memory, and understanding.

6. At the time of the execution of the said alleged codicil the said Sarah Hannibal did not know and approve of the contents thereof.

The plaintiff claims:—

(1) Revocation of the probate granted to the defendants on the 22nd May, 1924.

(2) That the Court shall pronounce against the said alleged codicil dated the 30th November, 1918.

(3) That the Court shall pronounce for the said will dated the 31st December, 1915.

(4) Such further or other order as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraph 4 hereof the plaintiff puts the defendants to proof of the due execution of the said alleged codicil.

Under paragraph 5 hereof the plaintiff alleges, etc., etc. [as in a Defence, *q.v.*].

Under paragraph 6 hereof the plaintiff alleges, etc., etc. [as in a Defence, *q.v.*].

PRECEDENT No. 26. STATEMENT OF CLAIM.

Action for Revocation of Administration—Residuary Legatee sets up Will.

Statement of Claim.

1. The plaintiff is the residuary legatee named in the true last will of the above-named Thomas C., late of Alpha, in the county of Beta, deceased, who died on the 10th day of August, 1922, the said will bearing date the 5th day of May, 1920.

2. Letters of administration to the estate of the said deceased were on the 30th day of August, 1922, granted out of the principal probate registry to the defendant as the lawful brother and only next-of-kin of the deceased.

The plaintiff claims:—

(1) Revocation of the said letters of administration.

(2) That the Court shall pronounce for the said will, and decree probate thereof in solemn form of law.

(3) Such further order as may be just.

[Signature of counsel.]

PRECEDENT No. 27. STATEMENT OF CLAIM.

Interest Suit—Death before 1926. [*Reprinted from R. S. C.* 1883, *App. C., Sec. III., No.* 1.]

Statement of Claim.

The plaintiff is cousin-german and one of the next-of-kin of M. N., late of No. 1, High Street, Putney, in the county of Surrey, grocer, who died on the 1st of March, 19 , a widower

STATEMENTS OF CLAIM—*continued.*

without child, parent, brother or sister, uncle or aunt, nephew or niece.

The plaintiff claims: A grant of letters of administration of the estate of the said deceased.

[Signature of counsel.]

NOTE.—If the plaintiff disputes the interest of the defendant, he must allege in his statement of claim that he denies the defendant's interest. R. S. C. Order XX., r. 9.

DEFENCES AND COUNTERCLAIMS.

PRECEDENT No. 28. DEFENCE AND COUNTERCLAIM.

Formal Parts of a Defence and Counterclaim.

1927. L. No. 156.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(Probate.)
In the estate of E. L., deceased.
Between F. L. ..... Plaintiff.
and
M. C. and A. C. ..... Defendants.

Defence and Counterclaim.

The defendants say that:—
(1) . . . . . .
(2) . . . . . .
And by way of counterclaim the defendants say that:—
(3) . . . . . .
(4) . . . . . .
The defendants claim:—
(1) . . . . . .
(2) . . . . . .

[Signature of counsel.]

Substance of the Case.

. . . . . .

Delivered the 21st day of August, 1927, by Epsilon and New, of 31, Wessex Street, E.C.4, in the county of London, Solicitors for the Defendants.

PRECEDENT No. 29. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution and Incapacity.

Statement of Defence.

The defendants say that:—

1. The said alleged will and codicil were not duly executed in accordance with the statute 1 Vict. c. 26.

2. At the time when the said alleged will and codicil respectively purport to have been executed the deceased was not of sound mind, memory, and understanding.

DEFENCES AND COUNTERCLAIMS—*continued.*

Substance of the Case.

Under paragraph 1 the defendants put the plaintiff to proof that the provisions of the statute 1 Vict. c. 26 were duly complied with.

Under paragraph 2 the defendants allege that at the time when the said will and codicil respectively purport to have been executed the deceased was suffering from spinal paralysis and senile dementia, was unable to talk coherently and was completely lost as to time, place and surroundings, and was quite incapable of managing his affairs or of understanding and appreciating the nature of a testamentary document, or the claims of his relatives on his testamentary dispositions, and was unable to form a rational opinion as to the extent of his property.

PRECEDENT No. 30. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution, Want of Knowledge and Approval, Undue Influence.

Statement of Defence.

The defendant says that:—

1. The said will was not duly executed in accordance with the statute 1 Vict. c. 26.

2. The deceased, at the time when the said will purports to have been executed, did not know and approve of the contents thereof.

3. The execution of the said will was procured by the undue influence of the plaintiffs Thomas C. and Sarah C.

Substance of the Case.

1. Under paragraph 1 of the defence the defendant puts the plaintiffs to the proof that the provisions of the statute were duly complied with.

2. Under paragraph 2 of the defence the defendant alleges that the deceased gave no instructions for the said will and the same was not read over or properly explained to her, nor did she read it herself, and she was unaware of the nature and effect thereof.

3. Under paragraph 3 of the defence the defendant alleges that the deceased was at the time the said will purports to have been executed 80 years of age, and very weak physically, being confined to her bed, that from the year 1915 the plaintiffs Thomas C. and Sarah C., with whom the deceased was living, assumed complete control over the deceased, and managed the whole of her affairs; that they denied the relatives of the deceased, including the defendant, access to her, and persistently exercised the said influence and control to such an extent that they finally coerced the deceased into executing the will propounded by the plaintiffs.

[Signature of counsel.]

DEFENCES AND COUNTERCLAIMS—*continued.*

PRECEDENT No. 31. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution, Incapacity, Want of Knowledge and Approval.

Statement of Defence.

The defendant says that:—

1. The alleged will of the deceased was not duly executed according to the provisions of the statute 1 Vict. c. 26.

2. The deceased at the time the said will purports to have been executed was not of sound mind, memory, and understanding.

3. The deceased at the time the said will purports to have been executed did not know and approve of the contents thereof.

Substance of the Case.

Under paragraph 1 of the defence the defendants allege that the said will was not signed at the foot or end thereof by the deceased or by any other person in his presence and by his direction, and such signature (if any) was not made or acknowledged by the deceased in the presence of two witnesses present at the same time, and such witnesses (if any) did not attest and subscribe the said will in the presence of the deceased.

Under paragraphs 2 and 3 of the defence the defendants allege that the deceased gave no instructions for the said will, that it was not read over to him, nor did he read it himself, and that the deceased was so weak mentally and physically as the result of excessive drinking that he was unable to appreciate or understand the meaning and effect of the said will or its purport and contents.

[Signature of counsel.]

PRECEDENT No. 32. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Defence: Undue Execution, Incapacity, Want of Knowledge and Approval. Counterclaim: Defendant propounds earlier (lost) Will and, in the alternative, a still earlier Will.

Statement of Defence and Counterclaim.

The defendant says that:—

1. The will propounded by the plaintiff was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

2. At the time when the said will purports to have been executed the deceased was not of sound mind, memory, and understanding.

3. The deceased at the time when the said will purports to have been executed did not know and approve of the contents thereof.

And by way of counterclaim the defendant says that:—

4. The said deceased duly executed her true last will in the month of September, 1919, whereby she appointed the defendant her residuary legatee. The said will was never revoked by the deceased, but the said will cannot now be found.

DEFENCES AND COUNTERCLAIMS—*continued.*

5. The contents and provisions of the said will are the same as the will of the 23rd day of June, 1919, hereinafter referred to, save in so far as they were altered by the provisions of a letter written by the deceased to her solicitor in the month of September, 1919, the said will and letter being respectively scripts Nos. 11 and 13 referred to in the affidavit of scripts sworn by the plaintiff C. R. on the 15th August, 1925.

6. If for any reason the will of September, 1919, is not admissible to probate, the will duly executed by the deceased on the 23rd day of June, 1919, whereby she appointed the defendant her residuary legatee is admissible to probate.

The defendant claims:—

(1) That the Court shall pronounce against the will propounded by the plaintiff.

(2) That the Court shall pronounce for the will of September, 1919, as contained in the documents referred to in paragraph 5 of this defence and counterclaim in solemn form of law.

In the alternative:—

(3) That the Court shall pronounce for the will of the 23rd June, 1919, in solemn form of law.

(4) Such further order as may be just.

[Signature of counsel.]

Substance of the Case.

1. Under paragraph 1 of the defence the defendant puts the plaintiff to proof that the provisions of the statute were complied with.

2. Under paragraph 2 of the defence the defendant alleges that from the beginning of the year 1918 until her death on the 19th day of March, 1924, the deceased was subject to paroxysms of rage and despair for no cause or for trivial causes, that she suffered from the delusion that her friends and relatives, including the defendant, were neglecting and ill-treating her, that during this period she was in great pain, and as a result her mind became completely unbalanced and unhinged, so that on the 19th day of March, 1924, she took her life while of unsound mind.

3. Under paragraph 3 of the defence the defendant alleges that at the time when the said will purports to have been executed the deceased was incapable of comprehending and appreciating its provisions and their effect for the causes set out in paragraph 2 of the defence.

PRECEDENT No. 33. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Defence: Fraud—Counterclaim: Defendant Claims Probate of Will with Omission of Certain Clauses.

Defence and Counterclaim.

The defendant says that:—

1. He is one of the residuary legatees and devisees named in the will propounded by the plaintiff.

2. By the said will the deceased purported to appoint his

DEFENCES AND COUNTERCLAIMS—*continued.*

wife Sara Beta to be one of the executors and trustees of his will, and by clause 5 thereof he devised unto his said wife three houses in Wincanton Road, Canchester.

3. The provisions of the said will referred to in paragraph 2 of the defence were obtained by the fraud of the plaintiff Sarah Alpha, who sues as Sarah Beta.

Substance of the Case and Particulars of Fraud.

On the 7th day of April, 1897, at the register office, Canterbridge, in the county of Wessex, the said plaintiff, then Sarah Delta, spinster, was lawfully married to John Alpha, who died on the 27th day of August, 1927. On the 15th day of August, 1919, the said John Alpha, being then to her knowledge alive, and her marriage with him still subsisting, by fraudulently concealing from the testator, Robert Beta, that she had a husband living, and by falsely and fraudulently representing herself to be a widow (which concealment and false representation she thereafter persisted in until the death of the said Robert Beta on the 14th day of January, 1927), the said plaintiff induced the said Robert Beta to go through a form of marriage with her at St. Peter's Church, Canchester, in the county of Wessex, aforesaid, and thereafter to live with her as her husband in the belief that she was his lawful wife, and to make the aforesaid appointment and disposition by his will in her favour, which he did in the faith (so fraudulently induced) that he was legally her husband and she his lawful wife, and in her character as his lawful wife so falsely assumed, and not otherwise.

And by way of counterclaim the defendant says that:

4. He repeats paragraphs 1 to 3 inclusive of the defence as if they were herein fully set forth.

The defendant claims:—

(1) That the Court shall pronounce for the said will with the omission from the probate of the provisions referred to in paragraph 2 of the defence.

(2) Such further and other order as may be just.

[Signature of counsel.]

PRECEDENT No. 34. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Lost Will—Defendant attacks Will and pleads Revocation.

Statement of defence and counterclaim of the above-named defendant A. J. W. by the Official Solicitor, her guardian *ad litem*.

This defendant by her guardian *ad litem* says that:

1. The said will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

In the alternative:

2. The said will was revoked by the deceased.

3. She does not admit that the contents of the said will are contained in the copy put forward by the plaintiffs.

And by way of counterclaim:

4. This defendant is the lawful niece by the whole blood and

DEFENCES AND COUNTERCLAIMS—*continued.*

one of the persons entitled to share in the estate of the deceased, who died on the 10th day of February, 1926, intestate, a bachelor without parent.

This defendant claims:—

(1) That the Court shall pronounce against the said will and declare the same null and void.

(2) Such further relief as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 1 and 3 this defendant puts the plaintiffs to the proof that the said will was duly executed, and that its contents are contained in the copy put forward by them.

Under paragraph 2 this defendant alleges that the said will was last known to be in the possession of the deceased and was not found at his death, and this defendant relies on the presumption of law that the said will was destroyed by the deceased *animo revocandi*.

PRECEDENT No. 35. DEFENCE.

Action for Probate in Solemn Form—Defence: Will not executed in accordance with the Law of the Domicil.

Statement of Defence (a).

The defendant says that:

1. At the time the said will purports to have been executed and at the time of her death the deceased was a German subject domiciled in the Republic of Germany.

2. That the said will was not duly executed in accordance with the law of Germany.

In the alternative:

3. The said will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

Substance of the Case.

1. Under paragraph 1 of the defence the defendant alleges that on the 1st day of April, 1882, the deceased married Fritz Baron von Liebestraum, of Silesia in the Empire of Germany, who then was, and so remained until his death on the 11th December, 1918, a German subject. The said Fritz, Baron von Liebestraum, was at the time when the said will purports to have been executed and at the time of his death domiciled in Germany. The deceased retained her German domicil and nationality so acquired until her death.

2. Under paragraph 2 of the defence the defendant puts the plaintiff to proof that the said will was executed in accordance with the law of Germany.

3. Under paragraph 3 of the defence the defendant puts the plaintiff to proof that the said will was executed in accordance with the statute 1 Vict. c. 26.

[Signature of counsel.]

(a) See Precedent No. 19.

DEFENCES AND COUNTERCLAIMS—*continued.*

PRECEDENT No. 36. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Defence: Undue Execution; Not a Testamentary Document. Counterclaim: Propounds earlier Will.

Statement of defence and counterclaim of the defendant H. A.

This defendant says that:

1. The said paper writing bearing date the 9th day of November, 1921, was not duly executed in accordance with the statute 1 Vict. c. 26.

2. That he denies that the said paper writing is in the nature of a testamentary disposition.

And by way of counterclaim:

3. This defendant is the executor named in the true last will of the deceased dated the 23rd day of October, 1918.

This defendant counterclaims:

(1) A declaration that the said paper writing dated the 9th day of November, 1921, is not in the nature of a testamentary disposition.

(2) Probate of the said will dated the 23rd day of October, 1918, in solemn form of law.

[Signature of counsel.]

Substance of the Case.

1. Under paragraph 1 of the defence this defendant puts the plaintiff to proof that the provisions of the statute were complied with.

2. Under paragraph 2 of the defence this defendant alleges that the said paper writing does not purport to be of a testamentary nature, nor did the deceased ever intend that it should be of a testamentary nature or should have any operation and effect [*or* was intended by the deceased to be a gift of the property named therein, to take effect during his lifetime and not after his death].

PRECEDENT No. 37. DEFENCE AND COUNTERCLAIM.

Action for Revocation of Probate—Plaintiffs attack Will and claim Intestacy. Defence: Joinder of Issue. Counterclaim: Propounds Will.

Defence and Counterclaim (*a*).

The defendant says that:

1. He denies that the deceased died intestate.

2. He denies each and every allegation contained in paragraphs 3, 4, and 5 of the statement of claim.

And by way of counterclaim:

3. The deceased executed his true last will dated the 1st day of April, 1923, whereby he appointed the defendant his executor.

(*a*) For statement of claim see Precedent No. 24.

DEFENCES AND COUNTERCLAIMS—*continued.*

The defendant claims:—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further relief as may be just.

[Signature of counsel.]

Substance of the Case.

The substance of the defence is contained in the counterclaim.

PRECEDENT No. 38. DEFENCE AND COUNTERCLAIM.

Interest Action—Defendant denies Plaintiff's Interest—Death before 1926.

Defence and counterclaim of the defendant G. B.

This defendant says that:

1. He admits that the said deceased died intestate and a spinster without parents and possessed of real estate.

2. He denies that the plaintiff is the nephew and heir-at-law of the said deceased.

3. The plaintiff's father James was not the lawful son of the father of the said deceased.

And by way of counterclaim:—

4. This defendant is a nephew and the heir-at-law of the said deceased, this defendant's father William George B., who was the eldest son of the father of the said deceased, having died on the 15th day of April, 1902.

This defendant claims:—

(1) A declaration that this defendant is the heir-at-law of the deceased.

(2) Such further relief as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 2 and 3 of the defence this defendant puts the plaintiff to proof that the plaintiff's father was born in lawful wedlock.

REPLIES AND DEFENCES TO COUNTERCLAIM.

PRECEDENT No. 39. REPLY.

Formal parts of a Reply.

[1927. L. No. 156.

In the High Court of Justice.
Probate, Divorce and Admiralty Division.
(*Probate.*)

In the estate of E. L. deceased.

Between F. L. ..... Plaintiff.

and

M. C. and H. C. ..... Defendants.

REPLIES AND DEFENCES TO COUNTERCLAIMS—*contd.*

Reply.

The plaintiff says that:—

(1) .....

(2) .....

[Signature of counsel.]

Delivered the 7th day of September, 1927, by Omega and Taw, of, 16 Canchester Street, E.C.4, in the County of London, solicitors for the plaintiff.

PRECEDENT No. 40. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiff propounds Will—Defendants attack Will and counterclaim an Intestacy.

Reply and Defence to Counterclaim.

The plaintiff says:

1. That he denies each and every allegation contained in the defence and joins issue thereon.

And by way of defence to counterclaim:

2. The plaintiff denies that the said deceased died intestate.

[Signature of counsel.]

Substance of the Case.

Under paragraph 2 of the defence to the counterclaim the plaintiff repeats his claim as indorsed upon the writ of summons.

PRECEDENT No. 41. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and claim Intestacy—Plaintiffs allege Existence of earlier destroyed Will—Dependent Relative Revocation.

Reply and Defence to Counterclaim.

The plaintiffs say that:—

1. They deny each and every allegation contained in paragraphs 1, 2, and 3 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The deceased duly executed a will dated the 17th day of January, 1915, whereby he appointed the plaintiffs his executors.

3. The said will was revoked by the will propounded by the plaintiffs.

4. Upon the execution of the will propounded by the plaintiffs the said will of the 17th day of January, 1915, was destroyed by the deceased.

5. If for any reason the said will propounded by the plaintiffs is not entitled to probate, the said will of the 17th day of January, 1915, is entitled to probate.

6. The contents of the said will of the 17th day of January, 1915, are contained in a draft thereof marked "E." and annexed to the plaintiffs' affidavit of scripts.

[Signature of counsel.]

REPLIES AND DEFENCES TO COUNTERCLAIMS—*contd.*

Substance of the Case.

Under paragraphs 2, 3, 4, and 5 the plaintiffs repeat their statement of claim as indorsed on the writ of summons, and allege that the destruction of the will of the 17th day of January, 1915, only operated to revoke the said will in the event of the will propounded by the plaintiffs being valid and effectual.

PRECEDENT No. 42. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and propound earlier Will—Plaintiffs allege Revocation.

Reply and Defence to Counterclaim.

The plaintiffs say that:

1. They deny each and every allegation contained in paragraphs 1, 2, 3, and 4 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The will of the 15th day of April, 1922, referred to in paragraph 5 of the defence and counterclaim, was revoked by the will propounded by the plaintiffs.

[Signature of counsel.]

Substance of the Case.

Under paragraph 2 the plaintiffs repeat their statement of claim as indorsed on the writ of summons.

PRECEDENT No. 43. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and propound Earlier Will—Plaintiffs allege existence of Intermediate Will.

Reply and Defence to Counterclaim.

The plaintiffs say that:

1. They deny each and every allegation contained in paragraphs 1, 2, 3, and 4 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The deceased duly executed a will dated the 29th day of May, 1923, whereby he revoked all former wills and appointed the plaintiffs A. and B. his executors.

3. The said will of the 29th day of May, 1923, was revoked by the will propounded by the plaintiffs.

4. If for any reason the said will propounded by the plaintiffs is not entitled to probate the said will of the 29th day of May, 1923, is entitled to probate.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 2 and 4 the plaintiffs allege that the will of the 15th day of April, 1919, propounded by the defendants in

REPLIES AND DEFENCES TO COUNTERCLAIMS—*contd.*

paragraph 5 of the defence and counterclaim was revoked by the said will of the 29th day of May, 1923, which was duly executed, and entitled to probate until revoked by the deceased.

Under paragraph 3 the plaintiffs repeat their statement of claim as indorsed on the writ of summons.

PRECEDENT No. 44. REPLY.

Action for Probate in Solemn Form—Defence: Will not executed in accordance with Law of Domicil—Reply: Will valid as the Exercise of a Power of Appointment—Will admitted to Probate by Court of Testatrix's Domicil.

Reply (*a*).

The plaintiff says that:

1. He denies that the deceased was a German subject as alleged in paragraph 1 of the defence.

2. He denies each and every allegation contained in paragraph 3 of the defence.

3. The said deceased died on the 15th day of May, 1925, a British subject, having duly executed the said will in accordance with the statutes 1 Vict. c. 26 and 24 & 25 Vict. c. 114.

In the alternative:

4. The said will is a good and valid exercise of a power of appointment in accordance with the terms of the will of Thomas Henry Ealing, deceased, dated the 8th day of June, 1884, and the codicil thereto dated the 16th day of May, 1885.

And in the further alternative:

5. The said deceased died domiciled in Germany and the said will has been admitted to proof by a Court of competent jurisdiction in Germany, namely, the Royal Court of First Instance, Silesia, and a certificate of inheritance according to the tenor of the said will has been duly sealed by the said Court, and the said will is valid and duly executed according to German law.

[Signature of counsel.]

SPECIFIC INSTANCES OF DELUSION.

PRECEDENT No. 45. SPECIFIC INSTANCES OF DELUSION.

To be delivered by the Defendant, where he pleads that the Testator was not of sound mind, before the case is set down for trial. [*Order XIX., r.* 25A.]

The following are the instances of specific delusions from which the defendant alleges that the deceased suffered:—

1. The deceased was under the delusion that attempts were being made to poison her, and that the defendant was a party to such attempts;

2. That persons were constantly spying on her, and listening at her door;

3. That the defendant was concerned in a plot to confine her in a madhouse.

(*a*) To Defence, Precedent No. 35.

INTERROGATORIES.

[*See App. VII., Form No.* 100.]

PRECEDENT No. 46. INTERROGATORIES.

[NOTE.—These interrogatories are merely intended to suggest useful matter for interrogation.]

[Where the Defendant propounds a missing will (*a*).]

1. Did the deceased personally give any instructions for the said will, which is alleged to have been executed at some date subsequent to the 19th day of June, 1925? If so, to whom, when, where, and in whose presence were such instructions given? State shortly what the instructions were.

2. Were any notes or memoranda in writing made of such instructions? If so, by whom, when, where, and what has become of the same?

3. Was any draft made of the said will? If so, when, where, and what has become of the same?

4. When, where, by whom, and from what draft or instructions was the said will written out?

5. On what date was the said will executed. Where was the said will executed, and who was present?

6. Where was the said will kept, and into whose custody or care was it given after it was executed, and where, when, and by whom was it last seen?

7. How, when, and where did the said will come to your hands $\frac{\text{and}}{\text{or}}$ possession $\frac{\text{and}}{\text{or}}$ knowledge?

8. Have you ever seen the said will? If so, where and upon what date or dates?

9. Did the deceased ever refer either verbally or in writing to the said will? State the occasions, if any, when he did so. If in writing, identify the document or documents and say where it is or where they are.

[Where the Plaintiff is charged with undue influence.]

1. Where, when, and under what circumstances do you allege that the plaintiff suppressed correspondence between the deceased and what members of his family? Identify the documents you allege to have been suppressed.

2. When first, and over what period, did the plaintiff prevent members of the deceased's family from seeing the deceased? Give the names of such persons and state as to each of them

(a) on what occasions during the said period he or she attempted to see the deceased;

(b) on what occasions during the said period he or she saw the deceased;

(*a*) Many of these interrogatories may be rendered unnecessary by an examination of the defendant's affidavit of scripts.

INTERROGATORIES—*continued.*

(c) on what occasions during the said period he or she was denied access to the deceased, by whom, and under what circumstances.

3. Where, when, and under what circumstances did the plaintiff threaten any and which members of the deceased's family with violence?

State whether such threats were verbal or in writing, if in writing identifying the documents, and if verbal stating the substance and character of each of such threats, and when, where, and to whom it was spoken. What was the nature of the violence threatened?

[NOTE.—Where the plaintiffs were charged with undue influence, the defendants were allowed to administer the following interrogatory: "What sum or sums of money have you, and each of you, received from the deceased (a) by way of payment for services rendered, (b) by way of loan, (c) by way of gift?"—*Young* v. *Holloway* (1887), 12 P. D. 167.]

CASES ON MOTION.

PRECEDENT No. 47. CASE ON MOTION.

Motion to presume Death and for Administration under Section 73.

Case on Motion (*a*).

1. Edward G., formerly of Alpha, in the county of Beta, was last seen or heard of on the 9th day of January, 1912, when he left his brother's house in an excited state, saying that he was going to Kennington Lane.

2. A sum lay to the credit of the said E. G. in the Court of Chancery, and the said E. G. would have been entitled to payment of the said sum, had he lived, on the 15th day of January, 1912. The said sum has never been claimed.

3. No letters have been received from the said E. G. since his disappearance.

4. Numerous inquiries were made and steps taken to ascertain the whereabouts of the said E. G. in the years 1912 and 1913, and advertisements were inserted in certain newspapers in the months of July and August, 1913, but without result.

5. It is believed that the said E. G. died on or since the 9th day of January, 1912, intestate, a bachelor, not possessed of real estate, and uninsured.

6. The estate of the said E. G. consists solely of the sum now in the Court of Chancery and is of the present value of £600 or thereabouts.

7. The mother and sole next-of-kin of the said E. G. is a lunatic not so found by inquisition. The only other persons

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(*a*) To be headed "In the High Court," etc. "In the Estate of E. G. presumed deceased."

CASES ON MOTION—*continued.*

entitled in distribution to the estate of the said E. G. are his brothers G. G. and W. G. W. G. is the present applicant.

8. The above averments are proved by affidavits.

The Court will be moved by counsel on behalf of the said W. G. for leave to depose on oath that the said E. G. died on or since the 9th day of January, 1912, a bachelor and intestate, and for a grant to the said W. G. of letters of administration to the estate of the said E. G. under section 73 of the Court of Probate Act, 1857, without citing the mother and sole next-of-kin of the said E. G., and for such further and other order as may be just.

PRECEDENT No. 48. CASE ON MOTION.

For Appointment of Administrator *pendente lite*—Death since 1925.

[To be headed in the Action.]

Case on Motion.

1. Joseph P., late of Alpha, in the county of Beta, died on the 1st day of April, 1926, leaving a will dated the 4th day of June, 1924, whereby he appointed the plaintiffs his executors.

2. The plaintiffs have issued a writ and delivered a statement of claim propounding as executors the said will in solemn form of law.

3. The defendants are the son and daughter, two of the persons entitled to share in the estate of the deceased upon an intestacy (*a*), who have entered a caveat and are opposing probate of the said will.

4. The deceased died possessed of personal estate of the estimated value of £15,000, and of real estate of the estimated value of about £50,000 (*b*).

5. It is necessary that an administrator of the real and personal estate *pendente lite* should be appointed (*b*).

6. The plaintiffs suggest that C. D., of the firm of E. F., of Alpha, in the county of Beta, should be appointed as such administrator as aforesaid.

7. The above averments are proved by affidavits.

The Court will be moved by counsel on behalf of the above-named plaintiffs to appoint the said C. D. or some other fit and proper person to be administrator *pendente lite* of the real and personal estate of the said deceased.

(*a*) Where death occurred before 1926, the defendants will be referred to as "two of the next-of-kin," and, if there be real estate, there will be an averment stating who is the heir-at-law, and the Court will be moved to appoint an administrator of the personal estate and a receiver of the real estate *pendente lite*.

(*b*) These averments are sufficient for the Case on Motion, but the affidavits in support should describe in detail the nature of the estate, and the reasons which render the appointment of an administrator and receiver requisite.

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